

No. 37966-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOHN SCALARA,

Appellant.

CC 11/19/19 AM 11:37
STATE OF WASHINGTON
BY [Signature]
COURT OF APPEALS
DIVISION TWO

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

APPELLANT'S REPLY BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

 1. THE INITIAL STOP OF SCALARA'S CAR WAS UNLAWFUL..... 1

 2. THE SEARCH INCIDENT TO ARREST WAS UNLAWFUL . 6

 a. Scalara did not waive his right to challenge the search incident to arrest..... 6

 b. The evidence seized during the unlawful search incident to arrest must be suppressed..... 12

 i. Fourth Amendment 13

 ii. Article 1, section 7 18

 3. THE TWO CONVICTIONS FOR POSSESSION OF STOLEN PROPERTY VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY 20

B. CONCLUSION..... 24

TABLE OF AUTHORITIES

Washington Supreme Court

<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	5
<u>State v. Baxter</u> , 68 Wn.2d 416, 413 P.2d 638 (1966).....	7
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	20
<u>State v. Eisfeldt</u> , 163 Wn.2d 628, 185 P.3d 580 (2008)	18
<u>State v. Kirwin</u> , 165 Wn.2d 818, 203 P.3d 1044 (2009)	8
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999) 4, 18, 19, 20	
<u>State v. Leyda</u> , 157 Wn.2d 335, 138 P.3d 610 (2006)	22, 23
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	7, 9
<u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009)	6
<u>State v. Morse</u> , 156 Wn.2d 1, 123 P.3d 832 (2005)	18, 19
<u>State v. Myrick</u> , 102 Wn.2d 506, 688 P.2d 151 (1984).....	18
<u>State v. Potter</u> , 156 Wn.2d 835, 132 P.3d 1089 (2006).....	20
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993)	9
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	8
<u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	21
<u>State v. Valladares</u> , 99 Wn.2d 663, 664 P.2d 508 (1983)	7
<u>State v. White</u> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	19, 20

Court of Appeals

<u>State v. Byrd</u> , 110 Wn. App. 259, 39 P.3d 1010 (2002)	5
--	---

<u>State v. Chapin</u> , 75 Wn. App. 460, 879 P.2d 300 (1994), <u>disapproved on other grounds by State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999)	4
<u>State v. Contreras</u> , 92 Wn. App. 307, 966 P.2d 915 (1998)	9
<u>State v. McReynolds</u> , 117 Wn. App. 309, 71 P.3d 663 (2003)	21, 22
<u>State v. Millan</u> , ___ Wn. App. ___, 2009 WL 2414850 (2009).....	7
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	7
<u>State v. Turner</u> , 102 Wn. App. 202, 6 P.3d 1226 (2000)	22
<u>State v. Webb</u> , 147 Wn. App. 264, 195 P.3d 550 (2008)	12

United States Supreme Court

<u>Arizona v. Gant</u> , ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)	10, 12, 17, 18
<u>Chimel v. California</u> , 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)	10
<u>Griffith v. Kentucky</u> , 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)	15
<u>Herring v. United States</u> , ___ U.S. ___, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)	14
<u>Illinois v. Krull</u> , 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)	14
<u>Mapp v. Ohio</u> , 367 U.S. 643, 660, 81 S.Ct. 1688, 6 L.Ed.2d 1086 (1961).....	13
<u>Michigan v. DeFillippo</u> , 443 U.S. 31, S.Ct. 2627, 61 L.Ed.2d 343 (1979).....	19
<u>United States v. Calandra</u> , 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)	14

<u>United States v. Leon</u> , 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)	14
<u>Weeks v. United States</u> , 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914)	13

Statutes

Former RCW 9A.56.160(1)(a)	24
RCW 46.16.240	4
RCW 46.70.090	1, 3, 4, 5
RCW 9.35.020(1)	23
RCW 9A.56.160(1)(c)	23

Rules

RAP 2.5(a)(3)	8
---------------------	---

Regulations

WAC 308-96A-295	2
-----------------------	---

Other Authorities

<u>Agnew v. State</u> , __ S.E.2d __, 2009 WL 1608714 (Ga. App. 2009)	17
<u>Department of Revenue v. A & A Auto Wrecking, Inc.</u> , 625 P.2d 1021 (Colo. 1981)	2
<u>Hathaway v. State</u> , 906 N.E.2d 941 (Ind. Ct. App. 2009)	11, 17
<u>Hill v. Harrill</u> , 203 Tenn. 123, 310 S.W.2d 169 (1957)	2
<u>State Bd. of Equalization v. Wyoming Auto. Dealers Ass'n</u> , 395 P.2d 741 (Wyo. 1964)	2

United States v. Buford, ___ F.Supp.2d ___ (M.D. Tenn., No. 3:09-00021, June 11, 2009)..... 11, 15, 17

United States v. Lopez, 567 F.3d 755 (6th Cir. 2009) 11, 17

United States v. McCane, ___ F.3d ___ (10th Cir., No. 08-6235, July 28, 2009)..... 11

A. ARGUMENT IN REPLY

1. THE INITIAL STOP OF SCALARA'S CAR WAS UNLAWFUL

The State argues Deputy Maier had a reasonable, articulable suspicion of illegal activity that entitled him to stop Scalara's automobile. The State argues the deputy had sufficient basis to stop the car because of: (1) the expired front license plate; (2) the "unusual" looking dealer plate; (3) the unusual placement of the dealer plate; and (4) the presence of numerous items inside the car. SRB at 10. To the contrary, and as further argued in the opening brief, the facts observed by the deputy did not raise a reasonable suspicion of illegal activity, because they were consistent with the language and purpose of the dealer plate statute.

First, the expired front license plate was not indicative of illegal activity. The purpose of the dealer plate law is to allow car dealers to register under one general number all the motor vehicles owned or controlled by them. RCW 46.70.090. The obvious legislative intent is to accommodate dealers by not requiring registration of each vehicle in the dealer's inventory, and to permit dealers to operate their vehicles upon highways with the ease of transferring one license plate from one vehicle to another. See

Department of Revenue v. A & A Auto Wrecking, Inc., 625 P.2d 1021, 1023-24 (Colo. 1981); Hill v. Harrill, 203 Tenn. 123, 132, 310 S.W.2d 169 (1957). Dealers are thereby relieved from the obligation to pay separate registration fees on each and every vehicle held by them for sale. State Bd. of Equalization v. Wyoming Auto. Dealers Ass'n, 395 P.2d 741, 743 (Wyo. 1964).

In other words, the presence of a license plate with expired tabs on a car with an apparently valid dealer plate does not raise any reasonable suspicion of criminal activity. The dealer is not required to renew the registration of the individual vehicle.

Moreover, for cars subject to the general registration laws, the current registration expiration month and year need be displayed only on the rear vehicle license plate. WAC 308-96A-295. "Expired month and year tabs may be displayed on the front vehicle license plate for vehicles that are required to display a front license plate." Id. This reinforces the conclusion that the presence of a license plate with expired tabs on the front of Scalara's car was in no way indicative of illegal activity.

Second, the State mischaracterizes the record by arguing that the deputy thought the dealer plate looked "unusual." SRB at 9. Deputy Maier testified that dealer plates usually have the letters

"DLR" running vertically down the side of the plate and only numbers running horizontally across instead of numbers and letters. 3/17/08RP 23. By this testimony, the deputy was merely describing what dealer plates usually look like; he did *not* testify that Scalara's dealer plate did not fit this description. See id. The court did not find the deputy thought the dealer plate looked unusual; to the contrary, the court found the deputies did not realize the dealer plate was counterfeit until after they stopped the car and seized the plates. CP 129. Deputy Maier specifically testified the dealer plate looked genuine. 3/17/08RP 67. Thus, there was nothing about the appearance of the dealer plate to raise a reasonable suspicion.

Third, the placement of the dealer plate on the back of the vehicle, covering the existing plate, did not raise a reasonable suspicion of illegal activity, because that placement was consistent with the statute. The statute requires the dealer plate to "be attached to the rear of the vehicle only." RCW 46.70.090(1). The statute does not specify the manner in which the plate must be attached. Logically, the plate may cover the existing expired license plate, because the existing plate does not reflect the registration status of the vehicle.

The State relies on State v. Chapin, 75 Wn. App. 460, 462, 879 P.2d 300 (1994), disapproved on other grounds by State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999), which held a police officer had authority to stop a person driving with a rear license plate mounted incorrectly in the back windshield. But that case is distinguishable, because here the dealer plate was correctly mounted on the rear of the vehicle as required by law. Again, a dealer plate must "be attached to the rear of the vehicle only." RCW 46.70.090(1). Further:

if only one license number plate is legally issued for any vehicle such plate shall be conspicuously attached to the rear of such vehicle. Each vehicle license number plate shall be placed or hung in a horizontal position at a distance of not more than four feet from the ground and shall be kept clean so as to be plainly seen and read at all times.

RCW 46.16.240. Here, there is no indication in the record or the court's findings that the dealer plate was not "conspicuously attached" to the rear of the vehicle or that it was not clean or able to be plainly seen and read at all times. The placement of the plate was therefore consistent with the statute.

Finally, the presence of numerous items inside the car did not indicate illegal activity. An officer or employee of a dealership, or his or her spouse, may use a vehicle affixed with a dealer plate

"to transport the dealer's own tools, parts, and equipment of a total weight not to exceed five hundred pounds." RCW 46.70.090(3)(b). Although the court found Deputy Maier "noticed that the vehicle was also full of miscellaneous items," the court did not find the items appeared to the deputy to be of a type not allowed by statute. CP 127. Further, the court did not find the presence of the "miscellaneous items" was a basis for the traffic stop. Instead, the court found the deputy stopped the car only because of the expired tabs on the front license plate. CP 127; 3/18/08RP 220. "In the absence of a finding on a factual issue [this Court] must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." State v. Byrd, 110 Wn. App. 259, 265, 39 P.3d 1010 (2002) (quoting State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997)). Because the trial court did not find the presence of the "miscellaneous items" in the car was a basis for the traffic stop, this Court must presume the State failed to carry its burden of proof on this issue.

In sum, the facts known to the deputy at the time of the traffic stop did not raise a reasonable suspicion of illegal activity, because the facts were consistent with what is allowed under the dealer plate statute. To the extent the dealer plate statute is

ambiguous as applied to this case, this Court must construe it strictly in Scalara's favor. State v. Mendoza, 165 Wn.2d 913, 925 n.5, 205 P.3d 113 (2009). Because the stop was unlawful, all evidence seized from the car must be suppressed.

2. THE SEARCH INCIDENT TO ARREST WAS UNLAWFUL

a. Scalara did not waive his right to challenge the search incident to arrest. The State contends Scalara waived his right to challenge the search of his car incident to arrest, because he did not argue in the trial court that the officer lacked lawful authority to conduct the search. SRB at 25-26. The State also complains Scalara's failure to object prevented the State from arguing that other exceptions to the warrant requirement, such as inevitable discovery, might apply. SRB at 26. To the contrary, Scalara did not waive his right to challenge the search, because he filed a pre-trial motion to suppress, he specifically challenged the scope of the search incident to arrest, and the record of the CrR 3.6 hearing and the trial court's findings is adequate to resolve the issue on appeal. Moreover, it is the State that waived the right to argue that other exceptions to the warrant requirement might apply, by failing to raise the issue below.

In arguing that Scalara waived his right to challenge the search by failing to object pre-trial, the State relies on several cases where defendants completely failed to file pre-trial suppression motions and where no suppression hearings were held. See State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (defense counsel failed to challenge warrantless arrest or argue evidence seized as result of arrest must be suppressed); State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983) (counsel affirmatively withdrew suppression motion at omnibus hearing and no CrR 3.6 hearing was held); State v. Baxter, 68 Wn.2d 416, 419, 413 P.2d 638 (1966) (counsel did not move to suppress evidence seized in search incident to arrest until after State rested its case); State v. Tarica, 59 Wn. App. 368, 373, 798 P.2d 296 (1990) (counsel failed to move to suppress evidence seized from wallet in search incident to arrest).

Similarly, in State v. Millan, ___ Wn. App. ___, 2009 WL 2414850 (2009), this Court recently held that the defendant waived his right to challenge on appeal the admission of evidence seized during a warrantless search incident to arrest, because he failed at the trial court level to file a motion to suppress or argue that the evidence was seized during an unlawful search.

Here, in contrast to those cases, Scalara filed a pre-trial motion to suppress the evidence seized during the warrantless search incident to arrest, and a CrR 3.6 hearing was held. At the hearing, counsel specifically argued "the officers searched the vehicle incident to arrest and that search was unlawful." 3/17/08RP 12. Further, counsel argued the scope of the search was "way beyond what should be allowed for a valid search incident to arrest." 3/18/08RP 207. These arguments raised below are sufficient to preserve Scalara's right to challenge the scope of the search incident to arrest on appeal.

Moreover, in determining whether an appellate court may reach a constitutional issue raised on appeal, the question ultimately is not whether the defendant objected below, but whether the record is adequate to enable the court to resolve the issue on appeal. Although not raised at trial, a defendant may submit for review a "manifest error affecting a constitutional right." State v. Kirwin, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009); RAP 2.5(a)(3). Constitutional errors are treated specially under RAP 2.5(a)(3) "because they often result in serious injustice to the accused." State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). "Such errors also require appellate court attention because they may

adversely affect the public's perception of the fairness and integrity of judicial proceedings." Id. at 687.

A constitutional error is "manifest," allowing appellate review, if the defendant can "show how, in the context of the trial, the alleged error actually affected the defendant's rights." McFarland, 127 Wn.2d at 333. The facts necessary to adjudicate the alleged error must be in the record on appeal. Id. Specifically, "[w]here the alleged constitutional error arises from trial counsel's failure to move to suppress, the defendant 'must show the trial court likely would have granted the motion if made.'" State v. Contreras, 92 Wn. App. 307, 312, 966 P.2d 915 (1998) (quoting McFarland, 127 Wn.2d at 334). "[W]hen an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal." Contreras, 92 Wn. App. at 313 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

Here, the record is adequate to determine whether the police officers exceeded the scope of an allowable search incident to arrest. In Arizona v. Gant, the United States Supreme Court made clear that the scope of a search incident to arrest must be

commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (citing Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)). To that end, police may conduct a warrantless search of a vehicle incident to a 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 arrest." Gant, 129 S.Ct. at 1723-24. In Gant, the arrestees were all handcuffed and secured in separate patrol cars at the time the officers searched Gant's car. Id. at 1719. Further, Gant was arrested for driving with a suspended license. Id. Under those circumstances, "police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein." Id. Therefore, the search was unreasonable in violation of the Fourth Amendment. Id.

Here, the record is adequate to conclude Scalara's case is factually indistinguishable from Gant. Like Gant, Scalara was handcuffed and secured in the backseat of the patrol car while the

officers searched his car. 3/17/08RP 33, 38, 60; 3/18/08RP 93, 97; CP 128 (findings of fact 8, 12, 14). Also like Gant, Scalara was arrested for the crime of driving with a suspended license. 3/17/08RP 27, 32; CP 128 (finding of fact 8). Under those circumstances, "police could not reasonably have believed either that [Scalara] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein." Gant, 129 S.Ct. at 1719. Therefore, the warrantless search was unlawful. Id.; see also, e.g., United States v. Buford, ___ F.Supp.2d ___ (M.D. Tenn., No. 3:09-00021, June 11, 2009) (holding warrantless search of car incident to arrest unlawful where defendant arrested for probation violation and seated securely in handcuffs in back of patrol car during search); United States v. McCane, ___ F.3d ___ (10th Cir., No. 08-6235, July 28, 2009) (warrantless search of car incident to arrest unlawful where defendant arrested for driving with suspended license and seated in handcuffs in back of patrol car during search); United States v. Lopez, 567 F.3d 755 (6th Cir. 2009) (search unlawful where defendant arrested for reckless driving and secured in back of patrol car during search); Hathaway v. State, 906 N.E.2d 941 (Ind. Ct. App. 2009) (search unlawful where defendant arrested for

driving with suspended license and defendant and passenger cooperative and officer did not fear for his safety).

Finally, the State's failure to argue in the trial court that other exceptions to the warrant requirement, such as inevitable discovery, might apply, precludes the State from raising those arguments on appeal. Appellate courts will not reach the issue of inevitable discovery if not raised in the trial court. State v. Webb, 147 Wn. App. 264, 275, 195 P.3d 550 (2008). As stated, Scalara filed a pre-trial motion to suppress, and a suppression hearing was held at which Scalara argued the search incident to arrest was unlawful. Therefore, the State had ample opportunity to argue inevitable discovery below, and because it failed to do so, it may not now raise the issue on appeal.

b. The evidence seized during the unlawful search incident to arrest must be suppressed. The State concedes that the new rule of constitutional procedure announced in Gant applies to Scalara's case. But the State contends Scalara is not entitled to a remedy for the constitutional violation, because the officers were relying in "good faith" on the law existing at the time of the search, which authorized police to search the entire passenger compartment of an arrestee's car incident to arrest. SRB at 28-36.

The State contends the "good faith" exception to the exclusionary rule applies under both the federal and state constitutions.

To the contrary, both the Fourth Amendment and article 1, section 7 require this Court to suppress the evidence seized during the unlawful search of Scalara's car.

i. Fourth Amendment. The United States Supreme Court adopted the exclusionary rule in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), explaining, "[i]f letters and private documents can . . . be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value." Id. at 393. In Mapp v. Ohio, the Court explained the exclusionary rule was necessary to provide a remedy for constitutional violations and protect judicial integrity. 367 U.S. 643, 649, 660, 81 S.Ct. 1688, 6 L.Ed.2d 1086 (1961).

But over time the Court distanced itself from these early cases, stating more recently that the rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v.

Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Accordingly, in United States v. Leon, 468 U.S. 897, 918, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the Court concluded that suppression of evidence based on a magistrate's error in issuing a search warrant would not deter law enforcement officers who "acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." Similarly, in Illinois v. Krull, 480 U.S. 340, 349-50, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), the Court held that the exclusionary rule would not deter illegal police conduct when the officer, in conducting the search, relied on a state statute that was not clearly unconstitutional. Finally, in Herring v. United States, ___ U.S. ___, 129 S.Ct. 695, 704, 172 L.Ed.2d 496 (2009), the Court concluded the exclusionary rule would not deter police who reasonably relied on an arrest warrant that was invalid due to a negligent bookkeeping error by another police employee. In view of the allegedly nonexistent deterrent effect of the rule under these various circumstances, the Court stated that application of the rule could not be justified in view of the "substantial costs of exclusion." Leon, 468 U.S. at 922; accord Krull, 480 U.S. at 352-53; Herring, 129 S.Ct. at 703.

But although the Court has focused in recent years on the deterrent purpose of the exclusionary rule, it has never held that the "good faith" exception should be extended into the realm of Supreme Court jurisprudence and the general area protected by the retroactivity doctrine, where competing concerns hold sway. United States v. Buford, ___ F.Supp.2d ___ (M.D. Tenn., No. 3:09-00021, June 11, 2009). Where police conduct a search or seizure in reasonable reliance on Supreme Court case law that is overturned while the defendant's case is pending on direct review, refusing to apply the exclusionary rule to the defendant's case is without logical support and leads to absurd results. Id.

Applying a new rule of constitutional procedure to cases pending on direct review when the new rule is announced, but refusing to provide a remedy for the constitutional violation, contravenes basic norms of constitutional adjudication and leads to the same inequitable results the retroactivity doctrine was meant to prevent. First, it is the nature of judicial review that courts adjudicate specific cases, with single cases becoming the vehicle for announcement of a new rule. Griffith v. Kentucky, 479 U.S. 314, 322-23, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Once the court has decided a new rule in the case selected, the integrity of judicial

review requires the court to apply that rule to all similar cases pending on direct review. *Id.* "[I]t is the nature of judicial review that precludes us from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'" *Id.* at 323 (citation omitted). Applying the exclusionary rule in the single case that pronounces the new constitutional standard, but refusing to apply it in other similar cases pending on direct review, has the same effect as applying the new rule selectively and therefore violates basic norms of constitutional adjudication.

Second, selective application of new rules violates the principle of treating similarly situated defendants the same. *Id.* "[T]he problem with not applying new rules to cases pending on direct review is 'the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." *Id.* (citation omitted). Again, applying the exclusionary rule in the single case in which the new constitutional standard is announced, but not in other similar cases pending on direct review, results in "actual inequity" to those

defendants who are denied the benefit of the new rule simply by chance.

To apply the "good faith" exception to the exclusionary rule in this case is to contravene these basic principles underlying the retroactivity doctrine. In Gant, the Court upheld the Arizona court's decision to suppress the evidence seized in the unlawful search incident to arrest, despite the officers' good faith reliance on the case law existing at the time of the search. 129 S.Ct. at 1724. The retroactivity doctrine requires that the new constitutional rule announced in Gant "applies with the same force as if Gant were on the books at the time of the defendant's arrest." Buford, 2009 WL 1635780. Basic norms of constitutional adjudication therefore preclude this Court from denying Scalara the same remedy that Gant received.

Consistent with these principles, several courts applying Gant to cases pending on direct review have suppressed the evidence seized without addressing whether the "good faith" exception to the exclusionary rule applies. See Hathaway v. State, 906 N.E.2d 941, 946 (Ind. Ct. App. 2009); Agnew v. State, ___ S.E.2d ___, 2009 WL 1608714 (Ga. App. 2009); United States v. Lopez, 567 F.3d 755, 757-58 (6th Cir. 2009).

ii. Article 1, section 7. Applying Gant and recognizing that the Washington Constitution generally provides greater protection to privacy interests than the federal constitution, this Court should hold that the search in this matter was unconstitutional under article 1, section 7. See, e.g., State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984) ("we have recognized that the unique language of Const. art. 1, § 7 provides greater protection to persons under the Washington Constitution than U.S. Const. amend. 4 provides to persons generally").

Washington courts applying article 1, section 7 have "long declined to create 'good faith' exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement." State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005); see also State v. Eisfeldt, 163 Wn.2d 628, 639, 185 P.3d 580 (2008); State v. Ladson, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999) ("Under article I, section 7, suppression is constitutionally required").

Unlike the federal constitution, which focuses on whether the police acted reasonably under the circumstances, article 1, section

7 of the state constitution focuses on the expectations of the people being searched. Morse, 156 Wn.2d at 10. Exclusion provides a remedy for the citizen in question and saves article 1, section 7 from becoming a "meaningless promise." Ladson, 138 Wn.2d at 359 (citation omitted). Exclusion also saves the integrity of the judiciary by not tainting judicial proceedings with illegally obtained evidence. Id.

Recognizing that the Washington Constitution affords greater protections than the United States Constitution, the Washington Supreme Court specifically rejected the "good faith" standard set out in Michigan v. DeFillippo, 443 U.S. 31, 99, S.Ct. 2627, 61 L.Ed.2d 343 (1979). See State v. White, 97 Wn.2d 92, 109, 640 P.2d 1061 (1982) ("The result reached . . . in DeFillippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. . . . This approach permits the exclusionary remedy to be completely severed from the right to be free from unconstitutional governmental intrusions"). Again, the purpose of article 1, section 7 is not only to curb governmental actions, but also to protect personal rights. Id.

This rule has not been altered by State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), or State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006), both of which deal with the question of whether a probable cause determination is altered by a statute later found to be unconstitutional. These cases analyze the question of whether there was probable cause to conduct a search in the first place and not the scope of a Washington state citizen's privacy rights. By concluding police had probable cause, both Potter and Brockob determined no constitutional violation occurred, and thus did not apply either the exclusionary rule or any exceptions to that rule. Brockob, 159 Wn.2d at 342; Potter, 156 Wn.2d at 843.

The exclusionary rule is constitutionally mandated and applies whenever an individual's right to privacy is unreasonably invaded. Ladson, 138 Wn.2d 359; White, 97 Wn.2d at 111-12. It therefore applies in this case.

3. THE TWO CONVICTIONS FOR POSSESSION OF STOLEN PROPERTY VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY

The State argues that Scalara was properly charged and convicted of two counts of possession of stolen property, even though the two convictions are based on Scalara's simultaneous possession of two checks belonging to the same person. The State

contends the unit of prosecution for the crime turns on the dollar value of the item of property. SRB at 42. The State also analogizes to cases analyzing the crimes of possession of a stolen access device and identity theft. SRB at 42-43. The State misconstrues the crime of possession of stolen property, which differs from those crimes.

First, Washington courts have consistently rejected the argument that the value of the property possessed determines the unit of prosecution for the crime. In State v. McReynolds, 117 Wn. App. 309, 335, 71 P.3d 663 (2003), the court explained that the value of the property possessed determines the *degree* of the crime, not the unit of prosecution. Because the definition of "possession of stolen property," RCW 9A.56.140(1), applies to all degrees of the crime, the unit of prosecution remains the same regardless of the value of the property. Id. (citing State v. Tili, 139 Wn.2d 107, 113-14, 985 P.2d 365 (1999) (for crime of rape, parallel construction of statutes for various degrees of rape dictates that unit of prosecution remains same for each degree of rape). The possession of stolen property statute, RCW 9A.56.010(18)(d), gives the prosecutor discretion to increase the degree of the charge based on the aggregated value of the property possessed, but it

does not define what the Legislature intended as the punishable act. Id. at 338; see also State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000) (although theft statute allows State, in its discretion, to aggregate values of individual acts of theft to increase degree of charge, statute does not define what Legislature intended as punishable act of theft); State v. Leyda, 157 Wn.2d 335, 350, 138 P.3d 610 (2006) (identity theft statute, which elevates degree of offense based on sliding scale of aggregate economic damages, does not show intent by Legislature to define unit of crime; "[r]ather, the decision indicates the legislature's intent to mete out a *greater degree of punishment* based on what is done with the stolen identity *after* the crime has been committed by way of unlawfully obtaining, possessing, using, or transferring it").

Instead, as argued in the opening brief, where the evidence shows a simultaneous possession of various items of stolen property, the unit of prosecution is only a single crime.

McReynolds, 117 Wn. App. at 339. The prosecutor may charge and convict of separate crimes only where the evidence shows separate transactions of receiving or concealing the items. Id.

The cases interpreting the crimes of possession of a stolen access device and identity theft do not change the analysis, as

those crimes are defined by different statutes indicating different legislative intents. For instance, a person commits the crime of possession of a stolen access device if the person "possesses a stolen access device." RCW 9A.56.160(1)(c) (emphasis added). In State v. Ose, 156 Wn.2d 140, 146, 124 P.3d 635 (2005), the court held that use of the word "a" in the statute, which is used only to precede singular nouns, unambiguously shows the Legislature's intent that possession of each stolen access device is a separate violation of the statute. Similarly, a person commits the crime of identity theft if he or she "knowingly obtain[s], possess[es], use[s], or transfer[s] a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1) (emphasis added). Again, use of the word "a" in the statute indicates the Legislature's intent that each possession of a separate means of identification or financial information is a separate crime. Leyda, 157 Wn.2d at 346 n.9.

In contrast to those crimes, in this case Scalara was charged and convicted of possession of stolen property in the second degree under former RCW 9A.56.160(1)(a). CP 1-5, 92-93, 99. Pursuant to that statute, a person commits the crime if he or she "possesses stolen property . . . which exceeds two hundred fifty

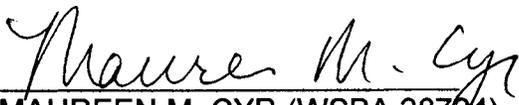
dollars in value but does not exceed one thousand five hundred dollars in value." Former RCW 9A.56.160(1)(a). Use of the mass noun "property," without the preceding qualifier "a," indicates the Legislature's intent that simultaneous possession of discrete items of stolen property is only a single crime. Again, a person commits separate units of the crime only if the evidence shows separate transactions of receiving or concealing items of property.

Because the evidence in this case shows that Scalara simultaneously possessed two checks belonging to the same person, but does not show separate transactions of receiving or concealing the checks, the two convictions for possessing stolen property violate his right to be free from double jeopardy.

B. CONCLUSION

For the reasons set forth above and in the opening brief, the evidence seized in the unlawful seizure and search of Scalara's automobile must be suppressed. Alternatively, one of the convictions for possession of stolen property must be vacated.

Respectfully submitted this 12th day of August 2009.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	COA NO. 37966-0-II
Respondent,)	
)	
v.)	
)	
MICHAEL SCALARA.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 12TH DAY OF AUGUST, 2009, A COPY OF APPELLANT'S *REPLY BRIEF* WAS SERVED ON THE PARTIES BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

[X] Stephen D Trinen
Pierce County Prosecutors Ofc
930 Tacoma Ave S Rm 946
Tacoma WA 98402-2102

[X] Michael Scalara
239414
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326-0769

09 AUG 19 AM 11:37
STATE OF WASHINGTON
BY _____
DEPUTY
COURT OF APPEALS
DIVISION II

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF AUGUST, 2009

x Ann Joyce