

NO. 63597-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

LESLIE A. KULL,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Where defendant voluntarily abandoned a wooden box, was there any constitutional prohibition against the police searching that box?

2. Where police conducted a search that was lawful at the time, based on binding Supreme Court precedent, is exclusion of the evidence found during the search required?

3. Can defendant raise arguments for the suppression of evidence in this Court that she did not raise below?

4. Where counsel made a reasonable tactical decision to challenge the admission of the fruit on the search of a wooden box on the basis of lack of probable cause, not that the container was clearly the property of defendant, was that ineffective assistance?

## **II. STATEMENT OF THE CASE**

On October 21, 2008, shortly before midnight, Officer Langdon came upon a stalled truck that was partially blocking an intersection. Defendant and a man, later identified as the driver, were trying to push the truck out of the intersection. The driver told the officer that “they had run out of gas” and asked the officer for assistance. CP 105-06, 2/19 RP 8-10. The driver told the officer that he was not the owner of the truck, but was borrowing it from a

friend. 2/19 RP 13. The officer later learned the driver had recently purchased the truck. There was never any indication that the truck belonged to defendant or that she had any interest in or ownership of the truck. 2/19 RP 37-38.

In order to push the truck with his patrol vehicle, the officer had to get a waiver of liability. He did not have the proper form in his patrol car, so the officer asked another officer to bring him a form. While waiting for the form, the officer got the driver's name and date of birth. When dispatch ran that identification, it determined the driver had outstanding warrants, and so informed the officer. The officer arrested the driver on those warrants and handcuffed him. 2/19 RP 12-15. At about that time, a second officer arrived with the forms. 2/19 RP 46. The officer then told defendant she was free to leave. 2/19 RP 16.

Defendant asked the officer if she could get her suitcase from inside the truck. The officer got the suitcase, looked in it with defendant's permission, and handed the suitcase to her. 2/19 RP 17-18. Defendant did not ask the officer to get anything else out of the truck, and did not indicate that she had any property left in the truck. She did, however, at some point before asking about her

suitcase, tell the officer she had been a passenger in the truck.  
2/19 RP 61.

The officer then started to search the interior of the truck incident to the driver's arrest. He found a wooden box next to where defendant's suitcase had been. The officer asked defendant if the box was hers. She became nervous and said that she didn't know who the box belonged to, but it did not belong to her. 2/19 RP 18-19. At that point, defendant was still free to leave. 2/19 RP 20.

The officer looked inside the wooden box and saw what he immediately recognized as "the type of pipe commonly used to smoke drugs." He also saw burned residue inside the pipe. Id. The officer asked the driver about the pipe. The driver told the officer "the pipe did not belong to him, and he didn't know anything about it." Id. At this point the officer arrested defendant. The officer explained his decision to arrest defendant:

[T]he small, wooden case was found immediately next to the suitcase that [defendant] requested to remove from the vehicle. Her reaction when I asked about the case being noticeably nervous, hesitation, and then the immediate "it's not my case." And the fact it was in a position where she was reasonably believed to have been sitting.

2/19 RP 21.

While the officer was searching the wooden box, defendant was standing at the rear of the truck with the other officer. 2/19 RP 46, 55.

Another officer transported defendant to the Lynnwood Jail. After defendant was taken out of the back seat of the transporting police car, crack cocaine was found in the back seat. When asked, defendant admitted the drugs belonged to her. 2/19 RP 23-24.

A little less than two months after defendant's arrest, the same officer that transported her to the Lynnwood Jail was called to a shoplifting. Defendant had been detained by the store's loss prevention officers. The officer took custody of defendant. After he read her the Miranda warnings, defendant told him she was facing "an 18-month mandatory minimum [sentence] for the last time she was arrested." When the officer asked defendant when she was last arrested, defendant answered, "when I dumped that crack in your back seat." 2/19 RP 72-74.

The State charged defendant with one count of possession of cocaine while on community custody. CP 139. Before trial, defendant moved to suppress the cocaine "and statements obtained as a result of an unlawful search and seizure." CP 130. Defendant argued that "Officer Langdon lacked probable cause to

stop let alone arrest [defendant].” CP 132. Defendant also argued that “the search of the truck was not validly incident to [the driver’s] arrest.” CP 134.

On February 19, 2009, the court held an evidentiary hearing on the admissibility of defendant’s statements and the cocaine found in the patrol vehicle that transported defendant to the Lynnwood Jail. The officers testified as set out above. Defendant testified that she was visiting a friend when the driver called the friend’s house and asked someone to help him push his truck. Defendant, a long-time friend of the driver, went and tried to help move the truck. She said she had a small suitcase with her, and she put it inside the truck while she was trying to help push it. Defendant claimed she had never ridden in the truck, sat in the truck, or been a passenger in the truck. She denied telling the officer that she had been a passenger in the truck. 2/19 RP 93-95, 98. Defendant also said she was telling the truth when she said she did not know who owned the wooden box. 2/19 RP 96.

The State argued that defendant had abandoned the wooden box, and did not have standing to challenge the search of the truck. 2/19 104-05. If defendant had standing to challenge the

search, the State argued it was incident to the arrest of the driver, thus the evidence should not be suppressed. 2/19 RP 106.

Defendant argued that the officer seized her when he asked her consent to search her suitcase. 2/19 RP 107. She then argued that there was no evidence that she had been in the truck, so there was no probable cause to arrest her. 2/19 RP 210-11. In conclusion, defendant argued "That there were concerns regarding whether the truck was validly searched incident to arrest." 2/19 211.

The following day, the court entered oral findings of fact and conclusions of law. The court found that Officer Langdon's testimony was more credible than defendant's. The court found defendant had told the officer that she was a passenger in the truck. It also found that defendant's statement that she felt she was being detained prior to the officer handing her suitcase to her was not credible. 2/20 RP 5-6, CP 108.

The court then assumed that defendant had standing to challenge the search. 2/20 RP 6, CP 108. It concluded that once the driver was arrested, "the passenger compartment of the vehicle and all unlocked containers were subject to search incident to arrest." 2/20 RP 8, CP 110. The court went on to conclude that the

officer had probable cause to believe defendant had been a passenger in the truck, even without her statement, and probable cause to arrest defendant for possession of drug paraphernalia. 2/20 RP 9, CP 110. The court did not make findings or conclusions about whether the wooden box was abandoned, whether the box belonged to or was associated with defendant, or whether defendant had actual standing to challenge the search of the truck.

The State drafted written findings of fact and conclusions of law. They mirrored the oral findings of fact and conclusions of law. CP 105-12.

On March 2, 2009, defendant waived a jury and was tried on stipulated evidence. CP 101-04, 3/2 RP 3, 6-7. The court found defendant guilty of possession of cocaine. 3/2 RP 10. The court sentenced defendant to a standard range sentence. 3/11 RP 27, CP 25, 28.

On April 21, 2009, the United States Supreme Court decided Arizona v. Gant, \_\_\_\_ U.S. \_\_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

### **III. ARGUMENT**

It is well settled law that the search of abandoned property does not offend the federal or state constitution. Here, defendant

left the wooden box in an area where she had no expectation of privacy, the interior of a truck belonging to another person. When asked if the box was hers, she said it was not. She had no legitimate expectation of privacy in the contents of that box.

Even if defendant did not abandon the box, the exclusionary rule does not require suppression of the fruits of the search where the search was clearly lawful under binding Supreme Court precedent at the time it was made.

Defendant argues for the first time that the wooden box inside the truck was clearly her property, thus its search incident to the arrest of the driver exceeded the permissible scope. Defendant waived this argument by failing to make it below. Since the record is insufficient for this Court to determine how the court below would have ruled, it is not manifest constitutional error nor is the failure to raise it ineffective assistance of counsel.

Assuming defendant could show from the record that had counsel moved to suppress the fruit of the search of the box on the basis it was clearly hers, would have been granted, counsel's performance was not deficient. He made a reasonable, tactical decision to argue the box was not hers, therefore there was no probable cause to arrest her. Arguing the box was clearly hers

would have required him to argue defendant lied on the stand when she denied ownership. Further, admitting the box was hers would have undercut counsel's theory that the contents of the box did not provide probable cause to arrest defendant.

**A. DEFENDANT HAD NO SUBJECTIVE EXPECTATION OF PRIVACY IN THE CONTENTS OF THE WOODEN BOX.**

After the driver's arrest, a small suitcase was the only property inside the truck defendant claimed was hers. When the officer asked her about a wooden box that was located near that suitcase, defendant denied ownership of that box. 2/19 RP 20. Defendant now contends that the search of that box was illegal under Arizona v. Gant, therefore the court erred by not suppressing the fruit of that search, the arrest of defendant, and her dropping cocaine in the back of the patrol car en route to jail. Brief of Appellant 14-17. Defendant has not shown she has any reasonable expectation of privacy in the contents of that box.

"One of the exceptions to the warrant requirement is for voluntarily abandoned property. State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). Abandonment is generally found where the defendant has no privacy interest in the area searched. Evans, 159 Wn.2d at 409-410. Here, defendant denied that she owned the

box the officer found in the truck. She had no expectation of privacy in the interior of the truck at the time the officer asked her about the ownership of the box. She was not the owner or driver of the truck. Accordingly, when she denied ownership of the box, if it was actually hers, she abandoned it.

While the court below did not consider abandonment, this Court may affirm an evidentiary ruling on any basis that is supported in the record. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

The concept of abandonment is similar to that of standing. A defendant seeking to suppress evidence . . . “must in every instance first establish that he had a legitimate expectation of privacy in the place where the allegedly unlawful search occurred.” State v. Jones, 68 Wn. App. 843, 848, 845 P.2d 1358, review denied, 122 Wn.2d 1018 (1993). To establish a reasonable expectation of privacy, one must first exhibit an actual expectation of privacy. Evans, 159 Wn.2d at 409.

Defendant left the box in the truck. She claimed the box was not hers. She did not attempt to retrieve it. She showed no subjective expectation of privacy in the contents of the box.

Even if defendant had a subjective expectation of privacy, unless at the time of the search, society recognized such an expectation as reasonable, there is no reasonable expectation of privacy. Evans, 159 Wn.2d at 409. At the time of the search, well-settled Supreme Court precedent was that incident to the arrest of the driver of a vehicle, the interior of that vehicle and all unlocked containers could be searched. State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), overruled, State v. Valdez, 167 Wn.2d 144 (2009). The Supreme Court balanced the privacy interests of the arrested driver and the need for effective law enforcement. It found the arrested driver had an insufficient privacy interest to preclude the search of the interior of the vehicle incident to his arrest. Id. After the Stroud decision, there could be no reasonable expectation of privacy in the interior of a vehicle, or of the interior of unlocked containers in that vehicle. Cf State v. Foulkes, 63 Wn. App. 643, 647, 821 P.2d 77 (1991) (a person who denies ever being in a car has no reasonable expectation of privacy in the interior of that car).

The ruling of the court admitting the fruits of the search of the box should be affirmed.

**B. THE EXCLUSIONARY RULE DOES NOT REQUIRE SUPPRESSION.**

Should this Court find that the box was not abandoned by defendant, and she had a reasonable expectation of privacy in the box, the court below should still be affirmed. State v. Riley, 154 Wn. App. 433, 444, 225 P.3d 462 (2010). Defendant relies only on the Fourth Amendment search and seizure law to support his argument that the search of the box was illegal and requires suppression of the evidence – Arizona v. Gant, State v. Harris, 154 Wn. App. 87, 224 P.3d 830 (2010). Brief of Appellant 14. While defendant also cites State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009), there is no analysis of why Article 1, § 7 now does not permit warrantless searches of the interior of a vehicle incident to the driver’s arrest. Since there is a good faith exception to the exclusionary rule under the Fourth Amendment, that should apply here. Riley, 154 Wn. App. at 441.

**C. DEFENDANT WAIVED ARGUMENT THAT THE SEARCH WAS OF A CONTAINER CLEARLY IDENTIFIED WITH HER.**

Defendant next claims that under the settled law of State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999), the box was “clearly shown” to belong to her during the CrR 3.6 hearing. Thus, its search exceeded the permissible scope of a search incident to the

arrest of the driver. Brief of Appellant 18-19. By not making this argument below, defendant waived it. State v. Nowinski, 124 Wn. App. 617, 630, 102 P.3d 840 (2004). This Court should decline to consider whether Parker applies.

Should this Court consider this issue, it should affirm the court below. The Supreme Court in Parker held that the arrest of the driver did not provide authority of law to search items “clearly associated” with a non-arrested passenger. State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001). Defendant claims the evidence at the CrR 3.6 hearing clearly showed that the box belonged to her. This misstates the evidence.

At the CrR 3.6 hearing, the officer testified that defendant asked if she could get her suitcase. After handing her the suitcase, the officer went back into the truck and noticed a wooden box. It was on the passenger side, near where defendant’s suitcase had been. The officer asked defendant if the box was hers. She denied any knowledge of the box. 2/19 RP 16-19. Further, when defendant testified, she maintained that the box was not hers. 2/19 RP 96. The officer had no basis for believing that the box was “clearly associated” with defendant. Accordingly, the search of the box did not violate the principle set out in Parker.

**D. THERE WAS NO MANIFEST CONSTITUTIONAL ERROR AND DEFENDANT'S COUNSEL WAS NOT INEFFECTIVE.**

Trying to avoid the consequences of her failure to raise the Parker issue below, defendant claims that she can raise this issue here because it is a “manifest error affecting her constitutional rights,” or because it showed she received ineffective assistance of counsel. Brief of Appellant 19-21. To be of constitutional magnitude, the prejudice must be evident from the record. Where the record is not sufficient to show prejudice, any alleged error was not manifest. Further, the decision not to raise a Parker issue was clearly a tactical one, thus it cannot be the basis for finding that counsel was ineffective.

Defendant claims that the prejudice to her “is evident from the record, because the nature of the box as belonging to a passenger . . . was clearly shown during the CrR 3.6 hearing[.]” Brief of Appellant 19. This misstates the prejudice defendant must demonstrate.

“[D]efendant, to show he was actually prejudiced by counsel’s failure to move for suppression, must show the trial court likely would have granted the motion if made.” State v. McFarland,

127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). Defendant has not made that showing.

The officer was not asked if he associated the wooden box with defendant before he searched it. He testified he asked defendant if the box was hers “Because it was on her side of the vehicle right near where her suitcase had been.” He did not say he believed that the box was defendant’s or was clearly associated with defendant. While the court found the officer had probable cause to arrest defendant for possession of the drug paraphernalia found in the box, it was not asked to make a finding of whether the officer knew, before he searched it, that the box was associated with defendant. Given defendant’s denial, it is not likely that the court would have found the mere proximity of the box, on the passenger’s side of the vehicle, overcame that denial. Accordingly, defendant has not shown actual prejudice. See State v. Busig, 119 Wn. App. 381, 391, 81 P.3d 143 (2003), review denied, 151 Wn.2d 1037 (2004) (McFarland standard of prejudice applies to manifest prejudice).

As a further reason to consider this issue, defendant raises ineffective assistance of counsel. Brief of Appellant 20-21. “The burden is on a defendant alleging ineffective assistance of counsel

to show deficient representation based on the record established in the proceedings below.” McFarland, 127 Wn.2d at 335. Defendant cannot show deficient representation.

“There is a strong presumption that counsel’s performance was reasonable. When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” State v. Kylo, 166 Wn.2d 856, 862-63, 215 P.3d 177 (2009). Here, counsel was precluded from arguing that the box was clearly associated with defendant because defendant had testified that it was not hers, and there was nothing to conclusively show that it was hers. Given the posture of the evidence, it was clearly a reasonable tactical decision to not raise a Parker issue.

Further, admitting the box was associated with defendant would eviscerate defendant’s claim that it was not hers, and the officer had no probable cause to believe it was hers. That this decision did not yield the hoped for result does not make it unreasonable.

**IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on June 21, 2010.

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