

LET 43-0

LET 43-0

~~FILED~~
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 AUG 19 PM 4:49

No. 665430-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMI S. HOWE,

Appellant.

COURT OF APPEALS
DIVISION ONE
AUG 19 2011

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Thomas J. Wynne

BRIEF OF APPELLANT

COREY E. PARKER
Attorney for Appellant

LAW OFFICE OF COREY EVAN PARKER
1001 Fourth Avenue
Suite 3200
Seattle, Washington 98154
(206) 682-3654

TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT.....1

II. ASSIGNMENTS OF ERROR.....5

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....6

IV. STATEMENT OF THE CASE..... 7

A. The Police Arrested Ms. Howe Without a Warrant..... 7

B. Prosecution Used Confidential Informant to Make Drug Buys.....9

C. Ms. Howe Moved to Suppress the Evidence Seized From the Stop and Arrest.....13

D The Court Denied the Motion to Suppress. 16

V. ARGUMENT.....18

Standard of Review: Issues of constitutional interpretation and waiver are questions of law, which courts review de novo. 18

A. THE SEARCH VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION.....19

1. A warrantless search is per se unreasonable.....19

2. The search wasn't justified, because neither of *Patton's* exceptions applied.....24

3. The State failed to prove that an exception to the warrant requirement applied.....30

4. The search was illegal, because the arrest was not a valid custodial arrest.....32

5. *State v. Patton* is consistent with *Arizona v. Gant*.....32

6. This case is similar to *State v Valdez*..... 33

B. THE WARRANTLESS SEARCH WAS ILLEGAL UNDER THE FOURTH AMENDMENT AND *ARIZONA v. GANT*.....36

C. ADMISSION OF TESTIMONY ABOUT WHAT THE NON-TESTIFYING INFORMANT SAID VIOLATED MS. HOWE’S SIXTH AMENDMENT RIGHTS, AS HELD BY WASHINGTON COURTS.....37

1. Ms. Howe met her burden of showing that the informant’s testimony was material.....39

2. The prosecution provided no explanation for the witness’ failure to appear.....41

D. U.S. SUPREME COURT DECISIONS REQUIRE THE EXCLUSION OF POLICE TESTIMONY ABOUT WHAT THE ABSENT INFORMANT TOLD POLICE.....42

1. The traditional construction of the Confrontation Clause dictates that prosecution testimony about the absent informant’s statements is inadmissible.....44

2. Ms. Howe’s confrontation rights were violated by admission of police testimony about what the informant told them, because he wasn’t available for cross-examination.....45

VI. CONCLUSION.....43

TABLE OF AUTHORITIES

Washington Supreme Court Cases

State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010).....25, 26, 27

State v. Acrey, 148 Wn.2d 738, 746, 64 P.3d 594 (2003).....30

State v. Casal, 103 Wn.2d 812, 699 P.2d 1234 (1985).....40

State v. Graham, 130 Wn.2d 711, 927 P.2d 227 (1996).....27, 28

State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).....18

State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009).....19, 22-25, 27-30, 32, 33, 36.

State v. Robinson, 171 Wn.2d 292; 253 P.3d 292 (2011)\.....18

State v. Smith, 101 Wn.2d 36, 677 P.2d 100 (1984).....39, 40

State v. Tibbles, 169 Wn.2d 364, 236 P.3d 885, (2010).....30

State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009).....33, 34, 35

Washington Court of Appeals Cases

State v. Petrina, 73 Wn. App. 779, 871 P.2d 637 (1994).....40

State v. Wright, 155 Wn.App. 537, 230 P.3d 1063 (2010).....14, 17, 22, 28, 35, 36.

United States Supreme Court Cases

Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).....20, 22, 37

Berger v. California, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508 (1969).....44

<i>Brendlin v. California</i> , 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).....	passim
<i>Brookhart v. Janis</i> , 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).....	44
<i>Bruton v. United States</i> , 391 U.S. 123, 138, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).....	45
<i>Chimel v. California</i> , 395 U.S. 752, 761, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).....	19, 20
<i>Crawford v. Washington</i> , 541 U.S. 36, 41, 124 S. Ct. 1354; 158 L. Ed. 2d 177, (2004).....	42, 43
<i>Davis v. Alaska</i> , 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).....	40
<i>Douglas v. Alabama</i> , 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965).....	44
<i>Idaho v. Wright</i> , 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638.....	44
<i>Katz v. United States</i> , 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).....	passim
<i>Lee v. Illinois</i> , 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986).....	44
<i>Lilly v. Va.</i> , 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)...	44
<i>Mancusi v. Stubbs</i> , 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972).....	44
<i>McDonald v. United States</i> , 335 U.S. 451, 455-56, 69 S.Ct. 191, 93 L.Ed. 153 (1948).....	20
<i>Ohio v Roberts</i> , 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980).....	43

<i>Washington v. Texas</i> , 388 U.S. 14, 18 L.Ed.2d 1019, 87 S. Ct. 1920 (1967).....	39
<i>White v. Illinois</i> , 502 U.S. 346, 365, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992).....	45

Cases from Other Jurisdictions

<i>Ashley v. Wainwright</i> , 639 F.2d 258 (5th Cir. 1981).....	39
---	----

Constitutional Provisions

U.S. Const. Amend. IV.....	36, 37
U.S. Const. Amend. VI.....	37, 40, 43
Wash. Const. Art. 1, §7.....	19, 26, 32

I. SUMMARY OF ARGUMENT

Detective Jose Vargas of the Snohomish Regional Task Force received information on December 23, 2008 from a confidential source that a person named Jamie Howe was selling methamphetamine in Snohomish County. The source said that he knew Jami Howe, had purchased methamphetamine from her before, and that she sold it in quantities of ounces or better.

At Detective Vargas' request, the informant telephoned Ms. Howe and asked to purchase methamphetamine. Detective Vargas and Detective Olmstead, also from the Task force, met with the informant on the evening of December 23, 2008 and gave him \$1,300 of pre-recorded buy money. At their request, the informant called Ms. Howe and arranged to meet at her house to purchase methamphetamine.

Detectives Vargas and Detective Olmstead followed the informant to Ms. Howe's residence in Tulalip and watched him walk into her house, and later leave the house. The informant handed Detective Vargas a gift bag containing an ounce of what later proved to be methamphetamine. Also in the gift bag was a greeting card with a picture of Ms. Howe and her boyfriend, with the message, "Happy Holidays from Ryan and Jami."

The police later disclosed the identity of the informant as Shane Heath.

On January 9, 2009, Task Force detectives enlisted the informant's help in arresting Ms. Howe. Detective Vargas testified that he asked the informant to call Ms. Howe to buy drugs. The informant phoned Ms. Howe and asked to buy an ounce of meth; she agreed to drive it to deliver it to the informant's house.

That evening, Task Force detectives and Everett Police Department patrol officers set up in the area around the informant's residence and waited for Ms. Howe. When they saw Ms. Howe driving her black BMW in the area a short time later, they stopped and arrested her. The officers did not have an arrest warrant.

Police told Ms. Howe that she was under arrest for the December 23, 2008 delivery of a controlled substance to the informant. The car was impounded at the scene.

After the arrest, Detective Vargas searched Ms. Howe's person and vehicle. In the purse, he found a baggie containing a small amount of suspected methamphetamine. Behind the driver's seat of the car, he found a cloth bag containing methamphetamine; plastic baggies, and a digital scale.

The total methamphetamine seized from Ms. Howe was approximately two ounces.

The State charged Ms. Howe with possession of a controlled substance with intent to manufacture or deliver, methamphetamine, and

Ms. Howe filed a motion to suppress all evidence obtained in the search, arguing that the police lacked probable cause for the arrest

The court denied the motion after a hearing. It concluded that the December 23, 2008 controlled buy had “sufficient indicia of reliability” to establish probable cause for the January 9, 2009 arrest. The court based its conclusion on the fact that detectives searched the informant before and after the purchase and watched him enter Ms. Howe’s residence; that the informant told officers that he bought methamphetamine from Ms. Howe, and that she gave him a holiday card with her name and picture on it, along with the drug.

The court concluded that the search of Ms. Howe’s vehicle was incident to her arrest, and did not violate the Fourth Amendment of the U.S. Constitution, nor Article I, Section 7 of the Washington Constitution.

The informant didn’t testify at the suppression hearing or trial. Ms. Howe testified at the trial. She testified that she never talked to the informant, Shane Heath, about selling an ounce of methamphetamine to

him. When she was stopped by the police, she was on her way to her friend TJ's house.

Ms. Howe testified that the methamphetamine that was found in her car did not belong to her, and she did not put it there. Somebody else's backpack was in her car; it is possible that the purse was somebody else's purse, too.

Ms. Howe testified that, of the possessions that the police found, only the \$693 in cash and the wallet belonged to her. The wallet was new; her previous wallet had been stolen in a robbery of her home.

On October 12, 2010, a jury found Ms. Howe guilty of the crime of Possession of a Controlled Substance With Intent to Manufacture or Deliver, and with Delivery of a Controlled Substance, methamphetamine.

Ms. Howe was sentenced to 16 months in prison on each count, with the two sentences to run concurrently. She has been released pending appeal, upon the posting of \$5,000 bond.

This appeal challenges (1) the denial of Ms. Howe's motion to suppress the evidence which the police seized during the warrantless search of her vehicle and person, in violation of her rights under the Washington State Constitution and the Fourth Amendment of the United States Constitution; (2) the court's admission of hearsay testimony at the suppression hearing and trial, over timely objection by defense counsel,

that the informant told the police that he had bought methamphetamine from Ms. Howe; (3) Admission of prosecution testimony, at the suppression hearing and trial, about the informant's statements that he had bought drugs from Ms. Howe, where the informant did not testify, and his record of convictions for drug offenses gave him motivation to lie in order to get a better deal from the prosecution in his own case. Admission of the informant's testimony deprived the Appellant of her right, under the Sixth Amendment, to confront and cross-examine him;

II. ASSIGNMENTS OF ERROR

- No. 1 The trial court violated the Appellant's rights, under the Washington State Constitution and the Fourth Amendment of the United States Constitution, by denying her motion to suppress the evidence seized from the warrantless search of her vehicle and person, where the prosecution failed to carry its burden of showing that an exception to the warrant requirement applied.
- No. 2 The trial court's denial of the motion to suppress violated the Appellant's right to a fair trial, guaranteed by the Sixth Amendment of the U.S. Constitution, by denying her motion to exclude the hearsay testimony of police officers about what the

confidential informant told them, where the informant did not testify at the suppression hearing or trial, and was not “unavailable.”

III. Issues Pertaining to Assignment of Error

No. 1 The prosecution has the burden of proving, by a preponderance of the evidence, that the challenged search and seizure was constitutional, under both the Washington Constitution, and the United States Constitution.

(Assignment of Error No. 1)

No. 2. *Arizona v. Gant*, issued on April 21, 2009, applies in this case, where Ms. Howe was found guilty on October 12, 2010.

(Assignment of Error No. 1)

No. 3 The trial court violated the Appellant’s rights under the Sixth Amendment of the U.S. Constitution right by denying her motion to suppress the testimony of prosecution witnesses as to what the informant told them, where the informant failed to testify at the suppression hearing or the trial; the informant’s failure to testify deprived the Appellant of her right to cross-examine the informant about his statements to police that he purchased drugs from Appellant, and where the informant’s

admitted history of buying methamphetamine made him an unreliable witness.

(Assignment of Error No. 1)

No. 4 *Arizona v. Gant* required the police to obtain a warrant in order to stop and search the Appellant and her car, because the police knew where Appellant lived and she was “findable,” and there was no justification for the stop of her vehicle.

(Assignment of Error No. 1)

No. 5 At the very least, the trial court was required to continue the suppression hearing, to provide an opportunity for the informant to appear and testify.

(Assignment of Error No. 2)

IV. STATEMENT OF THE CASE

A. Warrantless stop and Arrest of Appellant.

Appellant Jamie Howe was driving in the 700 block of Pecks Avenue in Everett, Snohomish County around midnight on January 9, 2009, when patrol officers from the Everett Police Department stopped and arrested her. RP 96, lines 9-16. The officers did not have an arrest warrant. Ms. Howe was alone. CP 147; Supplemental Affidavit of Probable Cause, filed 9/16/10.

Police officers and members of the Snohomish Regional Drug Task Force searched Ms. Howe's vehicle and found a cloth bag behind the driver's seat, which contained three baggies of suspected methamphetamine. CP 147.

The police impounded Appellant's car at the scene. RP SH, p. 28, lines 18-19.

Detective Vargas also searched Ms. Howe's purse, where he found another small baggie of amphetamine and almost \$700 in cash. RP SH, p. 9, lines 12-16 (6/3/10)¹ Detective Vargas testified that he conducted a field test of the material found in the cloth bag, which was "presumptively positive" for methamphetamine. RP SH, p. 9, lines 17-22. The total weight of the methamphetamine taken from Ms. Howe's vehicle was about two ounces, including the packaging material. RP SH p. 9, lines 23-25; p. 10, lines 1-10.)

Police informed Ms. Howe that she was under arrest for delivery of methamphetamine in December 2008, from a controlled buy that she allegedly had made to a confidential informant. RP SH 10, lines 13-18; CP 204, Affidavit of Probable Cause.

¹ The transcript for the Suppression Hearing, held June 3 and 4, 2010, is titled "Verbatim Report of Proceedings." In order to distinguish the Suppression Hearing transcript from the trial transcript, it is referred to in this brief as "RP SH."

The Supplemental Affidavit of Probable Cause stated that Task Force detectives enlisted the assistance of a confidential informant to arrest Ms. Howe. At the detectives' request, the informant called Ms. Howe on January 9, 2009 and arranged to buy an ounce of methamphetamine. Ms. Howe allegedly agreed to deliver it to the informant's residence. CP 147, 9/16/10.

In anticipation of the meeting, Task Force detectives and Everett patrol officers "set up" around the informant's neighborhood. When they saw Ms. Howe driving her BMW toward the informant's house, they stopped her and took her into custody.

The State charged Ms. Howe with possession of a controlled substance with intent to manufacture or deliver, and delivery of a controlled substance. She pleaded not guilty to both counts.

A CrR 3.6 hearing was held on Ms. Howe's motion to suppress the evidence seized after the arrest. At the hearing, Detective Vargas testified that Ms. Howe was arrested on a charge of delivery of controlled substance, which stemmed from the controlled buy on December 23, 2008. RP SH p. 10, lines 16-18; p. 16, lines 5-9.

B. Prosecution Used Confidential Informant to Make Drug Buys.

The Supplemental Affidavit of Probable Cause stated that Detective Vargas first received information from the confidential source

on December 23, 2008, that a person named Jamie Howe was selling methamphetamine in Snohomish County. CP 146, 9/16/10.

Det. Vargas testified, at the CrR 3.6 hearing, that he also had received information from another informant, independent of this one, identifying the Ms. Howe as a drug dealer, and naming her residence specifically. (RP SH p. 13, lines 7-13.)

The Prosecution alleged that, at Detective Vargas' request, the informant phoned Ms. Howe and talked to her about purchasing methamphetamine from her. *Id.*, CP 146.

The informant told Detective Vargas that Ms. Howe said she had two different kinds of methamphetamine available; average quality methamphetamine that would cost the informant \$1,200 per ounce, and high-quality methamphetamine that would cost \$1,600 per ounce. CP 146.

The informant said that Ms. Howe told him he could come to her residence later that same day, December 23, 2008, to buy methamphetamine. Shortly before 9 p.m. on that same evening, Detectives Vargas and Detective Olmstead met the confidential informant and gave him \$1,300 of pre-recorded "buy money;" \$1,200 to buy methamphetamine, and \$100 to make a payment on a debt that he allegedly owed to Ms. Howe. CP 146.

At the detectives' request, the informant allegedly called Ms. Howe and confirmed that he could meet her at Ms. Howe's house to buy methamphetamine. CP 146.

While the informant was talking on the phone with Ms. Howe, Detective Vargas heard Ms. Howe ask how much money he had, and tell him to come through her neighbor's property, because the gate to her driveway was frozen shut. CP 146-147.

Detectives Vargas and Detective Olmstead followed the informant to Ms. Howe's residence. They watched the informant park in the neighbor's driveway and walk to what they alleged was Ms. Howe's residence.² CP 147.

They saw that the appellant's BMW was parked in front of the residence. They observed the informant leave Ms. Howe's residence some time later, and drive to a predetermined location to meet the detectives. CP 147.

The informant handed Detective Vargas a gift bag, which contained an ounce of what was later tested, and confirmed to be methamphetamine. Also in the gift bag was a greeting card that had a

² At trial, the Appellant questioned whether the evidence established that the informant actually entered Appellant's residence, rather than the residence of some third party.

picture of Ms. Howe and her boyfriend, with the message, “Happy Holidays from Ryan and Jami.” The informant said that when he arrived at Ms. Howe’s residence, she already had the methamphetamine and card in the gift bag. CP 147.

The State charged Ms. Howe with possession of a controlled substance with intent to manufacture or deliver, and delivery of a controlled substance.

On May 11, 2010, Ms. Howe filed a Motion to Suppress the evidence seized from the search of her vehicle and purse, on the ground that there was no probable cause to stop or arrest her. The court denied the motion on September 30, 2010. CP 58-61, Certificate Pursuant to CrR 3.6 of the Criminal Rules For Suppression Hearing.

Ms. Howe pleaded not guilty to both counts on June 3, 2010. (CP 172-173; RP SH 4.)

Ms. Howe testified at the trial. She testified that she knew Shane Heath, but never sold methamphetamine to him, and never saw him on December 23, 2008, the day of the first alleged drug buy. Ms. Howe testified that he telephoned her on that day and wanted to come and get a ring that he was buying from her for his girlfriend. RP p. 124, lines 10-16.

Ms. Howe testified that Shane Heath came to her residence while she was gone and picked up the ring from her friend “Ro.” RP p. 125,

lines 13-18) Ms. Howe did not know what gift bag the ring was packaged in, but she told Ro that if Shane gave Ro the money, Ro could give him the ring. Jami told Ro to package the ring in a holiday gift bag, and get one of the cards off the counter. RP 125-126

C. Ms. Howe Moved to Suppress the Evidence Seized From the Stop and Arrest of January 9, 2009.

Defense counsel filed a Cr R 3.6 motion to suppress all evidence obtained from the search and arrest, on the ground that the State was unable to show that there was probable cause. CP 184-186, Defendant's Motion to Suppress, Declaration, And Memorandum of Law, 5/11/10.

Defense counsel repeated the motion verbally at the suppression hearing, asking the court "to suppress all of the evidence that was found on January 9, 2009 in a search of Ms. Howe's vehicle." RP SH 33, lines 1-4.

The written motion included defense counsel's sworn declaration that the State's only assertion of probable cause to stop and arrest Ms. Howe came from Detective Vargas. CP 185.

Defense counsel asserted that there were issues about relying on the informant's information from December 23, 2008 , and more information should be presented to the court before it should uphold the arrest, the seizure, and the search of the vehicle. He argued that the

detective did not know Ms. Howe; had no independent knowledge or familiarity with Ms. Howe, and had to rely on what the informant told him. RP SH 36, lines 2-10.

Mr. Thompson argued that *State v. Wright* required that, in order to search the vehicle, there must be a nexus between the arrestee, the vehicle and the crime. Even if a crime occurred, that happened in a house and had no connection to an automobile. Ms. Howe was “findable.” RP SH 36, lines 11-21.

The State responded that probable cause for Ms. Howe’s arrest was based on a Drug Task Force investigation that focused on the defendant as an alleged methamphetamine dealer in Snohomish County. CP 174-175, State’s Response To Motion to Suppress, 6/3/10. The State asserted that detectives used a confidential informant to purchase one ounce of methamphetamine from Ms. Howe at her residence in Tulalip on December 23, 2008. CP 174-175.

The State argued that Drug Task Force detectives developed probable cause to arrest Ms. Howe for Delivery of a Controlled Substance and relayed the information to Everett Police Officers, who ultimately arrested Ms. Howe, and that these circumstances required denial of Ms. Howe’s Motion to Suppress. CP 175.

A hearing was held June 3 and 4, 2010 on the motion to suppress. The State's confidential informant did not testify. The only prosecution witness who testified was Detective Vargas. RP SH 2-29.

Ms. Howe pleaded not guilty to both counts charged in the second-amended information: Count I, possession of a controlled substance with intent to manufacture or deliver, and Count II, delivery of a controlled substance. RP SH 4, lines 3-13.

Ms. Howe's attorney, Paul Thompson, told the court that it was important for the informant to testify, because the prosecution's case was based on what the informant told law enforcement. RP SH 19, lines 21-25.) He asked the court to suppress all of the evidence that was found in the search of Ms. Howe's vehicle and of her purse, on the ground that there was no probable cause for the stop or the arrest. RP SH 33, lines 5-11; 37, lines 10-14.

Defense counsel argued that Detective Vargas had used the confidential informant only once, and that no testimony was presented about who the informant was; how he knew Ms. Howe or had obtained his knowledge about Ms. Howe's alleged drug-dealing,; or whether the informant's information was reliable. RP SH 33, lines 14-23.

Mr. Thompson argued that it had not been established that the informant could be considered to be a professional informant. Although

there were indications that he had worked for law enforcement, no facts had been introduced to show what that work was. RP SH 34, lines 4-10.

Detective Vargas testified that he had no independent knowledge of what occurred inside Ms. Howe's house during the controlled buy. Before he arrested Ms. Howe, he had never spoken with her. RP SH 16-17. He stated that the informant would be a "named witness" and was available to testify at trial. RP SH 3, lines 9-13.

Detective Vargas testified that the probable cause to stop and arrest Ms. Howe on January 9, 2009 was based on the information that he learned from the informant from the controlled buy in December 2008. RP SH p. 16-17. Detective Vargas stated that the informant had not conducted controlled buys for him, before his drug purchase of December 23, 2008. However, Detective Vargas knew this person through another detective, and the informant had not been caught in any acts of dishonesty, as far as he knew. RP SH 17-19.

D. The Court Denied the Motion to Suppress.

The trial court denied the motion to suppress on June 4, 2010, at the end of the hearing. RP SH p. 46, line 24. The court entered written findings of fact and conclusions of law on November 16, 2010. Certificate Pursuant to CrR 3.6 of the Criminal Rules For Suppression Hearing, CP 58-61.

The Court entered the following three 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.
CP 60.

E. The Trial Continuances

Trial was originally set for April 30, 2010. On May 30, 2010, upon the parties' agreement, the Court continued the trial date to June 11,

2010. On August 27, 2010, the parties stipulated to continue the trial date to October 8, 2010. CP 151-152, Agreed Trial Continuance.

The jury trial was held on October 11 and 12, 2010.

V. ARGUMENT

Standard of Review

Issues of constitutional interpretation and waiver are questions of law, which courts review de novo. *State v. Robinson*, 171 Wn.2d 292; 253 P.3d 292 (2011).

An appellate court reviews findings of fact on a motion to suppress under the substantial evidence standard. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. The appellate court reviews conclusions of law in an order pertaining to suppression of evidence de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *reversed on other grounds and overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

If the defendant does not challenge any of the trial court's findings of fact, the appellate court considers them verities on appeal. It reviews conclusions of law de novo. *Mendez*, 137 Wn.2d at 214.

A. THE SEARCH VIOLATED ARTICLE I, SECTION 7 OF THE
WASHINGTON STATE CONSTITUTION.

The warrantless search of Ms. Howe’s vehicle and person violated both the Washington State Constitution and the Fourth Amendment of the United States Constitution, so the trial court erred by denying Ms. Howe’s motion to suppress the evidence seized from that search.

When a party claims both state and federal constitutional violations, a Washington court turns first to our state constitution. *State v. Patton*, 167 Wn.2d 379, 385, 219 P.3d 651 (2009), *citation omitted*.

Article I, section 7 of the State Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

1. A warrantless search is per se unreasonable.

The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” A warrantless search is per se unreasonable, valid only if it is shown that the “□‘exigencies of the situation made that course imperative.’□” *Chimel v. California*, 395 U.S. 752, 761, 89 S. Ct. 2034,

23 L. Ed. 2d 685 (1969), *citing McDonald v. United States*, 335 U.S. 451, 455-56, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

Among the exceptions to the warrant requirement is a search incident to a lawful arrest, which “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.” *Arizona v. Gant*, 129 S.Ct. Id. at 1716, *citations omitted*.

In *Gant*, the Court held that police may search, incident to arrest, only the space within an arrestee's “immediate control,” meaning “the area from within which he might gain possession of a weapon or destructible evidence.” *Arizona v. Gant*, 556 U.S. 332, 337.

The police arrested Mr. Gant for driving with a suspended license. Officers handcuffed him and locked him in a patrol car before they searched Mr. Gant’s car and found cocaine in a jacket pocket. The Arizona trial court denied his motion to suppress the evidence, and he was convicted of drug offenses.

The Supreme Court held that the search was unreasonable, and that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement did not justify the search because (1) police could not reasonably have believed that Mr. Gant could have accessed his car at the time of the search since the five officers outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars

before the officers searched respondent's car, and (2) police could not reasonably have believed that evidence of the offense for which appellant was arrested might have been found in the car, since he was arrested for driving with a suspended license, an offense for which police could not expect to find evidence in the passenger compartment of his car. *Arizona v. Gant*, 556 U.S. 332, 332-333.

The Washington Supreme Court noted that, “although the Court was at pains to explain that its rule was consistent with its earlier decisions in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), and *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), it also acknowledged that its earlier opinions had ‘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.’” *State v. Robinson*, 171 Wn.2d 292, 301, 302, 253 P.3d 292 (2011), citing *Gant*, 129 S. Ct. at 1718.

Washington was one jurisdiction with such an understanding. *State v. Robinson*, 171 Wn.2d at 302.

In this case, the record contains no evidence that either of the two exceptions which *Arizona v. Gant* identified as authorizing a warrantless search of Ms. Howe’s vehicle and her person existed.

The State presented no evidence that the police reasonably believed that Ms. Howe had access to her car during the search. The State presented no evidence about where Ms. Howe was positioned while the police searched her car and person, and whether or not Ms. Howe was handcuffed during the search.

Arizona v. Gant was decided on April 21, 2009. Although Ms. Howe was arrested on January 9, 2009 before *Gant* was issued, the jury entered its guilty verdict in this case on October 12, 2010. CP 68-69. It is clear that the holding of *Arizona v. Gant* applies retroactively to this case. "[A] decision of [the Supreme Court] construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." *State v. Wright*, 155 Wn. App. 537; 230 P.3d 1063 (2010).

Shortly after *Arizona v. Gant* was issued, the State Supreme Court determined the validity of an automobile search under the "incident to arrest" exception to the warrant requirement of article I, section 7 of the Washington State Constitution. In *State v. Patton*, 167 Wn.2d 379, 384, 219 P.3d 651 (2009), the Court held that "an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is

necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.”³

The *Patton* Court noted that “We have specifically recognized that Washington State citizens hold a constitutionally protected privacy interest in their automobiles and the contents therein. *State v. Patton*, 167 Wn.2d at 385, *citations omitted*..

The Court began its analysis with the presumption that a warrantless search is per se unreasonable, under the Washington Constitution, unless it falls within one of the carefully drawn exceptions to the warrant requirement. “These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement.” *Patton*, 167 Wn.2d at 386, *citation omitted*.

Additional facts in *Patton* are that sheriff's deputy staked out the defendant's residence in order to arrest him on an outstanding felony warrant. He saw a person generally fitting the defendant's description “rummaging around” inside a parked vehicle in the residence’s driveway. The deputy approached the defendant, announcing that he was under

³ Shortly after the Washington Supreme Court heard oral argument in *Patton*, the U.S. Supreme Court issued its decision in *Arizona v. Gant*, which the Washington Supreme Court noted articulated “a similar rule under the Fourth Amendment to the United States Constitution.” *Patton*, 167 Wn.2d at 384, n. 1.

arrest. The defendant fled into his residence. Two more deputies arrived, and the three of them entered the residence, took the defendant into custody, and handcuffed and placed into the back of a patrol car. The deputies then searched the parked vehicle, where they found two baggies of methamphetamine and \$122 in cash under the driver's seat.

The State charged Mr. Patton with illegal possession of methamphetamine and resisting arrest, and he moved to suppress the evidence obtained from the search of his vehicle. The trial court granted the motion, concluding that the search of Mr. Patton's car was not incident to arrest. The Supreme Court affirmed the trial court, holding that no nexus existed between the arrestee, the vehicle, and the crime of arrest, implicating safety concerns or concern for the destruction of evidence of the crime of arrest.

2. The search wasn't justified, because neither of *Patton's* exceptions applied.

It is the State's burden to show that the automobile search incident to arrest exception applies. *Patton*, 167 Wn.2d at 386; *State v. Afana*, 169 Wn.2d 169, 178-179, 233 P.3d 879 (2010).

In this case, the prosecution failed to show that either exception to *Patton's* rule applied. The State failed to show that Ms. Howe was within reaching distance of the passenger compartment at the time of the search,

so Patton's first exception did not apply. The State did not show that the search was necessary for officer safety, or to secure evidence of the crime of arrest that could be concealed or destroyed."⁴ Therefore, the second exception did not apply.

Ms. Howe's attorney filed a motion to suppress all of the evidence seized in the search, on the ground that the prosecution had presented "no facts...to the Defense that would justify the conclusion that probable cause existed for the detention or arrest of Jami Howe." CP 186, Defendant's Motion to Suppress, Declaration, and Memorandum of Law, filed May 11, 2010.

After the hearing, the court denied the motion, concluding, "from all of the circumstances, there was indicia of reliability [about the informant's information to police] based upon what the confidential informant had actually done with Detective Vargas to validate the arrest of the defendant. Obviously the search of her person was incident to that arrest and it was valid." RP SH 46, lines 1-6.)

⁴ Shortly after the Washington Supreme Court heard oral argument in *Patton*, the U.S. Supreme Court issued its decision in *Arizona v. Gant*, which the Washington Supreme Court noted articulated "a similar rule under the Fourth Amendment to the United States Constitution." *Patton*, 167 Wn.2d at 384, n. 1.

In *State v. Afana, supra*, a police officer asked two occupants of a parked car for identification, and then ran a warrant check on them. The check disclosed an outstanding warrant for the driver, Mr. Afana, for misdemeanor trespass. The officer asked both occupants to step out of the car, and arrested each of them. He searched the car and found a bag, behind the driver's seat, which contained methamphetamine and drug paraphernalia. The officer then arrested Mr. Afana's passenger on a drug charge.

The trial court granted Mr. Afana's motion to suppress the drug evidence. The Court of Appeals reversed. The Supreme Court reversed again, and held that the trial court properly suppressed the drug evidence as fruit of an unconstitutional search under article I, section 7 of the Washington State Constitution.

The Court asked whether the search was justified by authority of law, and concluded that it was not. "The 'authority of law' requirement of article I, section 7 is satisfied by a valid warrant, subject to a few jealously guarded exceptions "It is always the State's burden to establish that such an exception applies. As we have observed, Deputy Miller did not have a warrant to search Afana's car. Unless it can be shown that the search in question fell within one of the carefully drawn exceptions to the warrant

requirement, we must conclude that it was made without authority of law.”
Afana, 169 Wn.2d at 176-177.

The Court held that the search of Afana's car incident to the arrest of his passenger was unconstitutional under *Patton* and *Valdez*. *State v. Afana*, 169 Wn.2d 169, 184. The Court rejected the State's request that it adopt a “good faith” exception to the exclusionary rule as incompatible with article I, section 7 and hold that the evidence obtained as a result of this unlawful search must be suppressed. *Id.*

Ms. Howe’s attorney pointed out that it appeared, from the reports given to the defense during discovery, that Detective Vargas “ had the City of Everett Police Officers stop Jami Howe, and then the Detective proceeded to the scene and arrested her based on ‘probable cause for the crimes of Delivery of a Controlled Substance, methamphetamine.’” CP 186. However, counsel argued, “there are no facts to support the conclusion that any such crime may have ever occurred. Using the objective standard of probable [cause], the State cannot meet their burden of showing that probable cause existed at the time of the stop and arrest without more information being submitted. *See Graham*, 130 Wash.2d 711 (1996).” CP 186.

Counsel’s citation was to *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996), which held that under both the federal and state

constitutions, probable cause is the objective standard by which the reasonableness of an arrest is measured.

State v. Wright demonstrates that the search was illegal. Ms. Howe's attorney pointed out that when there is a search of the vehicle, there must be a nexus between the arrestee, the vehicle, and the crime. Prosecution witnesses testified, at the suppression hearing, that Ms. Howe was being arrested for the alleged delivery of a controlled substance on 12-23-08. Ms. Howe's attorney pointed out that, even if she committed the offense, she did so in her house. There was no nexus between the offense and the automobile." Even if Ms. Howe did sell drugs to the informant, the police testified that the sale occurred in her house. There was no connection to an automobile. She was living in that house, and she was "findable." RP SH. 36, lines 11-21.

The *Patton* Court's analysis under article I, section 7 of the Washington Constitution "begins with the presumption that a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement." The Court stressed that "These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement." *State v. Patton*, 167 Wn.2d at 386, *citation omitted*.

In *Patton*, Sheriff's deputies attempted to effectuate an arrest warrant for Mr. Patton while he stood in his driveway next to his parked car with his head in the window. When told he was under arrest, Mr. Patton fled from the car into his home, the officers detained him and subsequently searched his car. *State v. Patton*, 167 Wn.2d at 383.

The Court affirmed the trial court's suppression of the evidence seized from Mr. Patton's vehicle. "Though we agree Patton was under arrest while he stood next to his car, the search incident to arrest exception requires a nexus between the arrestee, the vehicle, and the crime of arrest, implicating safety concerns or concern for the destruction of evidence of the crime of arrest." *Patton*, 167 Wn.2d at 383. .

The Court found no such nexus and reinstated the order suppressing the evidence seized from the search of Mr. Patton's vehicle. It pointed out that the warrant was for failure to appear in court for a past offense unrelated to the eventual drug charge that arose from the car search.

The Court stated, "We hold that an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed." *State v. Patton*, 167 Wn.2d at 384.

3. The State failed to prove that an exception to the warrant requirement applied.

It is the State's burden to establish that one of the exceptions to the warrant requirement applies. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003). Even where probable cause to search exists, a warrant must be obtained unless excused under one of a narrow set of exceptions to the warrant requirement. *State v. Tibbles*, 169 Wn.2d 364, 236 P.3d 885, (2010) (Because exigent circumstances were not shown, the warrantless search of petitioner's car violated Wash. Const. art. I, § 7 and the evidence obtained should have been suppressed; there was no evidence that the destruction of evidence was imminent or that the trooper felt anyone was in danger.)

The Supreme Court has recognized exceptions for consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. *Tibbles* at 369, citing *Hendrickson*, 129 Wn.2d at 71. The burden is on the prosecutor to show that a warrantless search or seizure falls within one of these exceptions. *Hendrickson*, 129 Wn.2d at 70.

The prosecution presented no evidence, at the suppression hearing or the trial that Ms. Howe was within reaching distance of the passenger compartment at the time of the search. Nor did the State assert that the

search was necessary for officer safety, or to secure evidence of the crime of arrest that could be concealed or destroyed. In fact, the police impounded Ms. Howe's vehicle after the search. Detective Vargas testified that another patrol officer stopped Ms. Howe's car, and that Detective Vargas then arrested her. After the arrest, Detective Vargas searched the vehicle and Ms. Howe's purse. (p. 9, lines 12-16.)

Since the police had already arrested Ms. Howe, she would not have been able to reach into the passenger compartment of the vehicle to seize anything there. Furthermore, because the police impounded the vehicle, they could have postponed the search until after they obtained a warrant.

The police lacked probable cause for the warrantless arrest.

The Affidavit of Probable Cause provided no evidence that police had probable cause for arresting Ms. Howe. It stated that the Task Force detectives arrested Ms. Howe "on probable cause from an earlier controlled purchase of methamphetamine from her." They stated that "Patrol officers from the Everett Police Department who were assisting SRDTF detectives stopped the defendant as she was driving in Everett, and that "in a search of the defendant's vehicle incident to her arrest," Task Force detectives found the methamphetamines and cash. CP 204, Oct. 9, 2009.

The Supplemental Affidavit of Probable Cause gave more detail about the informant's alleged drug buy from Ms. Howe on December 23, 2008, but still provided no probable cause for the warrantless stop, search and arrest on January 9, 2009.

4. The search was illegal, because the arrest was not a valid custodial arrest.

A valid custodial arrest is a condition precedent to a search incident to arrest, and it is not enough that officers have probable cause to effectuate an arrest. *State v. Patton*, 167 Wn.2d at 393, citing *State v. O'Neill*, 148 Wn.2d 564, 585-86, 62 P.3d 489 (2003).

A search incident to the arrest of a recent vehicle occupant under the Fourth Amendment takes place “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Patton*, 167 Wn.2d at 393, citing *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 1719, 173 L. Ed. 2d 485 (2009).

5. *State v. Patton* is consistent with *Arizona v. Gant*.

The State Supreme Court resolved *Patton* on “independent and adequate state grounds” under art. I, section 7 of the Washington Constitution, and held that it was not necessary to reach *Patton*'s argument under the Fourth Amendment. Nevertheless, the Court held that its decision was consistent with the U.S. Supreme Court's holding in *Arizona*

v. Gant, which also disallowed a vehicle search conducted after the arrestee had been secured, and was no longer within reaching distance of the vehicle's passenger compartment. *State v. Patton*, 167 Wn.2d at 395, n. 9, citing *Gant*, 129 S.Ct. at 1719.

6. This case is similar to *State v. Valdez*.

The facts of this case are similar to those in *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009). A Sheriff's deputy stopped Mr. Valdez' vehicle because it had only one working headlight. After Mr. Valdez presented deputy Dennison with identification, Dennison conducted a records search and learned that Valdez had an outstanding arrest warrant.

A second deputy arrived to assist Dennison. Dennison arrested Valdez, handcuffed him, and placed him in the back seat of his patrol car. Dennison asked the passenger, Ruiz to exit the minivan and began to search it. Dennison and Boyle found no evidence of contraband but noticed several loose panels under the dashboard. Dennison called for a canine officer and dog, which found two packages of methamphetamine. Police interrogated Valdez and his passenger at the police station and after being advised of their *Miranda* rights, they admitted ownership of the methamphetamine and the intent to sell it. They later confessed and were convicted after a trial.

The Supreme Court dismissed the convictions of both defendants. It held that the warrantless search violated article I, section 7 of the Washington Constitution as well as the Fourth Amendment, and the evidence collected from that search should be suppressed. There was no showing that delaying the search in order to obtain a warrant would have endangered officers, or resulted in concealment or destruction of evidence related to the crime of arrest. *State v. Valdez*, 167 Wn.2d at 778-779.

The Court observed that, at the time of the search, Mr. Valdez was handcuffed and secured in the back seat of a patrol car. Therefore, he no longer had access to any portion of his vehicle, and the officers' search of his vehicle was therefore unconstitutional under both the Fourth Amendment and article I, section 7. *Valdez*, 167 Wn.2d at 777-778.

The Court explained, “Article I, section 7 [of the Washington Constitution] is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained. A warrantless search of an automobile is permissible under the

search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.” *Valdez*, 167 Wn.2d at 778.

Valdez requires suppression of the evidence seized from the warrantless search of Ms. Howe and her vehicle. In this case, as in *Valdez*, the search was not permissible under the search incident to arrest exception, because Ms. Howe already had been arrested and no longer had access to any portion of her vehicle. The search was not necessary to prevent destruction or concealment of evidence of the crime for which Ms. Howe was arrested. The police could have waited for a warrant, or could have obtained a warrant after the vehicle was impounded.

It is anticipated the State will argue that the controlling case on this issue is *State v. Wright*, 155 Wn.App. 537, 230 P.3d 1063 (2010). *Wright* should be distinguished on its facts. A police officer stopped Mr. Wright for driving without his headlights on. The officer noticed that an odor of marijuana came from the vehicle, and observed that Mr. Wright was acting furtively. The officer arrested the defendant for unlawful possession of marijuana, handcuffed him, and placed him in the patrol car. A K-9 unit was summoned, and the officer alerted to the presence of drug. A search of the passenger compartment resulted in marijuana, prescription pills, oxycodone, and a measuring scale.

Mr. Wright argued that, based on *State v. Patton*, the warrantless search of his car violated article I, section 7 of the Washington State Constitution. The Court of Appeals disagreed. It held that the search incident to arrest was based on probable cause to arrest for possession of marijuana, and that Wright's reliance on article I, section 7 and *Patton* was misplaced. *State v. Wright*, 155 Wn. App. at 549.

The Court explained that “Long-standing case law also establishes that the police have probable cause to arrest the occupant of a vehicle for possession of a controlled substance ‘when a trained officer detects ... the odor of a controlled substance’ emanating from an individual in a vehicle and to search the passenger compartment of the car incident to that arrest.” *Wright*, 155 Wn. App. at 553.

This case should be distinguished from *Wright*, because the police did not notice the odor of a controlled substance emanating from Ms. Howe’s vehicle before they stopped her. Instead, they testified that they stopped Ms. Howe for a drug sale that occurred on December 23, 2008, two weeks before the stop of January 9, 2009.

**B. THE WARRANTLESS SEARCH WAS ILLEGAL UNDER THE
FOURTH AMENDMENT AND *ARIZONA v. GANT*.**

The search also was illegal under the Fourth Amendment of the United States Constitution and *Arizona v. Gant*. “Consistent with our

precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment --subject only to a few specifically established and well-delineated exceptions.’”

Arizona v. Gant, 556 U.S. 332, 342-343, citing *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), *footnote omitted*.

The trial court erred by denying appellant’s motion to suppress the evidence seized from the search of her vehicle, because the prosecution failed to demonstrate that either of *Arizona v. Gant*’s exceptions applied.

C. ADMISSION OF TESTIMONY ABOUT WHAT THE NON-TESTIFYING INFORMANT SAID VIOLATED MS. HOWE’S SIXTH AMENDMENT RIGHTS, AS HELD BY WASHINGTON COURTS.

Shane Heath failed to testify, and the court’s admission of the officers’ testimony about Mr. Heath’s statements to them violated Appellant’s right to confront and cross-examine him, as guaranteed by the Sixth Amendment of the U.S. Constitution.

The prosecution based its case on the testimony of Detective Vargas, Detective Brian Emery, and Detective Benjamin Olmstead about

the informant's alleged drug buys, yet the State never gave a reason for Mr. Heath's absence.

Defense counsel repeatedly objected, at the suppression hearing, to the court's admission of the officers' hearsay testimony. For example, Det. Vargas testified that the informant said that he knew Jami Howe, had purchased meth from her in the past, and that she sold it in "quantities of ounces or better." RP SH p. 6, line 25; p. 7, lines 1-4.)

Detective Vargas testified that "We conducted a controlled buy [in December 2008] with that information, debriefed him, and then continued with the controlled buy." SH RP 7, lines 15-18. Detective Vargas said that the informant made a phone call to Ms. Howe in his presence, and that he heard Ms. Howe tell the informant that he could come to her residence. Detective Vargas was listening in on the informant's end of the conversation. (RP SH 12, lines 2-11.)

As a result of that investigation, the Task Force arrested Ms. Howe on January 9, 2009 for narcotics-related charges. (RP SH p. 8, lines 17-23.)

Defense counsel objected to the informant's absence. Mr. Thompson told the court that it was important for the informant to testify, because the State's case was based on what he told law enforcement. RP SH p. 19, lines 21-25.)

The right to compel witnesses is guaranteed by the Sixth Amendment, which provides, among other things, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] *to have compulsory process for obtaining witnesses in his favor*". *State v. Smith*, 101 Wn.2d 36, 46, 677 P.2d 100 (1984), *italics in original*.

These rights were recognized and applied to the states in *Washington v. Texas*, which described the importance of the right as follows. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *State v. Smith*, 101 Wn.2d at 41, *citing Washington v. Texas*, 388 U.S. 14, 18 L.Ed.2d 1019, 87 S. Ct. 1920 (1967).

1. Ms. Howe met her burden of showing that the informant's testimony was material.

The defendant carries the burden of showing materiality. This burden has been described as establishing a colorable need for the person

to be summoned. *State v. Smith*, 101 Wn.2d at 41-42, citing *Ashley v. Wainwright*, 639 F.2d 258 (5th Cir. 1981).

The Sixth Amendment right of confrontation includes the right to cross examine witnesses. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). A defendant has a Sixth Amendment right to compel attendance of witnesses who could materially aid his defense. *State v. Smith*, 101 Wn.2d 36, 41-42, 677 P.2d 100 (1984).

If a defendant establishes "a colorable need for the person to be summoned", then the person is a material witness whose identity the State must disclose to allow the defendant to compel attendance. *State v. Petrina*, 73 Wn. App. 779, 784, 871 P.2d 637, (1994), citing *Smith*, 101 Wn.2d at 41-42 and *State v. Casal*, 103 Wn.2d 812, 816, 699 P.2d 1234 (1985). A confidential informant's privilege yields only when the informant is "a material witness on the question of a defendant's guilt or innocence." *State v. Casal*, 103 Wn.2d 812, 816, 699 P.2d 1234 (1985).

Ms. Howe established a colorable need for Mr. Heath to testify at her suppression hearing, and therefore he was a material witness. The State did, in fact, disclose his identity to the defense. Detective Vargas stated on June 3, 2010, at the CrR 3.6 hearing, that the confidential informant was available to testify. RP SH p. 3, lines 9-13.) "So we've

confirmed that that person is available. He's going to be a named witness." *Id.*

2. The prosecution provided no explanation for the witness' failure to appear.

When Mr. Heath failed to appear at trial, the prosecution provided no explanation. Mr. Heath's statements to police that the drugs he purchased on January 9, 2009 came from Ms. Howe were crucial in obtaining Ms. Howe's conviction.

Det. Vargas admitted that he did not have any personal knowledge about how Mr. Heath became an informant for the Task Force, and that this was the first time that this informant had actually worked for him. Detective Vargas testified, at the trial, that he was contacted by the informant, and that he never used the informant before Ms. Howe's case. RP p. 55, lines 19-25; p. 56, lines 1-7.

During cross-examination at trial, Detective Vargas testified that, he was in the same room when the informant telephoned Ms. Howe and allegedly arranged to purchase drugs on December 23, 2008. He heard Mr. Heath make the call and heard a female's voice on the other end. However, he admitted that he didn't know whether the informant was actually talking to Ms. Howe. RP p. 56-57.

Detective Vargas also testified that when he set up the December 23, 2008 drug buy, he didn't actually see the informant go into Ms. Howe's house, and he did not actually see Ms. Howe that day. However, Detective Vargas did see the informant pull into the neighbor's driveway, as Ms. Howe allegedly instructed; drive through the property to Ms. Howe's house; and park in her driveway at the back door because her gate would not open to allow him to go through her driveway. RP 59-60.

D. U.S. SUPREME COURT DECISIONS REQUIRED THE
EXCLUSION OF POLICE TESTIMONY ABOUT WHAT THE
ABSENT INFORMANT TOLD POLICE.

The trial court abused its discretion by denying defense counsel's motion to exclude Detective Vargas' testimony concerning the informant's statements that he had bought drugs from Ms. Howe.

The U.S. Supreme Court has found the Confrontation Clause violated each time it has addressed a case in which a non-testifying accomplice's custodial confession was admitted against the accused. The Court stressed its historical holding that "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to

cross-examine. *Crawford v. Washington*, 541 U.S. 36, 41; 124 S. Ct. 1354; 158 L. Ed. 2d 177, (2004).

In *Crawford*, the trial court admitted the recorded statements of the defendant's wife, which the prosecution submitted to refute defendant's claim of self defense. The trial court held that the wife's statements were reliable hearsay, and the trial court agreed. The U.S. Supreme Court reversed the conviction and remanded for further proceedings.

The Court stressed that the "bedrock procedural guarantee" of the Sixth Amendment's Confrontation Clause applies to both federal and state prosecutions. *Crawford*, 541 U.S. at 42.

Crawford overruled *Ohio v Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980) which held that (1) a defendant's Sixth Amendment right to be confronted by the witnesses against him did not bar admission, at a criminal trial, of an unavailable witness' statement against him if the statement bore adequate indicia of reliability; and (2) to meet this test for admission of the statement, evidence had to (a) fall within a firmly rooted hearsay exception, or (b) bear particularized guarantees of trustworthiness. which held that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability--*i.e.*, falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."

Under *Crawford's* testimonial standards, Ms. Howe's confrontation rights were violated by the admission of testimony about Mr. Heath's out-of-court statements to police.

1. The traditional construction of the Confrontation Clause dictates that prosecution testimony about the absent informant's statements is inadmissible.

The Supreme Court has found the Confrontation Clause violated each time it has considered a criminal case in which the prosecution introduced a non-testifying accomplice's custodial statement or a non-testifying witness's prior testimony that was not subject to cross-examination. *See Lilly v. Va.*, 527 U.S. 116, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999) (accomplice's custodial confession); *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990) (alleged victim's statements to doctor); *Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986) (accomplice's custodial confession); *Berger v. California*, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508 (1969) (per curiam) (preliminary hearing testimony); *Brookhart v. Janis*, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966) (accomplice's custodial confession); *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965) (accomplice's custodial confession); *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (preliminary hearing testimony).

At the same time, the Supreme Court has condoned the use of an unavailable witness's prior testimony against the accused when the witness was subject to cross-examination during the prior testimony. *See Mancusi v. Stubbs*, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293, (1972) (testimony from a prior trial on same charges where witness was subject to "adequate" cross-examination); *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930 (1970) (preliminary hearing testimony when witness was subjected to "full" cross-examination). *Id.* These decisions state the following rule: The Confrontation Clause bars the government in criminal cases from introducing "testimony" that is not subject to (and has not previously been subjected to) cross-examination by the defendant. This rule prohibits the prosecution from introducing *ex parte* testimony or its functional equivalent. *See White v. Illinois*, 502 U.S. 346, 365, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992). (Thomas, J., concurring in part and concurring in judgment.)

2. Appellant's confrontation rights were violated by admission of police testimony about what the informant told them, because he wasn't available for cross-examination.

Applying this traditional understanding of the Confrontation Clause, the proper conclusion is that Ms. Howe's confrontation rights were violated by the admission of police officers' testimony that Shane Heath told them that he bought methamphetamine from Ms. Howe on

December 23, 2008 and January 9, 2009. As Justice Stewart explained in his concurring opinion in *Bruton v. United States*, 391 U.S. 123, 138, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), “an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.” The bright-line rule applied in these decisions, combined with the centuries of confrontation jurisprudence, made Shane Heath’s statements inadmissible if he was not available for cross-examination. The right to confrontation is a procedural requirement that the government prove its case through live testimony that is subject to cross-examination.

V. CONCLUSION

For the foregoing reasons, Appellant requests that this Court (1) reverse denial of her motion, entered at the CrR 3.6 hearing; to suppress all evidence seized from the search of her vehicle; (2) reverse the appellant’s conviction, and dismiss all charges against her, with prejudice. In the alternative, this Court should order a new trial.

Respectfully submitted this 19th day of August, 2011



Corey Evan Parker, WSBA # 40006
Attorney for Appellant Jamie Howe