

COURT OF APPEALS
DIVISION II

No. 38522-8-II

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

STATE OF WASHINGTON
BY: KLS
DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

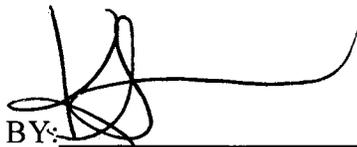
KEITH ALLEN HARVILL,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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Harvill and

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COUNTERSTATEMENT OF THE CASE

Procedural History

The State agrees with the procedural history as presented in the Brief of Appellant section III.

Factual Background

The State basically agrees with the facts as laid out in the Brief of Appellant; however, would supplement and correct the defendant's statement as follows:

CrR 3.6 Motion to Suppress heard July 10, 2008

The appellant stated that “[b]ecause the patrol vehicle was parked behind the van and blocking it, Harvill would not have been able to leave without hitting the patrol car.” Appellant's Brief at 3 citing 7/10/08 RP at 19. However, this testimony was in response to being asked if the defendant could have **backed out** of the area. 7/10/08 RP at 19.

The deputy clarified on re-direct that the area where he contacted the defendant was an open field with some small trees to the east, and that it would have been possible for the defendant to turn around and drive around the patrol vehicle, and, in fact, the deputy was able to turn his Expedition around, rather than travel back to the main road in reverse. 7/10/09 RP at 18 and 23.

The defendant also testified that he gave the deputy permission to search the back of the van. 7/10/08 RP at 34.

ARGUMENT

A. The trial court's Findings of Fact regarding the CrR 3.6 hearing were proper.

The defendant is not challenging findings of fact that were entered in this case, but, rather, the absence of certain findings. However, the trial court was in the best position to evaluate the credibility of the testimony and determine the facts in this case. The defendant has not offered substantial evidence that would support his proposed finding. In fact, as stated above, while the deputy testified that the defendant could not "back down" the road without hitting the patrol vehicle, the defendant could have turned his vehicle around in the adjacent field and driven around the patrol vehicle. 7/10/08 RP at 18-23.

B. The contact between the deputy and the defendant was not a "seizure."

Not every encounter between a citizen and the police rises to the stature of a seizure. A person is not seized simply by the fact that law enforcement officer may approach them and speak to them on the street, in a field or in any public place. The fact that the officer is in uniform and

may be armed, without more, does not convert the encounter to a seizure requiring some level of objective justification. *State v. Belanger*, 36 Wn.App. 818, 820, 677 P.2d 781 (1984), citing *U.S. v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497, 100 S. Ct. 1870 (1980).

Thus, for example, a seizure does not occur when an officer parks his car out of the way, does not impede the citizen's ability to use a sidewalk and asks the individual if he will talk to him, without making a show of authority. *State v. Harrington*, 144 Wn.App. 558, 183 P.3d 352 (2008). An encounter between a citizen and the police is consensual or permissive if a reasonable person under the totality of the circumstances would feel free to walk away. *U.S. v. Mendenhall* at 310.

“Nor does the fact that the officer is in uniform and armed, without more, convert the encounter to a seizure requiring some level of subjective justification.” *State v. Belanger*, 36 Wn.App. 818, 820, 677 P.2d 781 (1984). Furthermore, police questioning relating to one's identity, or a request for identification by the police, without more, does not result in a Fourth Amendment seizure. *State v. Aranguren*, 42 Wn.App. 452, 455, 711 P.2d 196 (1985), citing *INS v. Delgado*, 466 U.S. 210, 80 L.Ed.2d 247, 104 S.Ct. 1758 (1984). “Beyond mere questioning, asking a person to do something such as produce some identification or an airline ticket does not necessarily convert an encounter into a seizure.” *Nettles*, at 710, f. 6,

citing *Florida v. Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983). "[W]arrant checks are permissible as long as the duration of the check does not unreasonably extend the initially valid contact." *State v. Chelly*, 94 Wn.App. 254, 261, 970 P.2d 376 (1999) (emphasis added).

The fact that the police officer may subjectively believe that there is the possibility of criminal activity does not make the contact a seizure. *State v. Mote*, 129 Wn.App. 276, 282, 120 P.3d 596 (2005). A seizure, requiring an objective justification, only occurs when an individual's freedom of movement is restrained and the individual would not believe that he is free to leave or decline a request, due to an officers use of physical force or display of authority. *State v. O'Neil*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). Thus, in *O'Neil*, the court found that was no seizure of the defendant when the officer approached the defendant, who was sitting in a parked car next to a closed business and requested identification from the defendant. The court in *O'Neill*, 148 Wn.2d at 565 specifically held as follows:

We hold that the police officers action in approaching O'Neil and asking for identification, did not violate Article 1, § 7 in the Washington Constitution. We also hold that O'Neill was not seized until the officer asked O'Neill to step out of his vehicle.

In the case at bar, the deputy did not activate his lights or siren, nor did he use his gun. 7/10/08 RP at 9. The deputy approached the defendant's vehicle and the defendant jumped to the ground of his own accord. 7/10/08 RP at 9 and CP at 19-23, Finding of Fact 6. As the deputy inquired why the defendant was on the property, the defendant volunteered that he had an outstanding warrant. 7/10/08 RP at 11 and CP at 19-23, Finding of Fact 7. Deputy Gow did not give any directions or commands to the defendant as he walked away from the van to contact dispatch. 7/10/08 at 12 and CP at 19-23, Finding of Fact 8. It took approximately 5 minutes from the initial contact for the deputy to confirm the defendant's warrant. 7/10/08 RP at 13-14, CP at 19-23, Finding of Fact 9.

The facts in the case at hand demonstrate that there was not a "seizure" of the defendant until the deputy confirmed the defendant's warrants and placed the defendant under arrest. The deputy did not give any instruction or command to the defendant that would have caused a reasonable person to believe that they were not free to walk away. Also, while conducting the warrant check through dispatch, the deputy did not require the defendant to remain at the scene, nor did the defendant possess any identification that was held by the officer.

C. The deputy had specific and articulable facts that would justify a *Terry* detention in this case.

An officer may make an investigative *Terry* stop based upon less evidence than is needed for probable cause to make an arrest. An officer is permitted to briefly seize an individual for questioning based on specific and articulable objective facts that give rise to a reasonable suspicion that the individual has been or is about to be involved in a crime. *State v. Smith*, 145 Wash.App. 268, 275, 187 P.3d 768, 771 (Wash.App. Div. 3, 2008, see *State v. King*, 89 Wash.App. 612, 618, 949 P.2d 856 (1998)(citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *State v. Armenta*, 134 Wash.2d 1, 10, 948 P.2d 1280 (1997).

In this case, the deputy's assigned patrol area included the property where the defendant was found, and the deputy passed it several times a day while on patrol. 7/10/08 RP at 16. Further, the officer testified that he had not previously seen anyone motorcycling on the property, and that he believed the property was at issue in a lawsuit. 7/10/08 RP at 4 and 16. The deputy also testified that only access road that he knew for the property had been dug out to prevent access to the property. 7/10/08 RP at 5 and 8. When the deputy observed a "U-Haul sized" moving van on the property, he thought there might be illegal dumping occurring. 7/10/08 RP at 18.

At the very least, the deputy had enough specific and articulable facts to believe that the person in the van was trespassing on the property. Under *Terry*, the deputy had the authority to briefly detain the defendant and determine if the defendant had any right to be on the property. Within a very short time of speaking with the defendant, the deputy had additional information from the defendant that there was a warrant outstanding for the defendant's arrest.

D. The Defendant Has Waived Suppression Issue Under *Gant*

The defendant argues that evidence in his case should have been suppressed 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). 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 brief is

how *Gant* affects the present case. 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 before the trial court. Even though *Gant* applies retroactively, it only affects those cases on appeal where error was preserved below, and the issue in *Gant* is properly before this 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, trial counsel was not ineffective for failing to raise the *Gant* suppression issue before the lower court.

a. 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).

At the trial court level, any 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)). (Emphasis added.) 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 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 “[f]irst, the court should satisfy itself that the error is truly of constitutional magnitude - that is what is meant by “manifest””; and second, “[i]f 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 court 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)).

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

b. 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)).

Fed. Rule Crim. Proc 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. Rule Crim. Proc. 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 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). Because the failure to raise a suppression issue constitutes waiver of that issue rather than forfeiture, suppression motions raised for the first time on appeal are not subject to a plain error review.

c. In this case, 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. *See* Defendant’s Motion to Suppress, CP at 7-12, 8/5/08 RP at 31-34. 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. The defendant actually made a motion to suppress, but only on the grounds that he was improperly seized. The defendant made no argument that the search of his vehicle, subsequent to his arrest, was unlawful.

By not raising the issue before the trial court, the defendant deprived the State of the ability to put forth any relevant evidence and legal theories, including any 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. Here, the defendant had his vehicle illegally on private property and it is likely the vehicle was impounded. 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 admissible under other exceptions to the warrant requirement that may or may not have also involved inevitable discovery arguments. For example, the defendant stated during the 3.6 hearing that he consented to a search of his vehicle. 7/10/08 RP at 34.

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.

E. Even if the Court considers the argument, the evidence should not be suppressed where the deputy 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.

a. The Fourth Amendment Exclusionary Rule is Controlling.

Arizona v. Gant was decided purely on Fourth Amendment grounds. *Gant*, 129 S. Ct. at 1716. Nor has the Washington Supreme Court reversed its longstanding position that vehicle searches incident to a lawful arrest are valid under Article 1, § 7. Therefore, the defendant's argument that the outcome of this case is controlled by article 1, § 7 of the Washington constitution should fail, and this issue should be reviewed solely under a federal Fourth Amendment analysis.

b. 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, particular 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 reasonably relied on pre-*Gant* precedent, and were immune from civil liability for searched

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.

c. 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.

There is no basis to suppress the evidence under an article 1, § 7 exclusionary rule analysis,. 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 State 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..

F. Trial Counsel Was Not Ineffective for Failing to Argue for Suppression Pursuant to a *Gant* Analysis

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).

G. Trial Counsel Was Not Ineffective

The Washington State Supreme Court adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney’s performance fell below an acceptable standard, but also that his attorney’s failure affected the outcome of the trial.

Strickland v. Washington explains that the defendant must first show that his counsel’s performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel’s errors must have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* For prejudice to be claimed there must

be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

In this case, the defendant admitted on the stand all of the elements of the crimes charged. A defendant has the right to testify in his own behalf, and the defendant, not trial counsel, has the authority to decide whether or not the defendant will testify. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). The defendant must then suffer the consequences of choosing to take the stand.

Whether or not the defendant would testify was not trial counsel’s decision to make. Once trial counsel knew the defendant would testify, he made the best argument he could, knowing that his client was going to tell the truth. The plain fact is that the defendant was guilty, but wanted to present what he believed were mitigating factors. Factors such as the fact that the defendant’s father had died and he was still emotionally distraught. 8/5/08 RP at 41. Also that the defendant had not used the methamphetamine or firearms in question. 8/5/08 RP at 46.

In any event, the defendant cannot make the requisite showing to prove the second prong of the test for ineffective assistance of counsel. The evidence presented by the State in this case was overwhelming against the defendant. The only hope for the defense was to be successful on their motion regarding the initial contact of the defendant.

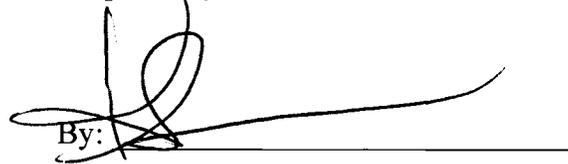
The appellant's brief states trial counsel erred by introducing evidence of the female clothing worn by the defendant, and it suggests that "Harvill could have simply testified that he did not know the drugs were in those pants." Appellant's Brief at 19-20. However, if that had been the case, the State would have elicited the information that the defendant was wearing mostly female clothing to undermine an unwitting possession argument. Further, the State would likely have inquired of the defendant if he had any knowledge of where the drugs came from. The defendant would have had to honestly answer that he had purchased the methamphetamine.

Trial counsel was in a difficult position in this case, the evidence was overwhelming and he had a client that was telling the truth about his guilt. The appellant has not made any credible argument that the errors he claims would have affected the outcome of the trial. Especially once the defendant decided to exercise his right to testify.

CONCLUSION

Pursuant to the argument presented above, the State asks that the pre-trial ruling of the trial court be affirmed and the verdict of the jury be upheld.

Respectfully Submitted,


By: _____

KATHERINE L. SVOBODA
Deputy Prosecuting Attorney
WSBA # 34097

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 38255-8-II

v.

DECLARATION OF MAILING

KEITH ALLEN HARVILL,

Appellant.

DECLARATION

I, Randi M. Toyra hereby declare as follows:

On the 23rd day of July, 2009, I mailed a copy of the Brief of Respondent to Roger A. Hunko; Attorney for Appellant; 569 Division Street, Suite E; Port Orchard, WA 98366; and Keith Allen Harvill 959541; Airway Heights Corrections Center; P. O. Box 2049; Airway Heights, WA 99001, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 23rd day of July, 2009, at Montesano, Washington.

[Signature]