

64191-3

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No. 64191-3-I

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

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**STATE OF WASHINGTON, Respondent,**

**vs.**

**PAIGE C. VOLKART, Appellant.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

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

1. Whether there is substantial evidence in the record to support the trial court's finding that the Whatcom County Sheriff's office policy mandates impoundment of a car when the driver is arrested for driving while their license is suspended and is not the registered owner of the car.
2. Whether there is substantial evidence in the record to support the trial court's finding and conclusion that Deputy Rathburn would have discovered the scale pursuant to the inventory search of the van.
3. Whether the impound of the van was lawful under the circumstances of this case because Volkart was under arrest for driving while license suspended, was not the registered owner of the van and the deputy could not reach either the registered owner or Volkart's mother to retrieve the vehicle.
4. Whether the evidence found in the van is admissible on alternative independent source grounds; specifically, pursuant to a lawful inventory search completed for impound purposes.
5. Whether Article I, section 7 of the Washington State Constitution requires suppression of evidence obtained when Deputy Rathburn acted in good faith under the authority of presumptively valid state and federal case law.

## C. FACTS

### 1. Procedural facts

Paige Volkart was charged with unlawful possession of heroin CP 39-40. Prior to trial, Volkart moved to suppress evidence found in the van she was driving subsequent to her arrest. CP 28-34. Volkart argued pursuant to Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the search of her van pursuant to her arrest was unlawful. CP 35-36. The State conceded the search of the van incident to Volkart's arrest for driving while license suspended is no longer permissible under Gant but argued that the evidence was nonetheless admissible pursuant to the inventory search and good faith exceptions to the exclusionary rule. Supp CP (sub nom 22). After hearing testimony and considering argument, the trial court denied Volkart's motion to suppress the evidence concluding the evidence was admissible because it would have been inevitably discovered pursuant to the inventory search conducted in anticipation of impounding the van. CP 44-45. Following a stipulated bench trial, Volkart was found guilty as charged. CP 42-43. Volkart timely appeals. CP 2-12.

## **2. Substantive facts**

At approximately 8:50 p.m. on March 11<sup>th</sup>, 2009, Whatcom County Deputy Ryan Rathburn initiated a traffic stop of a white full sized van driven by Paige Volkart in Whatcom County. FF 1, RP 7, 10. Deputy Rathburn initiated the traffic stop after observing the van Volkart was driving signal left but turn right onto Smith Road. RP 9. After Deputy Rathburn initiated his emergency lights, Volkart pulled the van off the roadway on the side of Smith Road. RP 23. Deputy Rathburn approached the driver side of the van, noticed Volkart and a small dog were the lone occupants and requested Volkart's license, proof of insurance and registration. RP 12. Volkart provided Rathburn with her license and informed him her license was suspended. RP 13. Volkart also claimed ownership of the van but Deputy Rathburn confirmed the van, while not reported stolen, was registered to a Simon J. Hernandez. RP 16, FF 6.

After confirming Volkart's license was suspended, Deputy Rathburn placed Volkart under arrest for driving while license suspended in the third degree and conducted a search of the passenger compartment of the van incident to her arrest. RP 13, FF4. Rathburn explained at the hearing below, that he also conducted an inventory search of the passenger compartment because he anticipated impounding the van. RP 17, FF 5,

7,9. Deputy Rathburn explained that it was standard police procedure to impound a vehicle rather than abandon the vehicle to the side of the road when attempts to contact a third party or the registered owner to retrieve the vehicle fail. RP 23-24. Consistent with the protocol, the van Volkart was driving was impounded after attempts to contact the registered owner and Volkart's mother, failed. RP 22-23, CP 46.

During the search of the passenger compartment of the van Rathburn found ten syringes, a heroin kit and a functioning scale containing what was later determined to be heroin residue. FF 5. Volkart confirmed to Deputy Rathburn the scale and one of the needles was hers. RP 28.

**D. ARGUMENT**

**1. There is substantial evidence in the record to support the trial courts findings of fact.**

Volkart asserts on appeal that there is insufficient evidence to support finding of fact 7 and 9, wherein the trial court found that Whatcom County Sheriff's office policy mandates a vehicle must be impounded when a driver is arrested and is not the registered owner of the vehicle. Volkart also assigns error to finding of fact 9 wherein the trial court found the drug paraphernalia and heroin residue found in the search of the van

would have inevitably been found pursuant to an inventory search. See Br. of App. 1, findings of fact, finding 7, 9, CP 44-45.

A trial court's findings of fact and conclusions of law are reviewed on appeal to determine whether substantial evidence supports its findings of fact, and then in turn, whether the findings of fact support the trial court's conclusions of law. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999). Unchallenged findings of fact are verities for appeal. State v. Gaines, 154 Wn.2d 274, 281, 103 P.3d 743 (2004).

There is substantial evidence to support the trial court's findings seven and nine. First, Deputy Rathburn testified department policy mandates deputies impound and remove a vehicle from roadways instead of abandoning them when the driver is suspended and they cannot reach either the registered owner or another contact person to remove the vehicle. RP 23-25. Deputy Rathburn confirmed it was standard procedure to impound vehicles under these circumstances. RP 23. Therefore substantial evidence in the record supports finding of fact seven.

Finding of fact nine is similarly supported by substantial evidence in the record. Deputy Rathburn testified he searched the vehicle incident to Volkart's arrest in the same manner he would any inventory search. RP 17. He also explained he wasn't conducting a general exploratory search for drugs or contraband and that at the time of the search, he anticipated he might need to impound the vehicle since Volkart was under arrest and she was not the registered owner of the vehicle. RP 17,19, 23. Additionally, Deputy Rathburn testified the heroin residue and drug paraphernalia were found out in the open in the compartment area of the van mixed in with what appeared to be other personal items. RP 19. Under these circumstances, the trial court's finding that Deputy Rathburn would have inevitably found the contraband at issue pursuant to an inventory search is supported by substantial evidence in the record.

**2. The contraband found in the van Volkart was driving is admissible pursuant to the inventory search exception to the warrant requirement.**

Volkart asserts the trial court erred concluding that the evidence found in Volkart's van was admissible because it would have been inevitably discovered pursuant to a lawful inventory search. Br. of App. at 6. Volkart additionally asserts, that because reasonable alternatives to impound existed, neither the impound itself nor the inventory search of the

van were lawful. Volkart contends therefore that the evidence found in the van should be suppressed because neither the inventory search or a “good faith” exception to the exclusionary rule, justified the warrantless search of the van. Br. of App. at 6.

The trial court appropriately concluded below that the inventory search of the van Volkart was driving was lawful and the evidence discovered in the van admissible for constitutional purposes. CL 2, 5. To the extent the trial court concluded the evidence was admissible because it would have been inevitably discovered during an inventory search however, the court erred. CL 4. As discussed below, this legal basis is no longer available in Washington. However, this Court should nonetheless affirm on the alternative ground that the challenged evidence in this case was found or would have been found independently pursuant to a valid inventory search.

A trial court’s conclusions of law on a motion to suppress are reviewed de novo. State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2010). An appellate court may affirm the trial court’s ruling on any ground the record supports. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

The Fourth Amendment guarantees “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...” U.S. Const. Amend IV. A warrantless search of an area in which the defendant has a privacy interest is per se unreasonable under the Fourth Amendment subject to “a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Similarly, Article I, §7 of the Washington State Constitution prohibits warrantless searches and seizures. Exceptions to the warrant requirement fall into several categories: consent, exigent circumstances, search incident to lawful arrest, inventory searches, plain view and investigatory stops. State v. Morales, 154 Wn.App. 26, 225 P.3d 311 (2010). The State has the burden of showing the warrantless search falls within one of these exceptions. State v. Kull, 155 Wn.2d 80, 85, 118 P.3d 307 (2005).

Deputy Rathburn searched the van Volkart was driving incident to her lawful arrest for driving while license suspended. Subsequently however, the U.S. Supreme Court in Arizona v. Gant, \_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), rejected previous interpretations of its decision in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69

L.Ed.2d 768 (1981), and clarified that a search incident to arrest automobile exception to the Fourth Amendment as defined in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23, L.Ed. 685 (1969), and New York v. Belton has limitations. Specifically, the Court held “police may search a vehicle incident to recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of the arrest.” Gant, 129 S.Ct. at 1723. Where these required justifications are absent, the search of the arrestee’s vehicle will be considered unreasonable unless law enforcement obtain a warrant or show that another exception to the warrant requirement applies. Gant, 129 S.Ct. at 1723-24, *see also*, State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009).

Pursuant to Gant, the trial court in this case appropriately concluded the search of the van pursuant to Volkart’s arrest was not lawful. CL 1. The trial court determined however, that Deputy Rathburn’s search was nonetheless lawful because the deputy would have inevitably discovered the drug kit and scale with heroin residue during its inventory search of the van, regardless of the search of the van incident to Volkart’s arrest. CL 2, 4.

In State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009), our State Supreme Court held subsequent to the hearing below, that the inevitable discovery rule in the context of a warrantless search of a home, is incompatible with the constitutional protections afforded to citizens of our State. Consequently, the doctrine of inevitable discovery does not support the admissibility of the evidence below. Nonetheless, Winterstein is not dispositive to the issues in this case because the evidence in this case was and was and would have been independently discovered pursuant to the inventory search conducted for purposes of impounding the van Volkart was driving when she was arrested for driving while license suspended.

This Court should affirm the trial court's decision to deny Volkart's request to suppress evidence pursuant to CrR 3.6 under this alternative legal basis. A trial court's denial of a motion to suppress may be upheld on any alternative ground supported by the record. State v. Bobic, 140 Wn.2d 250, 257-258, 996 P.2d 610 (2000). Even if that ground was not utilized by the trial court below. State v. Grundy, 25 Wn.App. 411, 415-416, 607 P.2d 1235 (1980), *review denied*, 95 Wn.2d 1008 (1981).

*Good Faith exception*

The exclusionary rule is a “judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect” by excluding evidence obtained in an illegal search. United States v. Calandra, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Nevertheless, the United States Supreme Court recognized that evidence obtained after an illegal search should not always be excluded if it was obtained in “Good Faith” and not obtained by exploitation of an initial illegality. Wong Sun v. United States, 371 U.S. 471, 484-5, 83 S.Ct. 407, 9 L.Ed.2d 441 (1996). In Michigan v. DeFillipo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), the court said:

[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.

Id. at 38 n.3.

In State v. Riley, 154 Wn.App. 433, 225 P.3d 4. 62 (2010), this Court analyzed at length the federal ‘good faith’ exception and concluded it can be applied to permit the admission of evidence obtained in a search of the passenger compartment of an automobile pursuant to the lawful

arrest of its occupant conducted before Gant was decided. Id. In State v. Afona, No. 82600-5 (July 1<sup>st</sup> 2010) however, our State Supreme Court held the “Good Faith” exception to the exclusionary rule is incompatible with the protections Article I, section 7 of our State Constitution. This exception is therefore not available as an alternative legal basis to uphold the validity of the search of the van Volkart was driving.

*Lawful inventory search*

The record does however sufficiently support the admissibility of the evidence in this case pursuant to the inventory search exception to the warrant requirement. The record reflects the van Volkart was driving was searched incident to arrest and for inventory purposes at the same. RP 17, 27. Deputy Rathburn testified he anticipated he would be impounding the vehicle and searched the van in a manner consistent with a standard inventory search in preparation for lawful impound RP 17, CP 46, State v. Peterson, 92 Wn.App. 899, 964 P.2d 1231 (1998) (impound and subsequent inventory search proper where no owner of the car is present to authorize someone to move the car or to authorize leaving the car where it is parked).

The exclusionary rule permits law enforcement to conduct a warrantless inventory search of a vehicle in preparation or following

lawful impoundment of a vehicle. State v. Morales, 154 Wn.App. 26, 225 P.3d 311 (2010). Evidence discovered during an inventory search is admissible when “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 purposes of finding evidence. State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968).

When...the facts indicate a lawful arrest, followed by an inventory search 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 (1998), *quoting* State v. Montague, 73 Wn.2d 381 (1968). Three principle reasons justifying an inventory search are to protect the vehicle’s owner’s property, to protect the police from false claims of theft by the owner and, to protect the police from potential danger. State v. Houser, 95 Wn.2d 143, 154, 622 P.2d 1218 (1998).

Pursuant to RCW 46.55.113(1) a vehicle is subject to summary impoundment whenever a driver is arrested for driving while license suspended. Additionally, pursuant to RCW 46.55.113(2)(d), officers are

permitted to impound a vehicle whenever, within the officer's discretion, the driver of a vehicle is arrested and taken into custody by a police officer. All seizures, including impounds however, must be reasonable in order to satisfy constitutional considerations. State v. White, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982). Whether a particular impound is reasonable is determined from the facts of each case. State v. Greenway, 15 Wn.App. 216, 219, 547 P.2d 1231, *review denied*, 87 Wn.2d 1009 (1976).

Deputy Rathburn was legally authorized to impound the van Volkart was driving since she was arrested for driving while her license was suspended, she was not the registered owner of the vehicle and she was being taken into custody. RCW 46.55.113. Moreover, impounding the van in this case was reasonable because the deputy did consider alternatives. Specifically, Deputy Rathburn attempted to notify both the registered owner and Volkart's mother in an effort to have one of them retrieve the van. Additionally, Deputy Rathburn did not have permission from the property owner to leave the van where it was and it was standard police policy to impound a vehicle rather than leave it abandoned when there is no third party available to retrieve the vehicle. RP 35, 36, FF 4. Under these circumstances, Rathburn's decision to impound the vehicle rather than leaving it abandoned off the side of a rural roadway was

reasonable and legally authorized. State v. Peterson, 92 Wn.App. 899, 964 P.2d 1231 (1998). Finding of fact 2, 3, 6 and 7 and the CrR 3.6 testimony support the reasonableness of the impound; the legality of which was not challenged below.

Moreover, Deputy Rathburn testified he simultaneously searched the van incident to arrest and for inventory purposes and was not looking for or expecting to find contraband. RP 17-18. The evidence seized in the van Volkart was driving was therefore discovered pursuant to a lawful inventory search conducted in preparation to impound the vehicle and should be admissible under this alternative ground, notwithstanding the trial court's inevitable discovery conclusion. State v. Bobic, 140 Wn.2d 250, 257-258, 996 P.2d 610 (2000).

In State v. Coats, 107 Wn.2d 882, 735 P.2d 64 (1987) and State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005), our state supreme court recognized, in limited circumstances, the independent source exception to the exclusionary rule upholds the admissibility of evidence that would otherwise be excluded under the exclusionary rule.

In Coats the state obtained evidence based on a search warrant affidavit that included illegally obtained information. State v. Coats, 107 Wn.2d at 886. The court upheld the search warrant nevertheless because

after the tainted information was removed, the remaining information independently established probable cause. Relying on Coats, the court in Gaines upheld a search warrant notwithstanding the fact that the search warrant was initially predicated in part on the officer's observation of a weapon during an illegal search of a vehicle trunk. The court found nonetheless, that the search warrant was still valid because probable cause existed even after excluding the illegally obtained information. State v. Gaines, 154 Wn.2d at 718-720.

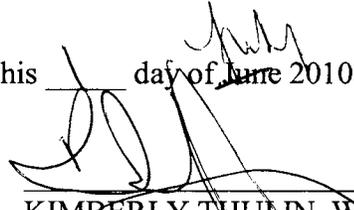
Similarly here, regardless of the unlawful search of the van incident to Volkart's arrest, Deputy Rathburn had an independent lawful basis to conduct an inventory search for purposes of impounding the vehicle. The van would have been impounded because Volkart was under arrest, was not the registered owner and Deputy Rathburn was not able to contact either the registered owner or Volkart's mother to retrieve the vehicle. Therefore, even if the Deputy had not searched the van incident to arrest, he would have conducted a valid inventory search. Volkart contends however, that Deputy Rathburn did not decide to impound the vehicle until after he searched the van incident to arrest. She implies therefore, that the impound was predicated on the unlawful search. A careful review of the transcript reveals however, that Deputy Rathburn did

not testify he impounded the vehicle *because* he found contraband only that the decision was made subsequent to the search. RP 35. Deputy Rathburn's statement on cross examination, read in context to his remaining testimony confirms this. Rathburn explained throughout the hearing that he took several factors into consideration before impounding the van including but not limited to departmental policy, the fact that Volkart was under arrest, was not the registered owner and he was unsuccessful in finding a third party to retrieve the vehicle for Volkart. Therefore, as in Coats and Gaines, the inventory search independently supports the admissibility of the evidence challenged below.

**E. CONCLUSION**

For the reasons set forth above, the State respectfully requests that this Court affirm Volkart's conviction for possession of controlled substance; heroin.

Respectfully submitted this 17 day of June 2010.

  
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**CERTIFICATE**

I certify that on this date I placed in the mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to appellant's counsel Andrew P. Zinner, addressed as follows:

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