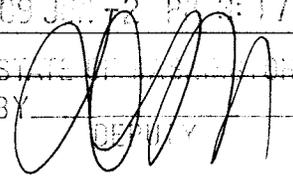


NO. 38219-9-II

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TODD NELSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 08-1-01846-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. The State concedes that the trial court erred where the defendant was denied the jury instruction and defense for unwitting possession.
2. Whether the court that heard the defendant's suppression motion erred when it denied the defendant's motion to suppress evidence where the defendant was not seized until the officer had probable cause to arrest him on the warrant?
3. Whether the defendant waived any challenge to the search of the vehicle based on *Arizona v. Gant*, where the defendant failed to raise it below?

B. STATEMENT OF THE CASE.

1. Procedure

On April 16, 2008 the defendant, Todd Nelson, was charged with unlawful possession of a controlled substance, heroin; and unlawful use of drug paraphernalia based upon an incident that occurred on April 15, 2008. CP 1-2.

The defendant filed a motion to suppress evidence, claiming that the defendant had been unlawfully seized by the police officer. CP 4-8. The State filed a response. CP 9-16. A suppression hearing was held July

22, 2008. *See* RP 07-22-08. The court denied the defendant's motion to suppress. CP 58-62; RP 07-22-08, p. 47, ln. 20, *see generally* p. 43-47.

The case proceeded to trial and the defendant was convicted of unlawful possession of a controlled substance, but was acquitted of unlawful use of drug paraphernalia. CP 56, 57. The defendant was sentenced on August 15, 2008. CP 111-124.

The notice of appeal was filed timely on September 2, 2008.

2. Facts

a. Facts At 3.6 Hearing

The court entered the following finding of fact at the 3.6 hearing:

THE UNDISPUTED FACTS

1. On April 15, 2008, at approximately 10:30 p.m., Officer Paul Herrera, an 8-year veteran Puyallup Tribal Police Officer, was on patrol alone in the area of 32nd and Roosevelt in Tacoma, Washington.
2. Officer Herrera observed a vehicle (1986 Honda Accord) parked on the side of the road in front of a truck. Officer Herrera saw that the rear bumper of the Honda was touching the front bumper of the truck and believed that the Honda had backed into the truck.
3. Officer Herrera stopped his vehicle on the side of the street opposite to the Honda. The officer turned on the small red and blue lights at the very ends of his patrol vehicle's overhead light bar when he exited his car to investigate. The officer did not activate any spotlights or sirens.

4. Officer Herrera approached the Honda on foot using a flashlight to illuminate the dark area and observed Todd Vernon Nelson (hereinafter defendant) sitting in the driver's seat of the Honda. The defendant was slumped over the steering wheel. There were no other persons in the vehicle or in the area.

5. When the officer got closer, he observed that the steering column appeared broken on the bottom, with wires exposed. Officer Herrera believed due to his training and experience that this may indicate that the vehicle had been stolen.

6. The Honda's driver's side window was partially rolled down, and the officer spoke to the defendant through the partially open window. He asked the defendant if the car belonged to him, and the defendant informed Officer Herrera that the Honda did not belong to him.

7. Officer Herrera walked to the front of the car so he could observe the front license plate and used his radio to request that dispatch communications personnel run a check on the vehicle's license plate (064-RQG). Dispatch personnel responded that the vehicle had not been reported as stolen and indicated that it was listed as belonging to a female.

8. Officer Herrera walked back to the driver's side window and asked the defendant if he had any identification. The defendant provided the officer with his identification. The officer used his radio to request that dispatch personnel check the defendant's identity and check for outstanding warrants. After about 30 seconds, dispatch personnel radioed back that there was a possible District Court warrant outstanding for the defendant's arrest pertaining to a misdemeanor charge. The officer asked the dispatch personnel to confirm the warrant, which they did.

9. During this process, which took only about 3 minutes according to the officer, the defendant remained seated in the driver's seat of the vehicle. Officer Herrera

was standing on the driver's side of the vehicle near the driver's window. At no time did the officer tell the defendant to remain at the scene or make any attempt to keep the defendant at the scene.

10. Officer Herrera testified that he subjectively believed that he would have stopped the defendant if he attempted to leave the scene at this point. However, since the defendant made no attempt to leave the scene the officer never took any action based on his subjective belief.

11. After the warrant had been confirmed the officer asked the defendant to exit his vehicle so he could be placed under arrest. The defendant was placed in the back the officer's patrol vehicle while the officer searched the defendant's vehicle incident to his arrest.

12. A second officer arrived after the defendant had already been arrested and placed in the back of Officer Herrera's vehicle.

13. Inside the Honda, Officer Herrera located a blue zipper bag on the front passenger's seat. Inside the bag, Officer Herrera found several hypodermic needles, two spoons with burnt residue and dirty cotton, and a small plastic baggie containing a black tar-like substance.

14. Due to his training and experience, Officer Herrera recognized the spoons with the burnt residue and dirty cotton as drug paraphernalia. Officer Herrera's NIK test of the black tar-like substance inside the small baggie tested positive for presumptive presence of heroin.

15. Officer Herrera informed the defendant that he was under arrest for Unlawful Possession of a Controlled Substance (UPCS), Heroin.

THE DISPUTED FACTS

There are no disputed facts.

FINDINGS AS TO DISPUTED FACTS

There are no disputed facts.

REASONS FOR ADMISSIBILITY OF THE EVIDENCE

1. Prior to asking the defendant to exit the Honda, the officer did not restrain the defendant's freedom of movement by either the use force or exhibit any show of authority.
2. Citing State v. O'Neill, 148 Wn.2d 564, 578, 62 P.3d 489, 498 (2003), this Court concludes that Officer Herrera did not seize the defendant when he engaged him in a conversation in a public place because a reasonable person in the defendant's circumstances would have felt free to leave, decline the officer's requests, or terminate the conversation and encounter entirely, up to the point when the officer asked the defendant to exit the Honda.
3. Officer Herrera's subjective belief that he would have stopped the defendant if he would have attempted to leave is irrelevant because this court concludes that a reasonable person in the same objective circumstances would have felt free to leave the scene or terminate the encounter.
4. The officer's request that the defendant exit the Honda so that he could be arrested constituted a seizure of the defendant, but that seizure was justified and lawful because the officer had learned and confirmed that there was an outstanding warrant for the defendant's arrest.
5. The search of the defendant's vehicle was incident to his lawful arrest based on the outstanding warrant, and the zipper bag found on the front passenger seat of the Honda was lawfully recovered and opened.
6. The items located in the zipper bag were lawfully found and recovered incident to the defendant's arrest.

7. This Court concludes that no unlawful seizure occurred in violation of the Fourth Amendment of the United States Constitution or Article I, Section 7 of the Washington State Constitution, and therefore the defendant's motion to suppress under CrR 3.6 is DENIED, and thus all evidence recovered is ADMISSIBLE at trial.

b. Facts at Trial

None of the facts elicited at trial are relevant on appeal where the State concedes that the trial court erred when it failed to grant the defendant's request for a jury instruction on the affirmative defense of unwitting possession.

C. ARGUMENT

1. THE STATE CONCEDES THAT THE TRIAL COURT ERRED WHERE IT DENIED THE DEFENDANT'S REQUEST FOR AN UNWITTING POSSESSION JURY INSTRUCTION.

State v. May, 100 Wn. App. 478, 997 P.2d 956 (2000) is controlling. Where, as here the defendant was charged with unlawful possession of a controlled substance, after requesting the jury instruction for unwitting possession the defendant was entitled to it. Because the court denied that request, it erred, and the proper remedy is reversal. See CP 37-55; RP 07-24-08, p. 101, ln. 17-20; p. 107, ln. 1-5, see generally RP 07-24-08, p. 98, ln. 12 to p. 107, ln. 5.

2. THE OFFICER DID NOT DETAIN THE DEFENDANT UNTIL HE ARRESTED HIM ON THE WARRANT.

As a preliminary matter, the defendant assigns no error to the trial court's findings of fact.¹ An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

a. The Defendant's Motion Should Be Denied Because The Officer's Social Contact With The Defendant Did Not Amount To A Seizure.

Not every encounter between a citizen and a law enforcement officer rises to the level of a seizure. In the absence of a seizure a citizen's interest in being free from police intrusion is minimal. *State v. Kinzy*, 141 Wn.2d 373, 387, 5 P.3d 668 (2000). The person arguing that a seizure occurred under article 1, section 7 of the Washington Constitution has the burden of proving a disturbance of his or her private affairs. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998).

Washington State adheres to the standard established in *United States v. Mendenhall* for determining when a person is "seized." *State v. O'Neill*, 148 Wn.2d 564, 575, 62 P.3d 489, 62 P.3d 489 (2001) (quoting *Young*, 135 Wn.2d at 510-511 (citing *United States v. Mendenhall*, 446

¹ The facts were undisputed by the parties below.

U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980))). Under that standard, a person is seized for purposes of article 1, section 7 of the state constitution “only when, by means of physical force or a show of authority, his freedom of movement is restrained.” *Young*, 135 Wn.2d at 510 (citing *State v. Stroud*, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981) (citing *Mendenhall*, 446 U.S. 544)).

A police officer does not effect a seizure simply because he engages a person in conversation or asks the person questions. *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389 (1991). A seizure does not occur unless under the totality of the circumstances a reasonable person would not feel free to leave. *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). This test is an objective one. *See State v. Thorn*, 129 Wn.2d 347, 352, 917 P.2d 108 (1996), citing *State v. Toney*, 60 Wn. App. 804, 806, 810 P.2d 929, *review denied*, 117 Wn.2d 1003, 815 P.2d 266 (1991).

Here the initial contact between the officer and the defendant was not a seizure. While the language used by an officer to initiate a contact can effect a seizure, it does not always do so. *See State v. Barnes*, 96 Wn. App. 217, 223, 978 P.2d 1131 (1999). Language that is permissive does not effect a seizure. *Barnes* 96 Wn. App. at 223 (identifying as permissive phrases such as, “Gentlemen, I’d like to speak with you, could you come to my car?” or “Can I talk to you guys for a minute?”).

However, language that is coercive can effect a seizure. *Barnes*, 96 Wn. App. at 2233 (identifying “Wait right here” as coercive and effecting a seizure).

Here, the length of the contact was minimal where the total period of contact prior to arrest was about three and a half minutes. RP 07-22-08, p. 15, ln. 18-22. When Officer Herrera approached the vehicle the driver’s window was already partially open and Officer Herrera spoke to the defendant through the window. CP 59, Undisputed Fact 6; RP 07-22-08, p. 8, ln. 3-10, p. 9, ln. 11-19. Officer Herrera then went to the front of the vehicle to check the license plate, and while he did so he did not order the Nelson to remain at the scene. RP 07-22-08, p. 10, ln. 9-11.

Nor did the officer’s request for the defendant’s identification elevate the encounter to a seizure. In *State v. Hansen*, the court held that no seizure occurred where two officers approached the defendant and asked for identification, which the officers held for 30 seconds as they wrote down the individual’s name and birthday. *State v. Hansen* 99 Wn. App. 575, 576, 579, 994 P.2d 855 (2000), *review denied*, 141 Wn.2d 1022, 10 P.3d 1074 (2000). *See also United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). However, if an officer retains a suspect’s identification and walks away with it, a seizure does occur. *State v. Thomas*, 91 Wn. App. 195, 201, 955 P.2d 420, *review denied*, 136 Wn.2d 1030 (1998); *State v. Coyne*, 99 Wn. App. 566, 995 P.2d 78 (2000). Here, Officer Herrera asked for Nelson’s identification to

check for warrants and his driving status. RP 07-22-08, p. 11, ln. 25 to p. 12, ln. 13. Officer Herrera remained with Nelson at his vehicle and used his radio to check with dispatch. RP 07-22-08, p. 12, ln. 3-25. The whole process took about a minute. RP 07-22-08, p.12, ln. 14-20. Once dispatch advised Officer Herrera that Nelson had a warrant, Officer Herrera asked dispatch to confirm that the warrant was valid upon which he then arrested Nelson. RP 07-22-08, p. 12, ln. 17 to p. 13, ln. 19.

In addition, Washington courts have held that more intrusive fact-patterns do not constitute a seizure. See *State v. O'Neill*, 104 Wn. App. 850, 17 P.3d 682 (2001). In *O'Neill* an officer approached the driver of a parked vehicle located in front of a closed supermarket, and asked the driver for identification. The officer had run a license plate check before approaching the driver and learned that the vehicle had previously been involved in drug offenses. The officer also knew that the business had been recently burglarized. The court held that the initial contact and request for identification did not constitute a seizure, noting that the officer did not block the driver's car, did not activate his emergency lights, and did not draw his weapon. *O'Neill*, 104 Wn. App. at 861-62.

Importantly, in *O'Neill* the court emphasized that the officer's knowledge that the vehicle had been involved in prior drug offenses and was parked by a business, which has been recently burglarized, did not elevate the contact to a seizure. *O'Neill*, 104 Wn. App. at 862. The court explained that the test of whether a seizure has occurred is an objective

one which goes only to the question of whether a reasonable person under the same circumstances would have felt free to leave. *O'Neill*, 104 Wn. App. at 862. Concluding that a reasonable person would have felt this way, the court held that a seizure had not occurred and the contact did not violate article 1, section 7 of the Washington Constitution. *O'Neill*, 104 Wn. App. at 862.

The Washington State Supreme Court has held that a “police officer’s conduct in engaging a defendant in conversation and asking for identification does not, alone, raise the encounter to an investigative detention.” *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). That is what occurred in the case at hand. The contact was brief and minimal, and from an objective standard a reasonable person would have felt free to leave. The defendant has failed to meet his burden of showing that he was seized. Consequently, the contact did not constitute a seizure and the defendant’s motion to suppress should be denied.

- b. Officer Herrera Had A Reasonable Articulable Suspicion To Make An Investigative Stop And Detain Nelson, Where The Officer Believed That Nelson May Have Been Involved In A Vehicle Collision And Was Possibly In Possession Of A Possible Stolen Vehicle.

In evaluating investigative stops, the court must determine: 1) Was the initial interference with the suspect’s freedom of movement justified at its inception? 2) Was it reasonably related in scope to the

circumstances, which justified the interference in the first place? *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868-79, 20 L. Ed. 2d 889 (1968); *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). In determining the proper scope of the intrusion, the court considers: 1) the purpose of the stop; 2) the amount of physical intrusion; and 3) the length of time the suspect is detained. *Williams*, 102 Wn.2d at 740. “The police may stop a suspect and ask for identification and an explanation of his or her activities if they have a well-founded suspicion of criminal activity.” *State v. Bray*, 143 Wn. App. 148, 153, 177 P.3d 154 (2008).

The level of suspicion required for an investigative detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). A court will examine the “totality of the circumstances” to determine whether a particular stop was reasonable. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). An officer’s training and experience is a relevant factor in determining the reasonableness of the officer’s actions. *Glover*, 116 Wn.2d at 515. “Further, reasonableness is measured not by exactitudes but by probabilities.” *State v. Samsel*, 39 Wn. App. 564, 570, 694 P.2d 670 (1985).

Additionally, an officer does not have to rule out all possible explanations for the behavior of an individual before conducting a *Terry* stop. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988); *see also State v. Young*, 28 Wn. App. 412, 421, 624 P.2d 725, *review denied*,

95 Wn.2d 1024 (1981) (“Merely because a police officer lacks probable cause to arrest an individual, he need not shrug his shoulders and allow suspected criminal activity to continue or to escape his further scrutiny.”); *Samsel*, 39 Wn. App. at 570-71 (“While an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience and the officer is not required to ignore that experience.”); *Glover*, 116 Wn.2d at 513 (Police may stop a citizen to investigate with less than probable cause to believe a crime has been committed).

In the present case, Officer Herrera had sufficient reasonable articulable suspicion to stop the defendant based on several observations. The Honda was parked on the side of the road; CP 58, Undisputed Fact 2. The Honda appeared to have backed into a truck; CP 58, Undisputed Fact 2. Nelson was in the driver’s seat slumped over the steering wheel. CP 59, Undisputed Fact 4. As he got closer to the vehicle, Officer Herrera observed that the Honda’s steering column appeared to be broken in a manner consistent with a stolen vehicle. CP 59, Undisputed Fact 5; RP 07-22-08, p. 8, ln. 14 to p. 9, ln. 4. The officer suspected the Honda was stolen. CP 59, Undisputed Finding 5. Even though the owner had not reported the vehicle stolen, that was not dispositive of the issue for Officer Herrera because owners are not always immediately aware that their vehicle has been stolen so stolen vehicles are often not immediately reported stolen. RP 07-22-08, p. 10, ln. 20 to p. 11, ln. 2. When asked,

Nelson told Officer Herrera that the vehicle did not belong to Nelson. CP 59, Undisputed Finding 6.

Officer Herrera was not required to rule out all possible explanations for why the defendant was sitting in a vehicle with a damaged steering column. *State v. Anderson*, 51 Wn. App. at 780. Instead, the officer relied on his training and experience and did not “shrug his shoulders and allow suspected criminal activity to continue or to escape his further scrutiny.” *State v. Young*, 28 Wn. App. at 421. As such, Officer Herrera’s suspicions that the defendant was involved in an un-reported stolen vehicle led to the officer’s request for the defendant’s identification.

Furthermore, RCW 46.52.010(1) requires:

The operator of any vehicle which collided with any other vehicle which is unattended shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle of the name and address of the operator and owner of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck a written notice, giving the name and address of the operator and of the owner of the vehicle striking such other vehicle.

In this case, the officer observed facts that led him to believe that the defendant had been involved in a collision with the vehicle behind him. However, there is no indication that the defendant had made any efforts to locate the owner of the vehicle or leave a note. The officer had a duty to investigate the possible collision and take steps to make sure that

the incident was properly documented and that the owner of the other vehicle received accurate information as required by RCW 46.52.010. In light of all of these concerns, a brief seizure of the defendant to identify him and verify his identity and driving status with a radio check is reasonable, and so the defendant's motion should be denied.

3. THE DEFENDANT HAS WAIVED ANY
CHALLENGE TO THE SEARCH OF THE
VEHICLE PURSUANT TO *ARIZONA V. GANT*.

The defendant brings this motion to reverse the trial court based on the recently filed opinion of the United States Supreme Court, *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, ___ L. Ed. 2d ___ (April 21, 2009). *See* Supp. Br. App., p. 3. The defendant asserts, in a footnote, that because his appeal was pending on direct review at the time *Gant* was decided, the change in the law established in *Gant* applies retroactively. Supp. Br. App., p. 5, n. 1. The State agrees that *Gant* applies retroactively to all cases currently pending on direct review and not yet final. *See, e.g., Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L. Ed. 2d 649 (1987) (a new rule for the conduct of criminal prosecutions applies retroactively to all cases, state or federal, pending on direct review or not yet final); *Teague v. Lane*, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); *In re St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992).

The analysis, however, does not end with the retroactive application of *Gant*. The issue on appeal raised by the defendant's

supplemental brief is how *Gant* affects the present case. However, the State's response consists of four issues. First, even though this case is currently pending on appeal, because it involves a challenge to suppress the evidence, the issue is waived because it was not raised in the trial court. Even though *Gant* applies retroactively, it only affects those cases where error was preserved and the issue raised in *Gant* is properly before the court. Here, the issue was waived.

Second, under the rules articulated in *Gant* itself the search here may be proper even if the issues were preserved and *Gant* were to affect this case. This will be discussed in conjunction with the waiver argument.

Third, even if error was preserved so that *Gant* can be applied to this case, and even if under *Gant* the search here was unlawful, there is a separate question as to whether the exclusionary rule requires suppression of the evidence found during the search of the defendant's car. The "good faith" exception to the exclusionary rule applies. Because the officer conducted the search of the defendant's vehicle in good faith and under "authority of law" in effect at the time of the search, the evidence obtained during the vehicle search should not be suppressed.

Fourth, the defendant may not now or subsequently claim without merit that trial counsel was ineffective for failing to raise the issue in the suppression hearing.

As a preliminary matter, the defendant assigns no error to the trial court's findings of fact. An appellate court reviews only those findings to

which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

a. The Argument The Defendant Now Makes In The Supplemental Brief Is Waived Where The Defense Failed To Raise It Below.

i. **Waiver under the law of Washington.**

It is long and well established under both the State and Federal constitutions that if an objection to evidence that was allegedly obtained illegally is not asserted timely, it is waived. See *State v. Gunkel*, 188 Wash. 528, 535-36, 63 P.2d 376 (1936); *State v. Baxter*, 68 Wn.2d 416, 423, 413 p.2d 638 (1966); *State v. Duckett*, 73 Wn.2d 692, 694-95, 440 P.2d 485 (1968). Where a defendant fails to assert a suppression issue at the trial court level, the defendant has waived that argument and may not raise the issue for the first time on appeal. *State v. Mierz*, 127 Wn.2d 460 468, 901 P.2d 286 (1995); See also *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967), *cert. denied*, 389 U.S. 871 (1967). The issue is also waived where a defendant raises a suppression issue at the trial court, but fails to pursue the issue. *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1991). Additionally, an appellate court will generally refuse to consider a constitutional question which is raised only in a reply brief. See *State v. Alton*, 89 Wn.2d 737, 575 P.2d 737 (1978). However, in *State v. Kitchen*, the court did consider a constitutional issue raised for the first time in a

reply brief where that issue related to the basic constitutional right of the right to a unanimous jury verdict. *State v. Kitchen*, 46 Wn. App. 232, 730 P.2d 103 (1986), *affirmed* 110 Wn.2d 403, 756 P.2d 18 (1982).

Accordingly, the error was presumably a manifest constitutional error.

At the trial court level, the suppression motion must be raised in a timely manner and the court has authority to reject suppression motions that were not made prior to the start of trial. *See* CrR 4.5(d). CrR 3.6 was adopted in 1975 and specifically governs motions to suppress evidence. Under CrR 3.6 the defendant has the burden of requesting a hearing on suppression issues. *State v. Gould*, 58 Wn. App. 175, 185, 791 P.2d 569 (1990).

CrR 3.6 motions to suppress evidence are heard prior to the time the case is called for trial. *See* Ferguson, 12 & 13 Washington Practice: Criminal Practice and Procedure, Chap. 23 (3d Ed) (citing CrR 4.5(d)); Tegland, 4A Washington Practice Rules Practice, CrR 3.6. Such a standard is implicit in the language of CrR 3.6 where the rule requires the moving party to set forth in a declaration the facts the party expects to be elicited in the event there is an evidentiary hearing. CrR 3.6(a). A pre-trial hearing is further implicated by the rule's language that based upon the pleadings the court is to determine whether an evidentiary hearing is required. CrR 3.6(b). All of this implicitly requires a pre-trial hearing. The requirement of a pre-trial hearing is also consistent with the legal standards in Washington prior to the adoption of rule CrR 3.6. *State v.*

Simms, 10 Wn. App. 75, 77, 516 P.2d 1088 (1973) (citing *State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638 (1966); *State v. Robbins*, 37 Wn.2d 431, 224 P.2d 345 (1950)). Moreover, nothing in CrR 3.6 permits or contemplates successive suppression motions.

The interpretation of CrR 3.6 as requiring pre-trial suppression motions is also consistent with CrR 4.5(d), which governs omnibus hearings.

(d) Motions. All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue. [...].

Waiver for failure to raise the issue before the trial court applies to suppression motions even where the claimed issue is a constitutional one and there is a reasonable possibility the motion to suppress would have been successful if the issue had been raised. *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990); see also *State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982), *rev'd. in part on other grounds*, *State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1982). This is because the exclusion of improperly obtained evidence is a privilege that may be waived, and the fact that it was not raised is not an error in the proceedings below. See *Tarica*, 59 Wn. App. at 372 (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)). In *State v. Baxter*, the court held that the defendant's motion to suppress evidence at the end of the State's case was

too late where the defendant was well aware of the circumstances of his arrest at the time the allegedly unlawful evidence was entered. *Baxter*, 68 Wn.2d at 416.

RAP 2.5(a)(3) provides that the court may refuse to review any claim of error which was not raised at the trial court, however the party may raise for the first time a manifest error affecting a constitutional right.

In *State v. Valladares*, the court held that where a defendant raised and then later withdrew a suppression issue that it could not be raised for the first time on appeal under RAP 2.5(a)(3) because the rule's discussion of manifest constitutional error contemplates a trial error involving due process rights, as opposed to pre-trial rights. *Valladares*, 31 Wn. App. at 75-76. Moreover, the court in *Valladares* specifically clarified the scope of the exception under RAP 2.5(a)(3) because it was being misconstrued and had been "misread with increasing regularity." *Valladares*, 31 Wn. App. at 75. RAP 2.5(a)(3) is a limited exception to the general rule that issues may not be raised for the first time on appeal. *Valladares*, 31 Wn. App. at 75.

The court in *Valladares* went on to hold that where the defendant failed to pursue a challenge to evidence that might have been suppressible, the admission of that evidence was not a clear violation of the defendant's due process rights and was therefore not a manifest constitutional error that could be raised for the first time on appeal. *Valladares* 31 Wn. App. at 76 (citing *Baxter*, 68 Wn.2d at 413). *Valladares* appealed to the

Washington Supreme Court, which agreed with and affirmed the Court of Appeal's analysis on this issue of waiver. See *Valladares*, 99 Wn.2d, at 671-72. The Supreme Court held that by, "withdrawing his motion to suppress the evidence, *Valladares* elected not to take advantage of the mechanism provided for him for excluding the evidence," and thus waived or abandoned his objections. *Valladares*, 99 Wn.2d at 672.

Only six years after the court of appeals in *Valladares* felt the need to clarify "manifest error," in *State v. Scott*, the Supreme Court again felt the need to clarify the proper construction to be given to the "manifest error standard." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In *Scott* the court held that the proper approach to claims of constitutional error asserted for the first time on appeal is that first, the court should satisfy itself that the error is truly of constitutional magnitude - that is what is meant by manifest; and second, if the claim is constitutional then the court should examine the effect the error had on the defendant's trial according to the harmless error standard. *Scott*, 110 Wn.2d at 688.

The standard set forth in *Scott* has subsequently been elaborated into a four-part analysis.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the

court must address the merits of the constitutional issue. Finally, if the determines that an error of constitutional import was committed, then and only then, the court undertakes a harmless error analysis.

State v. Bland, 128 Wn. App. 511, 515-16, 116 P.3d 428 (2005).

Moreover, under RAP 2.5(a)(3), while an appellant can raise a manifest error affecting a constitutional error for the first time on appeal, appellate review of the issue is not mandated if the facts necessary for a decision cannot be found in the record, because in such circumstances the error is not “manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)). Additionally, it is worth noting that if a case is appealed a second time, an error of constitutional dimensions will not be considered if the error could have been asserted in the first appeal but was not, because at some point the appellate process must stop. See *State v. Suave*, 100 Wn.2d 84, 86-87 666 P.2d 894 (1983).

Notwithstanding all the controlling precedent on RAP 2.5(a)(3), in *State v. Littlefair* the court held otherwise and ruled that a suppression issue could be raised for the first time on a second appeal because it was a matter of constitutional magnitude. See *State v. Littlefair*, 129 Wn. App. 330, 337-38, 119 P.3d 359 (2005), *review denied*, 149 Wn.2d 1020, 72 P.3d 761 (2003). The court in *Littlefair* seems to have gone astray because it focused on the constitutional right, but failed to consider the definition of “manifest error.” Compare *Littlefaire*, 129 Wn. App. at 338

to *Scott*, 110 Wn.2d at 687 (agreeing with and quoting *Valladares*, 31 Wn. App. at 76 “that the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below’”).

The waiver rule serves the interests of judicial economy by requiring the defendant to raise the challenge in a timely manner that permits court to consider it without unnecessarily wasting resources. *See State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 429 (1988).

ii. Forfeiture and waiver under federal law.

Washington courts often look to federal standards for guidance on the issue of waiver. *See Scott*, 110 Wn.2d at 687 (citing 3A C. Wright, Federal Practice and Procedure § 856, at 339-41 (2d ed. 1982); Fed.R. Crim.P. 52(b)). This is because RAP 2.5(a)(3) has its genesis in federal law. *Scott*, 110 Wn.2d at 687, n. 4 (citing Comment (a), RAP 2.5(a)(3), 86 Wn.2d 1152 (1976)). Thus, similar to Washington, under federal law where a ground for suppression is not made timely at the trial court the issue is waived. *See United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002) (citing Federal Rule of Criminal Procedure 12(b)(3) and holding that ground for suppression not included in pre-trial motion to suppress was waived); *United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000) (failure to bring a timely motion to suppress constitutes a

waiver of the issue); *United States v. Restrepo-Rua*, 815 F.2d 1327, 1329 (9th Cir. 1987) (per curiam) (failure to raise a particular ground in support of a motion to suppress constitutes waiver). Under the federal standard, the court may in its discretion grant relief from waiver for “cause shown,” but that requires the defendant to make a particular showing in its brief, something that has not been done here. *See Restrepo-Rua*, 815 F.2d at 1329 (citing *United States v. Gonzales*, 749 F.2d 1329, 1336 (9th Cir. 1984)).

Federal Rule of Criminal Procedure 52(b) is analogous to RAP 2.5(a)(3). *Scott*, 110 Wn.2d at 687, n. 4. However, RAP 2.5(a)(3) is significantly narrower because RAP 2.5(a)(3) covers only constitutional errors, while Fed.R.Crim. P. 52(b) covers “plain errors.” *Scott*, 110 Wn.2d at 687, n. 4. Rule 52(b) provides: “PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Rule 52(b) at its adoption was intended as a “restatement of existing law.” *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (quoting Advisory Committee’s Notes on Fed. Rule Crim. Proc. 52, 18 U.S.C. App., p. 833). The rule has only been changed once since its adoption in 2002 and those changes are intended to be stylistic only. *See* Advisory Committee’s Notes to the 2002 Amendments.

The appellate courts’ authority under Rule 52(b) is limited. There must be “error” that is “plain” and it must “affect substantial rights.”

Olano, 507 U.S. at 732. While the rule leaves the decision to correct the forfeited error to the sound discretion of the court of appeals, the court should not exercise that discretion unless the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Olano*, 507 U.S. at 732 (quoting *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046, 84 L. Ed. 2d 1 (1985) (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936))).

Federal law makes a careful distinction between error that has been “waived” and error that has been “forfeited.” Forfeiture is the failure to make the timely assertion of a right. *Olano*, 507 U.S. at 733. While under federal law, waiver is the “intentional relinquishment or abandonment of a known right.” *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)). “Deviation from a legal rule is ‘error’ unless the rule has been waived.” *Olano*, 507 U.S. at 732-33. As opposed to waiver, mere forfeiture does not extinguish an “error” under Rule 52(b). If a legal rule was violated in district court proceedings and the defendant did not waive the rule, than an “error” has occurred under Rule 52(b) despite the absence of a timely objection. *Olano*, 507 U.S. at 733-34.

“The second limitation on for appellate authority under Rule 52(b), is that the error be “plain.” Plain means “clear” or “obvious.” *Olano*, 507 U.S. at 734. The third requirement is that that plain error “affects substantial rights.” In most cases, this means that the error must have

been prejudicial such that it affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. The court then conducts a harmless error analysis, with the defendant having the burden to show prejudice. *Olano*, 507 U.S. 735.

It is also worth noting that Rule 52(b) is permissive, not mandatory so that the court of appeals has authority to order a correction but is not required to do so. *Olano*, 507 U.S. at 735. The discretion conferred by Rule 52(b) should be employed where a miscarriage of justice would otherwise result. *Olano*, 507 U.S. at 736. This means that “the Court of Appeals should correct a plain forfeited error affecting substantial rights if the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936)). A plain error affecting substantial rights does not without more satisfy this standard, lest the discretion granted by Rule 51(b) be nullified. *Olano*, 507 U.S. at 737.

The court in *Olano* stated that at a minimum, in order to be plain, an error must be clear under current law. *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 586, 169 L. Ed. 2d 445 (1997) (citing *Olano*, 520 U.S. at 743). But the court in *Olano* declined to consider the situation where the error was unclear at the time of appeal, but became clear on appeal because the applicable law was clarified in the interim. *Olano*, 507 U.S. at 734. That issue was considered by the court in *Johnson*, wherein

the court held that “plain error review applies absent a preserved objection even when the error results from a change in the law that occurs while the case is pending. *United States v. Morelos*, 544 F.3d 916, 921 (8th Cir. 2008). Citing *Johnson*, 520 U.S. at 467. The 9th circuit court of appeals has recognized that some narrow exceptions exist to the general rule is that issues raised for the first time on appeal will not be considered. One such exception is where the new issue arises while the appeal is pending because of a change in the law. *U.S. v. Flores-Payson*, 942 F.2d 556, 558 (9th Cir. 1991).

Nonetheless, a change in the law is not sufficient to justify a plain error review of suppression issues not raised below. Under Federal Rule of Criminal Procedure 12(b)(3) a suppression issue must be raised before the trial court. *United States v. Rose*, 538 F.3d 175, 177 (3rd Cir. 2008). Rule 12(b)(3) supercedes the “plain error” standard of Rule 52(b). This is because suppression issues not raised in the trial court “direct a waiver approach” to the analysis. *Rose*, 538 F.3d at 177-79, 182-83 (citing Fed.R.Crim.P. 12(e) (stating that failure to raise the issues prior to trial constitutes waiver)). *See also U.S. v. Chavez-Valencia*, 116 F.3d 127, 129-33 (5th Cir. 1997). Since the failure to raise a suppression issue constitutes waiver of that issue rather than forfeiture, suppression motions raise for the first time on appeal are not subject to a plain error review.

iii. Here the defendant waived the suppression issue.

Here, as in *Baxter*, the evidence was admitted without any objection on the basis that the defendant now asserts.² See RP, p. 40, ln. 23 to p. 41, ln. 6. The defendant waived his claim that the evidence should be suppressed because the officer lacked lawful authority to conduct a search of the vehicle incident to his arrest and because that claim was waived, it may not now be raised for the first time on appeal. See *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990) (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)); *State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982).

The doctrine of waiver is particularly applicable here under the procedural facts of this case. By not raising the issue before the trial court, the defendant deprived the State of the ability to put forth any relevant evidence and alternative legal theories that would have supported the search of the vehicle. For instance, the State could have asserted an argument for inevitable discovery based upon an inventory of the vehicle. As with suppression issues, inevitable discovery arguments must be raised before the trial court or are waived. See *State v. Rulan C.*, 97 Wn. App. 884, 889, 970 P.2d 821 (1999). Alternately, the evidence may have been

² The only objection when the heroin and spoon were admitted into evidence was as to foundation.

admissible under other exceptions to the warrant requirement that may or may not have also involved inevitable discovery arguments.

Because the defendant did not raise a challenge to the officer's authority to search the vehicle incident to the arrest of the defendant, the State was not put on notice of the issue and was deprived of the opportunity to develop the record regarding alternative bases supporting the lawfulness of the search or the admission of the evidence. For that reason, the facts necessary for a decision cannot be found in the record and review is unwarranted. *Riley*, 121 Wn.2d at 31-32.

b. Even If The Court Were To, For Some Reason, Consider The Merits Of The Argument The Evidence Should Not Be Suppressed Where The Officer Acted In Good Faith.

In the alternative, there is no basis to suppress the evidence found during the search of the defendant's vehicle because the officers were acting "under authority of law" and in reliance upon presumptively valid case law. In this circumstance, the "good faith" exception to the exclusionary rule applies under both the Fourth Amendment and article 1, § 7 of the Washington constitution.

i. **The Fourth Amendment exclusionary rule is controlling.**

In his supplemental brief, the defendant relies exclusively on *Gant* to support his assertion that the warrantless search of his car was invalid.

See Supplemental Brief, p. 3-5. *Gant*, was decided purely on Fourth Amendment grounds. *Gant*, 129 S. Ct. at 1716. The defendant makes no argument that the outcome of this case is controlled by article 1, § 7 of the Washington constitution. Nor has the Washington Supreme Court reversed its longstanding position that vehicle searches incident to a lawful arrest are valid under article 1, § 7. Absent any basis to address state constitutional issues, the defendant's motion for reconsideration should be reviewed under federal Fourth Amendment analysis.

ii. The Fourth Amendment good faith exception to the exclusionary rule applies.

Absent an exception to the warrant requirement, a warrantless search is impermissible under the Fourth Amendment to the U.S. Constitution. The exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect” by excluding evidence that is the fruit of an illegal, warrantless search. *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct 613, 38 L. Ed. 2d 561 (1974) (emphasis added). Evidence derived directly or indirectly from illegal police conduct is an ill-gotten gain, “fruit of the poisonous tree,” that should be excluded from evidence. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct 407, 9 L. Ed. 2d 441 (1963). Nevertheless, the United States Supreme Court has recognized that evidence obtained after an illegal search should not be excluded if it

was not obtained by the exploitation of the initial illegality. *Wong Sun*, 371 U.S. at 488.

Consistent with these basic principles, the United States Supreme Court in *Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979), held that an arrest (and a subsequent search) under a statute that was valid at the time of the arrest remains valid even if the statute is later held to be unconstitutional.

In *DeFillippo*, the Court stated:

At that time [of the underlying arrest], of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

DeFillippo, 443 U.S. at 37-38.

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality -- with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement. *DeFillippo*, 443 U.S. at 37-38 (emphasis added). The Court further noted that:

[T]he purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

DeFillippo, 443 U.S. at 38 (footnote 3, emphasis added).

The Court recognized a “narrow exception” when the law is “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” *DeFillippo*, 443 U.S. at 37-38. Accordingly, in *DeFillippo* the Supreme Court upheld the arrest, search, and subsequent conviction of the defendant even though the statute which justified the stop was subsequently deemed to be unconstitutional.

DeFillippo, 443 U.S. at 40.

The only difference between *DeFillippo* and the present case is that in *DeFillippo* the Court was addressing an arrest based on a presumptively valid statute that was later ruled unconstitutional, whereas here the situation involves a search upheld as constitutional by well-established and long-standing judicial pronouncements. This distinction does not justify a different result. Law enforcement officers should be entitled to rely on established case law – from both the federal and state courts – in determining what searches are deemed constitutional. Indeed, in the area of search and seizure it is generally the courts that establish the “rules,” not the legislative bodies. Judicial decisions, particularly those of

the Supreme Court, as to the constitutionally permissible scope of searches and seizures are clearly entitled to respect, deference, and reliance by officers in the field.

Prior to *Gant*, both the federal and state courts had unequivocally endorsed the constitutional validity of the vehicle searches incident to arrest. See, e.g., *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). This is made explicitly clear in *Gant* which recognized that the Court's prior opinions have "been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. . ." and that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception." *Gant*, 129 S. Ct. at 1718.

Likewise, the constitutionality of the search incident to arrest rule was repeatedly confirmed by the Washington Supreme Court over the past 23 years. See, e.g., *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001); *State v. Parker*, 139 Wn.2d 486, 489, 987 P.2d 73 (1999); *State v. Johnson*, 128 Wn.2d 431, 441, 909 P.2d 293 (1996); *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989).

There can be little doubt that officers relied on these specific judicial pronouncements when conducting vehicle searches. Indeed, the

majority opinion in *Gant* emphasized that officers had reasonable relied on pre-*Gant* precedent and were immune from civil liability for searches conducted in reasonable reliance on the Court's previous opinions. *Gant*, 129 S. Ct. at 1722, n.11.

Accordingly, this case does not fit within the narrow exception recognized in *DeFillippo* when the law is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." The pre-*Gant* cases may now be viewed as flawed, but the repeated judicial reliance on them for almost 30 years demonstrates that the search incident to arrest rule was neither grossly nor flagrantly unconstitutional.

Finally, the basic purpose of the exclusionary rule is not furthered in any way by suppression of the evidence in this case. As the Court in *DeFillippo* noted, no conceivable deterrent effect would be served by suppressing evidence which, at the time it was found, was the product of a lawful search. Prior to April 21, 2009, officers understood that they could search a vehicle incident to the arrest of a recent occupant. After April 21, 2009, the *Gant* opinion – and the associated threat of suppression of evidence and potential civil liability – will provide appropriate deterrent effect to such searches. But the retroactive application of the exclusionary rule has no deterrent value at all.

In sum, the United States Supreme Court has recognized that the application of the exclusionary rule serves no purpose when officers relied

in good faith on a presumptively valid statute. This same reasoning should apply to judicial opinions of long-standing duration. Pursuant to the *DeFillippo* “good faith” exception the evidence obtained during the search in the present case should not be suppressed and the defendant’s motion for reconsideration should be denied.

iii. The evidence should not be suppressed under Article 1, § 7 because the search was conducted “under authority of law” and pursuant to a presumptively valid case law.

As discussed above, it is not appropriate to review this case under an article 1, § 7 analysis because the defendant has only sought relief based on *Gant*, a Fourth Amendment case. However, even if the court were to address whether the evidence should be suppressed under an article 1, § 7 exclusionary rule analysis, there is nevertheless no basis to suppress the evidence. This is because the pre-*Gant* search was conducted pursuant to authority of law and presumptively valid judicial opinions. *See State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996) (holding that search of a vehicle incident to arrest of an occupant is one of the exceptions to the warrant requirement under Article I, section 7).

In a recent series of cases, the Washington Supreme Court has adopted the “good faith” exception to the exclusionary rule analysis set forth in *Michigan v. DeFillippo*, *supra*. For example, in *State v. Potter*,

156 Wn.2d 835, 132 P.3d 1089 (2006), the defendants maintained that they were unlawfully arrested for driving while their licenses were suspended because, subsequent to their arrests, the State Supreme Court held that the statutory procedures by which the Department of Licensing suspended licenses were unconstitutional. The defendants in **Potter** contended that under article I, section 7, evidence of controlled substances found in their vehicles during searches incident to their arrests had to be suppressed as a result of the illegal arrests.

In a unanimous decision, the Supreme Court applied the **DeFillippo** rule under article I, section 7, and held that an arrest under a statute valid at the time of the arrest remains valid even if the basis for the arrest is subsequently found unconstitutional. **Potter**, 156 Wn.2d at 843, 132 P.3d 1089. The Court stated:

In [**White**,] we held that a stop-and-identify statute was unconstitutionally vague and, applying the United States Supreme Court's exception to the general rule from DeFillippo, excluded evidence under that narrow exception for a law "so grossly and flagrantly unconstitutional" that any reasonable person would see its flaws.

Potter, 156 Wn.2d at 843 (quoting **State v. White**, 97 Wn.2d 92, 103, 640 P.2d 1061 (1982) (quoting **DeFillippo**, 443 U.S. at 38)). Under the facts presented in **Potter**, there were no prior cases holding that license suspension procedures in general were unconstitutional and thus there was no basis to assume that the statutory provisions were grossly and flagrantly unconstitutional. Accordingly, applying **DeFillippo**, the Court

affirmed the defendants' convictions despite the fact that the statutory licensing procedures at issue had subsequently been held to be unconstitutional. *Potter*, 156 Wn.2d at 843.

Similarly, in *State v. Brockob*, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006), a defendant contended that his arrest for driving while his license was suspended and a search incident to that arrest were unlawful for the same reason claimed in *Potter*. The Court rejected the defendant's argument, stating that:

White held that police officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is “so grossly and flagrantly unconstitutional’ by virtue of a prior dispositive judicial holding that it may not serve as the basis for a valid arrest.”

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

Potter and *Brockob* have had the effect of overruling *White* (unanimously, in *Potter*) insofar as *White* can be read to reject the *DeFillippo* good faith reliance on a presumptively valid statute. As discussed above, the only difference between these cases and the present case is that the present case involves presumptively valid case law, as opposed to a presumptively valid statute. This distinction has no bearing

on the analysis: the judicial opinions of the Sate Supreme Court are at least as presumptively valid as legislative enactments.

Applying the analysis from *DeFillippo*, *Potter*, and *Brockob*, the good faith exception to the exclusionary rule applies. Moreover, as previously discussed, there were an overwhelming number of judicial opinions affirming the validity of vehicle searches incident to arrest. This case law was presumptively valid at the time the defendant was arrested. The narrow exception to *DeFillippo* does not apply; that is, there was no gross or flagrant unconstitutionality. Accordingly, the search incident to arrest of the defendant's vehicle should be upheld because the search was conducted in good faith, under authority of law, and pursuant to presumptively valid case law.

c. The Defendant Cannot Later Claim Ineffective Assistance of Counsel.

The defendant has not yet alleged ineffective assistance of counsel as a result of the failure to raise a suppression challenge related to the lawfulness of the search of the vehicle incident to Bliss's arrest. In anticipation that the defendant might assert such an argument, neither should the defendant now be permitted to raise such a challenge in the reply brief. An appellate court will generally refuse to consider a constitutional question which is raised only in a reply brief. See *State v. Alton*, 89 Wn.2d 737, 575 P.2d 737 (1978). Moreover, to raise a claim of

ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. *McFarland*, 127 Wn.2d at 333-34; *Riley*, 121 Wn.2d 22.

Counsel, whether in recommending that his or her client enter a plea or that a suppression issue not be pursued, is not ineffective for failing to forecast changes or advances in the law. *See, e.g., In re the Personal Restraint Petition of Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) (counsel could not be faulted for failing to anticipate a change in the law); *Sherrill v. Hargett*, 184 F.3d 1172, 1176 (10th Cir.), *cert. denied*, 528 U.S. 1009 (1999); *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir.), *cert. denied*, 519 U.S. 1119 (1993) (“The Sixth Amendment does not require counsel to forecast changes or advances in the law, or to press meritless arguments before a court.”); *Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir.), *cert. denied*, 502 U.S. 831 (1991) (same); *Elledge v. Dugger*, 823 F.2d 1439, 1443 (11th Cir. 1987) (“Reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.”). Thus, any argument by the defendant that his conviction must be vacated due to his counsel’s failure to pursue a suppression motion under the rule announced in *Gant* must fail. This is because the propriety of counsel’s conduct must

be viewed at the time counsel was required to act. See *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir.), *cert. denied*, 537 U.S. 1093 (2002) (“we have rejected ineffective assistance claims where a defendant ‘faults his former counsel not for failing to find existing law, but for failing to predict future law’ and have warned that clairvoyance is not a required attribute of effective representation.”) (quoting *United States v. Gonzalez Lerma*, 71 F.3d 1537, 1542 (10th Cir. 1995)); *United States v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990) (counsel’s conduct was not deficient when, at the time of trial, the instruction given to the jury was the standard instruction that had been approved by the appellate court).

The defendant fares no better by arguing that his conviction occurred after the Supreme Court granted review in *Gant* on February 25, 2008. *Arizona v. Gant*, ___ U.S. ___, 128 S. Ct. 1443, 170 L. Ed. 2d 274 (2008). Counsel is not required to preserve an issue after a higher court has granted review of an intermediary appellate court’s decision but not yet passed upon the propriety of the lower court’s reasoning. See *United States v. McNamara*, 74 F.3d 514, 516-17 (4th Cir. 1996) (counsel was not constitutionally deficient for following controlling law of circuit that willfulness was not an element of structuring financial transactions to avoid currency reporting requirements even though Supreme Court had granted certiorari on that issue at time legal advice was given; “an attorney’s failure to anticipate a new rule of law was not constitutionally deficient”); *Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995), *cert.*

denied, 517 U.S. 1171 (1996) (trial counsel in capital case was not constitutionally ineffective for failing to preserve an issue at trial based merely on the Supreme Court's grant of certiorari in a case which raised the issue); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991) (ruling that trial counsel was not ineffective by failing to raise *Batson* challenge two days before *Batson* was decided), *cert. denied*, 504 U.S. 920 (1992).

D. CONCLUSION.

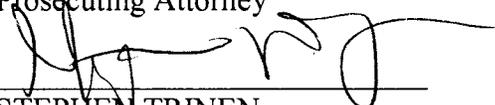
The State concedes that the trial court erred where the defendant was denied the jury instruction and defense for unwitting possession. Reversal and remand is appropriate. Because the defendant was not seized until he was arrested, the lower court properly denied his suppression motion for unlawful seizure.

The defendant is not entitled to relief under *Arizona v. Gant* because he failed to raise the issue to the trial court so that it is waived.

Even if this court were to consider the merits of the case under *Gant*, the officer was acting in good faith on the then existing case law.

DATED: June 1, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/2/09 
Date Signature


STATE OF WASHINGTON
COUNTY OF PIERCE
JUL 2 11 51 AM '09
BY: [Signature]