

No. 40542-3-II  
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

Vs.

**THOMAS FENWICK**

Appellant.

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DIVISION II  
STATE OF WASHINGTON  
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Appeal from the Superior Court of Washington for Lewis County  
Cause No. 09-1-00706-8

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**Respondent's Brief**

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MICHAEL GOLDEN  
Lewis County Prosecuting Attorney

By:

  
Lori Smith  
Deputy Prosecuting Attorney  
WSBA No. 27961

Lewis County Prosecutor's Office  
345 W. Main Street, 2nd Floor  
Chehalis, WA 98532-1900  
(360) 740-1240

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## STATEMENT OF THE CASE

Without waiving the right to contest any facts at some later time, Appellant's statement of the case is adequate for purposes of responding to his opening brief.

## ARGUMENT

### **A. FENWICK DID NOT MOVE TO SUPPRESS THE SEARCH ON ANY BASIS IN THE TRIAL COURT AND THEREFORE ANY SEARCH ISSUE IS WAIVED.**

Fenwick argues for the first time on appeal that the search of his vehicle incident to his arrest was an unlawful vehicle search under Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).<sup>1</sup> Fenwick is mistaken. Because Fenwick did not move to suppress evidence of the vehicle search at all in the trial court, he has waived that issue and cannot raise it for the first time in this appeal.

Fenwick did not move to suppress fruits of the vehicle search incident to his arrest below. Therefore, he has waived the right to raise this issue now. State v. Slighte, \_\_\_ Wn.App. \_\_\_, 238 P.3d 83, 85-87 (2010); citing State v. Millan, 151 Wn.App. 492, 500, 212 P.3d 603 (2009), *review granted*, 168 Wn.2d 1005, 226

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<sup>1</sup> Gant was decided on April 21, 2009. Gant, supra. Fenwick was arrested in this case on December 12, 2009. RP 8. Trial took place on March 16 and 17, 2010. RP 1-206.

P.3d 781 (2010)<sup>2</sup>; State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995)(defendant waives right to challenge admission of evidence gained in an illegal search or seizure by failing to move to suppress the evidence at trial); State v. Burnett, 154 Wn.App. 650, 652, 228 P.3d 29 (2010); but see, State v. McCormick, 152 Wn.App.at 540, 216 P.3d 475 (2009)(defendants may raise an admissibility of evidence challenge on appeal without having done so in the trial court, following a change in the law under Arizona v. Gant); see also State v. Harris, 154 Wn.App. 87, 224 P.3d 830 (2010).

This Court should follow the ruling in Millan and should find that Fenwick waived the right to challenge the vehicle search because he did not move to suppress evidence of the search on any basis in the trial court. Millan, supra. Accordingly, this Court should affirm.

In the alternative, because this issue is currently pending before the Washington State Supreme Court in Millan, this Court should stay this appeal until that Court resolves the split in authority on the waiver issue as discussed in Millan. State v. Millan, supra.

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<sup>2</sup> It does not appear that Fenwick mentions the Millan case at all in his opening brief.

**1. Even If Fenwick Is Allowed To Raise a Search Issue for the First Time On Appeal, This Case Falls Within the "Scalia Exception" or "Crime of Arrest Exception" Noted in Gant and the Search Should Be Upheld on This Alternative Basis.**

If Fenwick is allowed to raise a Gant search issue for the first time on appeal, the search should nonetheless be upheld in this case because even under Gant a vehicle may be searched incident to arrest under certain circumstances. Here, the search was lawful under the "crime of arrest exception" noted in Gant.

In the present case, Fenwick was stopped and arrested on suspicion of driving under the influence of drugs, and was convicted of that crime plus possession of methamphetamine and unlawful possession of a firearm first degree. CP 4 (sentenced only on DUI and firearm convictions). When the vehicle was stopped for erratic driving, Fenwick admitted to the officer after Miranda and prior to the vehicle search that he uses methamphetamine and that there were needles inside the vehicle. RP 7-10; 14. The officer then searched Fenwick's vehicle. These facts bring the vehicle search in this case within the "crime of arrest exception" mentioned by Justice Scalia in the Gant decision.

The Gant Court explained this exception thusly:

we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton*, 541 U.S., at 632, 124 S.Ct. 2127 (SCALIA, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. See, e.g., *Atwater v. Lago Vista*, 532 U.S. 318, 324, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); *Knowles v. Iowa*, 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Arizona v. Gant 129 S.Ct. 1710, 1719 (2009)(emphasis added).

Thus, under Gant, a warrantless search of a vehicle incident to arrest might still be proper when it is "'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" Id. In the present case, the officer did indeed have just such a "reason to believe."

Here, Fenwick was arrested on suspicion of driving while under the influence of drugs, and Fenwick told the officer he uses methamphetamine and that there were needles in the vehicle. RP 7-10; 14. Thus, it was reasonable for the officer to believe he would find drugs inside Fenwick's vehicle--evidence directly related to the "crime of arrest" (DUI). Gant, supra. Accordingly, even if

Fenwick may properly raise the Gant search issue for the first time now, the search was nonetheless still a lawful search under the "crime of arrest" exception noted in Gant itself. Id. The search should thus be upheld on this alternative basis.

That said, it is nonetheless also true that it is not clear whether this "crime of arrest" exception (or Scalia exception) noted in Gant applies in Washington under Article 1, Section VII. See e.g., Statev. Valdez, 157 Wn.2d 761, \_ P.3d \_,2009 WL 4985242(2009), where, arguably in *dicta*, that Court seemingly construes any "crime of arrest" exception very narrowly, by noting that a warrantless search of an automobile permissible only for officer safety or to prevent destruction or concealment of evidence of the crime of arrest. Id. However, Valdez is not the last word on this topic because the *specific* issue of whether the "Scalia exception" or the "crime of arrest" exception from Gant applies in Washington has now been accepted for review by the Washington Supreme Court. See State v. Snapp, 153 Wn.App. 485, 219 P.3d 971 (2009)<sup>3</sup> *review granted* October 5, 2010, Supreme Court No. 84223-0(search affirmed because officers searched the vehicle for evidence of the crime for which they arrested the defendant),

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<sup>3</sup> Snapp is not cited by Fenwick in his opening brief.

(Snapp case consolidated with State v. Wright, 155 Wn. App. 537 (2010)).

Consequently, because consideration of the "crime of arrest" exception and whether it exists under Washington's Constitution is now currently pending before the Washington Supreme Court as well, this appeal should probably be stayed as to this basis as well.

**B. FENWICK'S TRIAL COUNSEL WAS NOT INEFFECTIVE.**

Fenwick also argues that his trial counsel was ineffective for failing to file a motion to suppress and for failing to object at trial to various items found in the search of the vehicle being admitted at trial. But Fenwick cannot meet the very high bar set by the Strickland Court and its progeny for proving his counsel was ineffective. This argument is accordingly without merit.

To show ineffective assistance of counsel, an appellate must show that (1) defense counsel's performance fell below an objective standard of reasonableness based on all the circumstances; and (2) there was a reasonable probability that the result of the proceeding would have differed absent counsel's unprofessional errors. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In addition, "[w]hile it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of

what initially appeared to be a valid approach does not render the action of trial counsel reversible error." State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. And counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. McFarland, 127 Wn.2d at 334 n.2.

In the present case, Fenwick's trial counsel quite likely did not file a motion to suppress pursuant to Gant because such a motion reasonably appeared to trial counsel as "unlikely to succeed" due to the "crime of arrest" exception previously discussed above and noted in Gant. In other words, Fenwick's counsel likely knew a motion to suppress would fail because the vehicle search here was proper as a search under the "crime of arrest" exception noted in Gant, so trial counsel did not perform the futile act of filing a motion to suppress. This was not ineffective assistance of counsel, and because Fenwick has not shown that a motion to suppress would likely have been granted, he cannot show the required prejudice. McFarland, supra.

Again, Fenwick was stopped for erratic driving and was acting fidgety and admitted he uses methamphetamine, and that needles were inside the vehicle, and Fenwick was arrested for driving under the influence of drugs. RP 7-10. Then, the officer searched the vehicle--which was proper under the "crime of arrest" exception in Gant because it was reasonable for the officer to believe that evidence (i.e., drugs) of the crime of arrest (DUI) would be found in Fenwick's vehicle. Gant, supra. Because the search was lawful, a motion to suppress the vehicle search would have been denied, and Fenwick's trial counsel was thus not ineffective for failing to bring a futile motion. McFarland, supra.

Finally, Fenwick claims his counsel was also ineffective for failing to object to the admission of evidence about "medical gloves, screwdrivers, pliers, and a ski mask" found in the search of Fenwick's vehicle. Brief of Appellant 15. Fenwick claims these items "suggested that Mr. Fenwick was planning (or had completed) a violent crime" and "suggested a propensity to commit crime." Id. This argument is not persuasive, given that screwdrivers, pliers, and items of clothing such as warm hats are probably common items carried inside a vehicle by many travelers inside a vehicle. Certainly screwdrivers and pliers are handy to

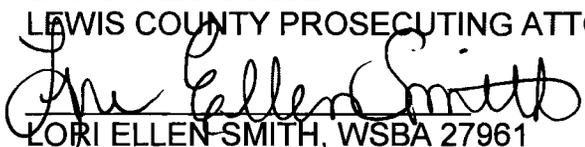
have in case of a vehicle breakdown--and so would having access to something warm (like a ski hat) be convenient in case a person gets stranded on the road in cold weather. As such, it is not likely the jury was "prejudiced" by mention of these items at trial, and Fenwick certainly cannot show that the outcome of his case would have been different had his counsel objected to this evidence. Accordingly, Fenwick's ineffective assistance of counsel claim fails on this basis as well, and his convictions should be affirmed.

#### CONCLUSION

Even if Fenwick can raise a vehicle search issue for the first time on appeal, the search in this case should be upheld because the search in this case was proper under the "crime of arrest" exception noted in Arizona v. Gant. For this same reason, Fenwick's trial counsel was not ineffective for failing to move to suppress the vehicle search because the motion would have been denied under the "crime of arrest" exception. Nor was Fenwick's trial counsel deficient for failing to object to the admission of evidence about items found in Fenwick's vehicle. In general, these items are commonly found inside vehicles and thus this evidence did not prejudice the jury or Fenwick. Thus, Fenwick has not shown his trial counsel was ineffective.

Accordingly, Fenwick's convictions should be affirmed in all respects. In the alternative, this appeal should be stayed pending the Washington Supreme Court's rulings in State v. Millan and State v. Snapp.

RESPECTFULLY SUBMITTED THIS 20th day of October, 2010.

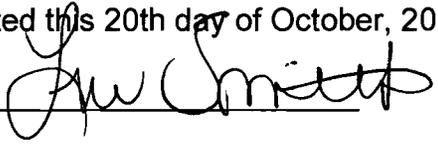
L. MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTING ATTORNEY  
by:   
LORI ELLEN SMITH, WSBA 27961  
Deputy Prosecuting Attorney

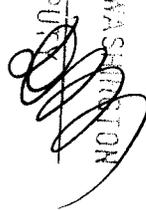
**Declaration of Service**

The undersigned certifies that a copy of the document to which this certificate is attached was served upon the appellant by U.S. mail, postage prepaid, addressed to appellant's attorney at the following address:

Backlund & Mistry  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501

Dated this 20th day of October, 2010, at Chehalis, Washington

  
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