

No. 62903-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN P. HEESE,

Appellant.

FILED
STATE OF WASHINGTON
2009 OCT 16 PM 4:52

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

The Honorable Richard J. Thorpe

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE DECISION IN *GANT v. ARIZONA* COMPELS
THE SUPPRESSION OF THE EVIDENCE SEIZED
BY THE POLICE DURING THE SEARCH OF MR.
HEESE'S VEHICLE

While conceding that the decision in *Arizona v. Gant*, ___
U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), applies to Mr.
Heese's matter, the State posits a number of arguments on why the
evidence seized here should not be suppressed under *Gant*. The
State's arguments should be rejected and the evidence seized by
the police should be suppressed.

1. Article I, section 7 of the Washington Constitution is
absolute and does not permit application of a "good faith"
exception. In its response, the State argues this Court may apply
a "good faith" exception similar to that enunciated by the United
States Supreme Court in *Michigan v. DeFilippo*, 443 U.S. 31, 38, 99
S.Ct. 2627, 61 L.Ed.2d 343 (1979), to save the search in this case.
This Court should reject the State's invitation.

Recognizing that the Washington Constitution affords
greater protections than the United States Constitution, the
Washington Supreme Court has rejected the "good faith" exception
set out in *DeFilippo, supra*. See *State v. White*, 97 Wn.2d 92, 109,

640 P.2d 1061 (1982) (“The result reached . . . in *DeFilippo* is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations . . . This approach permits the exclusionary remedy to be completely severed from the right to be free from unconstitutional governmental intrusions”). The purpose of article I, section 7 of the Washington Constitution is not only to curb governmental actions but also to protect personal rights. *Id.*; see also *State v. Morse*, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005) (Washington courts have “long declined to create ‘good faith’ exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with the recognized exceptions to the warrant requirement”).

Instead, the Court has held that the good faith exception is “unworkable and contrary to well established principles.” *White*, 97 Wn.2d at 106 n.6. In fact, the Court in *White* specifically repudiated the “good faith” standard set forth in *DeFilippo* in favor of an objective probable cause standard, noting that an objective standard that does not examine an officer’s intent is the only

workable test to determine whether the rights of the accused have been violated. *Id.*¹

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

2. Suppression is required under the Washington Constitution.² In *White*, the Supreme Court held that:

¹ This Court should reject the argument by the State that *White* is consistent with *DeFilippo*. Not only has the Washington Supreme Court clearly rejected this notion, but *White* specifically repudiates *DeFilippo* within its holding. *White*, 97 Wn.2d at 109-11.

² To the extent the State wishes to argue the police acted properly based upon a rule that had been in existence for several years, the Supreme Court in *Gant* explicitly rejected any such argument:

Although it appears the State's reading of *Belton* has been widely taught in police academies and that law enforcement

we think the language of our state constitutional provisions constitutes a mandate that the right to privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.

97 Wn.2d at 110.³

In this matter, there are no exceptions to the state exclusionary rule that would justify a conclusion other than that the evidence in this matter should be suppressed. The record does not indicate any justification to support the search of Mr. Heese's vehicle. Mr. Heese was placed under arrest for driving on a suspended driver's license and was secured in the police car prior to the police search of his vehicle. There were no articulable suspicions that there was any other criminal activity of which the police were aware, nor did the police appear concerned about the destruction of evidence related to Mr. Heese's driving. As such, there were no constitutionally valid reasons for the search.

officials have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by reasons underlying the *Chimel* exception . . . If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence.

Gant, 129 S.Ct. at 1723.

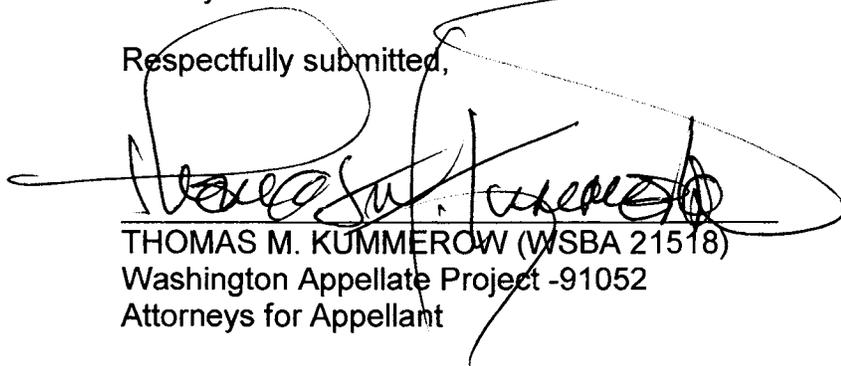
³ "Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence." *State v. Ladson*, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999).

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Heese submits this Court must order the evidence in his matter suppressed and reverse his conviction.

DATED this 15th day of October 2009.

Respectfully submitted,



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NO. 62903-4-I

JOHN HEESE,)

Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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