

64191-3

64191.3

NO. 64191-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

PAIGE C. VOLKART,

Appellant.

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

The Honorable Ira J. Uhrig, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373



TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	6
1. THE SECOND, OR "INVENTORY," SEARCH OF VOLKART'S VAN VIOLATED HER STATE CONSTITUTIONAL RIGHT TO PRIVACY	6
a. <i>There is no inevitable discovery exception in Washington.</i>	7
b. <i>The search was not a reasonable inventory search.</i>	9
2. THE "GOOD FAITH" EXCEPTION DOES NOT SAVE THE SEARCH INCIDENT TO ARREST.	17
D. <u>CONCLUSION</u>	36

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Impoundment of Chevrolet Truck, WA License No.A00125A ex rel. Registered/Legal Owner</u> 148 Wn.2d 145, 60 P.3d 53 (2002).....	14
<u>In re Personal Restraint of St. Pierre</u> 118 Wn.2d 321, 823 P.2d 492 (1992).....	8
<u>State v. Avila-Avina</u> 99 Wn. App. 9, 991 P.2d 720 (2000).....	9
<u>State v. Bales</u> 15 Wn. App. 834, 552 P.2d 688 (1976) <u>review denied</u> , 89 Wn.2d 1003 (1977).....	12
<u>State v. Barajas</u> 57 Wn. App. 556, 789 P.2d 321 <u>review denied</u> , 115 Wn.2d 1006 (1990).....	14
<u>State v. Brockob</u> 159 Wn.2d 311, 150 P.3d 59 (2007).....	24, 25, 26
<u>State v. Eisfeldt</u> 163 Wn.2d 628, 185 P.3d 580 (2008).....	23, 24
<u>State v. Evans</u> 154 Wn.2d 438, 114 P.3d 627 (2005).....	8
<u>State v. Greenway</u> 15 Wn. App. 216, 547 P.2d 1231 <u>review denied</u> , 87 Wn.2d 1009 (1976).....	14
<u>State v. Hardman</u> 17 Wn. App. 910, 567 P.2d 238 (1977) <u>review denied</u> , 89 Wn.2d 1020 (1978).....	14

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Hendrickson</u> 129 Wn.2d 61, 917 P.2d 563 (1996).....	12
<u>State v. Houser</u> 95 Wn.2d 143, 622 P.2d 1218 (1980)	12, 14
<u>State v. Johnston</u> 107 Wn. App. 280, 28 P.3d 775 (2001) <u>review denied</u> , 145 Wash.2d 1021 (2002)	33
<u>State v. Johnson</u> 128 Wn.2d 431, 909 P.2d 293 (1996).....	7
<u>State v. Ladson</u> 138 Wn.2d 343, 979 P.2d 833 (1999).....	7
<u>State v. Montague</u> 73 Wn.2d 381, 438 P.2d 571 (1968).....	12
<u>State v. Moore</u> 161 Wn.2d 880, 169 P.3d 469 (2007).....	7, 24
<u>State v. Morales</u> __ Wn. App. __, __ P.3d __, 2010 WL 118340 (2010).....	9, 11
<u>State v. Morse</u> 156 Wn.2d 1, 123 P.3d 832 (2005).....	7, 21, 22, 23, 24, 27
<u>State v. Nall</u> 117 Wn. App. 647, 72 P.3d 200 (2003).....	26
<u>State v. Pedro</u> 148 Wn. App. 932, 201 P.3d 398 (2009).....	8
<u>State v. Porter</u> 102 Wn. App. 327, 6 P.3d 1245 (2000).....	32

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Potter</u> 156 Wn.2d 835, 132 P.3d 1089 (2006).....	24, 25
<u>State v. Quinlivan</u> 142 Wn. App. 960, 176 P.3d 605 <u>review denied</u> , 164 Wn.2d 1031 (2008).....	33
<u>State v. Rathbun</u> 124 Wn. App. 372, 101 P.3d 119 (2004).....	2-5, 13-17, 28, 31, 32, 35
<u>State v. Reyes</u> 98 Wn. App. 923, 993 P.2d 921 (2000).....	9
<u>State v. Richman</u> 85 Wn. App. 568, 933 P.2d 1088 (1997).....	9
<u>State v. Simpson</u> 95 Wn.2d 170, 622 P.2d 1199 (1980).....	13
<u>State v. Webb</u> 147 Wn. App. 264, 195 P.3d 550 (2008).....	33, 34
<u>State v. White</u> 135 Wn.2d 761, 958 P.2d 982 (1998).....	12, 15, 18, 20-26
<u>State v. Williams</u> 102 Wn.2d 733, 689 P.2d 1065 (1984).....	7, 13, 15, 16
<u>State v. Winterstein</u> 167 Wn.2d 620, 220 P.3d 1226 (2009).....	7, 8, 9, 10

FEDERAL CASES

<u>Arizona v. Gant</u> __ U.S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)5, 17, 28-32, 34, 35	
---	--

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Beard v. Banks</u> 542 U.S. 406, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) <u>cert. denied</u> , 546 U.S. 983 (2005).....	8
<u>Chimel v. California</u> 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed.2d 685 (1969).....	28, 29, 30, 31
<u>Griffith v. Kentucky</u> 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).....	8
<u>Michigan v. DeFillippo</u> 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).18, 19, 20-21, 25, 27	
<u>New York v. Belton</u> 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).....	28, 29, 30, 31
<u>Pierson v. Ray</u> 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).....	19
<u>Preston v. United States</u> 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964).....	28
<u>Teague v. Lane</u> 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).....	8
<u>Terry v. Ohio</u> 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	20
<u>Thornton v. United States</u> 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004).....	30
<u>United States v. Gonzales</u> 578 F.3d 1130 (2009).....	25, 26, 34
<u>United States v. Green</u> 324 F.3d 375 (5th Cir. 2003)	31

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>United States v. Weaver</u> 433 F.3d 1104 (9th Cir. 2006)	32

OTHER JURISDICTIONS

<u>People v. DeFillippo</u> 80 Mich. App. 197, 262 N.W.2d 921 (1977).....	18
--	----

RULES, STATUTES AND OTHER AUTHORITIES

RCW 46.20.342	11
RCW 46.20.345	11
RCW 46.55.113	10, 14, 17
RCW 46.61.113	10
RCW 46.61.502	11
RCW 46.61.504	11
U.S. amend. IV.....	7, 20, 21, 22, 23, 24, 34
Const. art. I, § 7.....	7, 8, 21, 22, 23, 24, 36

A. ASSIGNMENTS OF ERROR

1. The trial court erred by finding the Whatcom County Sheriff's Office policy requires impoundment of a car when the driver is arrested for driving with a suspended license (DWLS) and is not the registered owner. Supp. CP __ (sub. no. 43, Findings and Conclusions: 3.6 Hearing), Finding of Fact 7, at 2 (attached as appendix A).

2. The trial court erred by finding the scale with residue "would have been discovered during the inventory search had it not been discovered during the search incident to arrest." Supp. CP __ (sub. no. 43, Findings and Conclusions: 3.6 Hearing), Finding of Fact 9, at 2.

3. The trial court erred by concluding the inventory search of the appellant's van was lawful. Supp. CP __ (sub. no. 43, Findings and Conclusions: 3.6 Hearing), Conclusion of Law 2, at 2.

4. The trial court erred by concluding the scale with residue would have been inevitably discovered during the inventory search had the deputy not conducted the search incident to arrest. Supp. CP __ (sub. no. 43, Findings and Conclusions: 3.6 Hearing), Conclusion of Law 4, at 2.

5. The trial court erred by concluding the scale with residue was admissible. Supp. CP __ (sub. no. 43, Findings and Conclusions: 3.6 Hearing), Conclusion of Law 5, at 2.

Issues Pertaining to Assignments of Error

1. Did the trial court err by concluding the heroin was admissible under the inevitable discovery doctrine after concluding the original search of the appellant's van incident to her arrest for driving with a suspended license was unlawful?

2. Did the trial court err by concluding the inventory search of the appellant's van before the van was impounded lawful?

3. Did the trial court err by concluding the impoundment of the van was lawful?

4. Did the trial court err by concluding the heroin, which was found during the inventory search, admissible?

B. STATEMENT OF THE CASE

Whatcom County Deputy Sheriff Ryan Rathbun stopped the van Paige C. Volkart was driving after he observed the van turn right while the left turn signal was blinking. RP 8-9, 12. Volkart stopped the van completely off the roadway "on the less travelled portion of the Smith Road." RP 13, 23, 31. Volkart was within two blocks of her mother's home, which was just down Smith Road. RP 34, 47.

Volkart produced her driver's license upon Rathbun's request, and at the same time said the license was suspended. After Rathbun confirmed

this fact, he had Volkart step out the van, handcuffed her, and arrested her for driving with a suspended license. RP 13, 31-32.

Rathbun placed Volkart inside his patrol car and then searched the van's passenger area incident to the arrest. RP 16-17. He testified that at the time, it was the standard practice within his department to search incident to arrest. RP 17-18. He also "anticipated having to do an inventory for the impound of the vehicle." RP 17. During the search, Rathbun found about 10 syringes and two scales. On each scale Rathbun found brown residue that field-tested positive for heroin. RP 18-21.

Rathbun learned the van's registered owner was a Mr. Hernandez. RP 16, 21-22, 22, 39-40. Volkart told Rathbun she bought the van three weeks earlier. Rathbun could not recall whether Volkart produced a bill of sale, registration, or title for the van. RP 16, 32, 39. Rathbun "made an attempt to try and locate [Hernandez's] number and contact them," but was not able to make contact. RP 22, 29. The van had apparently not been reported stolen, however, because Rathbun also tried several times without success to contact Volkart's mother to take the van home. RP 22, 36.

Rathbun testified Volkart indicated concern for her property inside the van. RP 22. He impounded the van because he "didn't want to leave it there as an abandoned vehicle." In addition, his department's policy

mandated impoundment if attempts to locate either a third party or registered owner were not successful. RP 23-24.¹ Rathbun did not decide to impound the van until after he had already searched it incident to arrest. RP 35.

Because the van was being impounded, Rathbun again searched the interior to identify any property of value and list it on an inventory sheet. This "inventory search" protects police from accusations of theft or disposal of personal property. RP 26. Rathbun conducted the search in the same manner and in the same area as the earlier search incident to arrest. He testified he would have found the syringes and scales during the inventory search if he had not first found them in the search incident to arrest. RP 27.

Volkart told Rathbun at the scene that the electronic scale was hers and that she used it to weigh beads. One of the syringes was also hers. Volkart said she was not a diabetic and had not used heroin for four years.

¹ Rathbun testified, "It's standard procedure to remove the vehicle from the roadway, however we attempt to contact either a third party or registered owner to pick up the vehicle. When that's not able to be done we have it towed and impounded." RP 23-24. This testimony indicates the Whatcom County Sheriff's Office policy is to try to contact either a third party or the registered owner before impounding the vehicle. Hence the assignment of error as to Finding of Fact 7, which is that the sheriff's office policy requires impoundment when the driver is not the registered owner and is arrested for DWLS.

RP 28. She denied the drug residue on the scales belonged to her and said the other syringes and the residue must have belonged to another person she once permitted to stay in the van. RP 28-29, 33-34.

In many respects, Volkart's testimony was consistent with Rathbun's. She permitted a homeless couple to stay in her van one rainy night and said the "mess" inside the vehicle was not all hers. RP 43, 45-46. He said her syringe was a "big bulb" type that she used to treat an ear infection. RP 46. She parked the van safely off the roadway and asked Rathbun to leave the van because her mother lived "two or three driveways" down the road. RP 47.

The trial court heard the above testimony in a pretrial suppression hearing held after Volkart filed a motion to suppress the heroin residue. CP 28-36. By the time of the hearing, the United States Supreme Court had issued its decision in Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Consistent with Gant, the trial court found the search incident to arrest invalid. Supp. CP ___ (sub. no. 43, Findings and Conclusions: 3.6 Hearing) at 2; RP 76-78.

In so ruling, the court rejected the state's argument that Rathbun's search incident to arrest should be authorized because he acted in good faith under the pre-Gant law that existed at the time of the search. RP 66-

70, 73-74 (argument), RP 76-78 (court). But the court went on to find Rathbun would have inevitably discovered the same incriminating evidence during the valid inventory search that preceded the lawful impoundment of the van. Supp. CP ___, at 2; RP 78-82.

Volkart waived her right to a jury trial and stipulated that the trial court could determine her guilt or innocence based on the police and laboratory reports. CP 16-17, RP 85-94. The trial court rejected Volkart's unwitting possession defense and found her guilty. Supp. CP __ (sub no. 44, Findings and Conclusions: Stipulated Bench Trial, filed November 23, 2009) (attached as appendix B); RP 94-99. The court imposed a standard range sentence. CP 18-27.

C. ARGUMENT

1. THE SECOND, OR "INVENTORY," SEARCH OF VOLKART'S VAN VIOLATED HER STATE CONSTITUTIONAL RIGHT TO PRIVACY.

The "inevitable discovery" exception to the warrant requirement does not exist in Washington. And while an inventory search is a recognized exception, it may be undertaken only where there is no reasonable alternative to impoundment. In Volkart's case, a reasonable alternative existed; therefore the inventory search exception cannot justify the warrantless search.

a. There is no inevitable discovery exception in Washington.

Subject to narrow exceptions, warrantless searches and seizures are per se unreasonable and violate the Fourth Amendment and article I, section 7 of the Washington Constitution. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The state bears the burden of proving a warrantless search falls within an exception to the warrant requirement. State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). Courts review de novo a trial court's determination that a warrantless search was valid. State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007).

Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision affords Washington citizens greater protection of privacy rights than the Fourth Amendment. State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). The provision recognizes privacy rights without express limitations. State v. Ladson, 138 Wn.2d 343, 348-49, 979 P.2d 833 (1999). Whenever the government violates this right, the remedy of exclusion of evidence seized must follow. State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009).

The Court in Winterstein held the inevitable discovery exception to the exclusionary rule does not comport with article I, section 7. 167

Wn.2d at 636. In short, there is no inevitable discovery rule in Washington. This Court is bound by the Winterstein Court's clear pronouncement. State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009). Because the trial court relied on the inevitable discovery rule to deny Volkart's motion to suppress evidence, this Court must reverse.²

Volkart anticipates the state may argue Winterstein should be applied prospectively only. This Court should reject such an argument. Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (new rule for conduct of criminal prosecutions applies retroactively "to all cases, state or federal, pending on direct review or not yet final"); In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 330, 823 P.2d 492 (1992) (new rule applies to all cases not yet final when rule is announced). A rule is new if reasonable jurists could have disagreed on the law before the opinion is announced. State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (citing Beard v. Banks, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004)), cert. denied, 546 U.S. 983 (2005); see Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) ("case

² Because the Supreme Court found the "inevitable discovery" doctrine incompatible with article I, section 7, Volkart assigned error to the trial court's finding of fact 9 and conclusion of law 4, which were based on inevitable discovery.

announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.").

As the Winterstein Court noted, the Court of Appeals had adopted the federal inevitable discovery rule with modifications. 167 Wn.2d at 634-35 (citing State v. Avila-Avina, 99 Wn. App. 9, 17, 991 P.2d 720 (2000); State v. Reyes, 98 Wn. App. 923, 930, 933, 993 P.2d 921 (2000); State v. Richman, 85 Wn. App. 568, 577, 933 P.2d 1088 (1997)). That these cases drowned in the wake of Winterstein indicates disagreement among reasonable jurists. Winterstein should therefore apply retroactively to Volkart's case.

b. The search was not a reasonable inventory search.

The state may also attempt to distinguish Winterstein, as the Court of Appeals did in State v. Morales, __ Wn. App. __, __ P.3d __, 2010 WL 118340 (2010). In that case, Morales was detained after crashing his vehicle into a car and leaving the accident scene. 2010 WL 118340 at *1. Morales smelled of alcohol and had watery eyes. Id. at *2.

From outside Morales's vehicle, an officer saw two beer cans in open view on the front seat. Id. at *2, *8. After Morales left in an ambulance, the officer searched his vehicle and found three additional beer containers behind the front seat. The officer then impounded the disabled

vehicle and inventoried the items found inside according to normal police procedure. Id. at *2, *9. The state charged Morales with several traffic-related offenses, including driving under the influence and vehicular assault. Id. at *3.

The trial court held the search was not justified as incident to arrest because Morales was at the hospital during the search. Id. at *3, *8. But the court ruled the two beer containers on the front seat were admissible under the open view exception. And the three found behind the front seat were admissible because they would have been inevitably discovered during impoundment of Morales's vehicle and the inventorying of its contents. Id. at *3, *8-*9.

The appellate court affirmed, holding Winterstein was not dispositive because the inventory search and impound were lawful and not in response to the discovery of the three beers found behind the front seat during the invalid search incident to arrest. Id. at *9. The court found the impound lawful under RCW 46.55.113(1), which authorizes summary impoundment whenever (1) a driver is arrested for DUI, and (2) there is probable cause to believe the vehicle was used in the commission of a felony (vehicular assault). Id. at *9.³

³ RCW 46.61.113 provides in pertinent part as follows:

For the reasons that follow, Volkart urges this Court to reject Morales. First, Morales ignores a sufficient body of pertinent case law. More importantly, the Morales court failed to determine whether there were reasonable alternatives to impoundment and an inventory search.

Second, Morales is distinguishable. In that case, officers had probable cause to believe the car was used to commit vehicular assault, thus making Morales's vehicle itself an important item of evidence. Morales, 2010 WL 118340 at *9. Morales's disabled and heavily damaged car was found parked "on the side of the road," with its front bumper severed off, the hood sticking up and steam coming from the engine. Id.,

(1) Whenever the driver of a vehicle is arrested for a violation of RCW 46.61.502, 46.61.504 [DUI], 46.20.342, or 46.20.345 [driving while license suspended], the vehicle is subject to summary impoundment, pursuant to the terms and conditions of an applicable local ordinance or state agency rule at the direction of a law enforcement officer.

(2) In addition, a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances:

...

(d) Whenever the driver of a vehicle is arrested and taken into custody by a police officer;

...

(g) Upon determining that a person is operating a motor vehicle without a valid and, if required, a specially endorsed driver's license or with a license that has been expired for ninety days or more[.]

at *1. Finally, the record does not indicate where Morales's car ended up in relation to his or a relative's house. In contrast to the circumstances in Volkart's case, the dangerous condition of Morales's car and its unspecified location "on the side of road" made leaving the car where it stopped an unreasonable alternative.

More generally, an inventory search after a lawful impoundment of a vehicle is a recognized exception to the general rule requiring a warrant. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996); State v. Bales, 15 Wn. App. 834, 835, 552 P.2d 688 (1976), review denied, 89 Wn.2d 1003 (1977). An officer may not, however, resort to an inventory search as a way to make a general exploratory search of a vehicle without a search warrant. State v. White, 135 Wn.2d 761, 770, 958 P.2d 982 (1998) (citing State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968)).

The first inquiry, then, is whether the state can show reasonable cause for the impoundment. State v. Houser, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980). A motor vehicle may be lawfully impounded if: (1) the officer has probable cause to believe it was stolen or used to commit a felony, (2) it impedes traffic, poses a threat to public safety, or is itself threatened by vandalism or theft of its contents, and neither the defendant

nor his spouse or friends are available to move the vehicle; and (3) if the driver has committed one of the traffic offenses for which the Legislature has specifically authorized impoundment. State v. Simpson, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980).

In Volkart's case, neither the first nor second justification for an impound was present. First, Officer Rathbun had no probable cause to believe the van was stolen or used to commit a felony. The vehicle's registered owner was a Mr. Hernandez. RP 16-21, 22, 39-40. Volkart told Rathbun she bought the van three weeks earlier, but Rathbun could not recall whether Volkart produced a bill of sale, registration, or title for the van. RP 16, 32, 39. Rathbun was unable to contact Hernandez. RP 22, 29. The van had apparently not been reported stolen, however, because Rathbun tried to contact Volkart's mother to take the van home.

With respect to the second justification, Volkart's van was completely off the roadway "on the less travelled portion of the Smith Road." RP 13, 23, 31. The van was near Volkart's mother's house. RP 34, 47. Rathbun testified Volkart indicated concern for her property inside the van. RP 22. Although Rathbun he said he impounded the van because he "didn't want to leave it there as an abandoned vehicle[,]" he did not say the van was threatened by vandalism or theft of its contents. RP 23. See

State v. Williams, 102 Wn.2d at 743 (rejecting this rationale, observing that "[t]he vehicle could have been moved to the side of the street, parked and locked."); State v. Houser 95 Wn.2d at 152 (justification does not apply because state did not show vehicle was impeding traffic or could not have been driven off trafficway while defendant was in police custody). .

Under the third justification, Rathbun had statutory authority under RCW 46.55.113 to impound the van because he took Volkart into custody for driving with a suspended license. RCW 46.55.113 however, merely grants discretionary authority to impound; it does not require an officer to seize the affected vehicle. In re Impoundment of Chevrolet Truck, WA License No.A00125A ex rel. Registered/Legal Owner, 148 Wn.2d 145, 153-155, 60 P.3d 53 (2002).

Impoundment under this "traffic regulations" exception, however, is not reasonable if reasonable alternatives exist. State v. Barajas, 57 Wn. App. 556, 561-62, 789 P.2d 321, review denied, 115 Wn.2d 1006 (1990). The state bears the burden of showing an impoundment is reasonable. State v. Hardman, 17 Wn. App. 910, 912, 567 P.2d 238 (1977), review denied, 89 Wn.2d 1020 (1978). Whether a particular impoundment is reasonable is determined by the facts of each case. State v. Greenway, 15 Wn. App. 216, 219, 547 P.2d 1231, review denied, 87 Wn.2d 1009 (1976).

In Volkart's case, there was a reasonable alternative to impoundment. As stated, Volkart's van was safely parked off the roadway. In addition, the van was in Volkart's neighborhood. Rathbun believed Volkart told him her mother lived about two blocks away. RP 34-35. Volkart testified her mother lived only "two or three driveways down." RP 47. She emphasized she "could have yelled to her" mother. RP 47. This testimony is supported by pretrial Exhibit 1, the impound report. Rathbun wrote on the report Volkart stopped her van on the "3500 Block E. Smith Rd" and listed Volkart's street address as "3765 E. Smith Rd." Ex. 1. Under the circumstances, the reasonable alternative would have been to leave the van parked where it was until Volkart could contact her mother.

At a minimum, Rathbun should have asked Volkart if she wanted to waive the protection of an inventory search and instead simply lock the van. "In Washington, an individual is free to reject the protection that an inventory search provides and take the chance that no loss will occur." State v. White, 135 Wn.2d 761, 771 n.11, 958 P.2d 982 (1998)." For this rule White cited State v. Williams, 102 Wn.2d at 743. The Williams Court held that even if impoundment was authorized, police could not have conducted a routine inventory search without first asking petitioner if

he wanted one done: "Clearly, a defendant may reject this protection, preferring to take the chance that no loss will occur." Williams, 102 Wn.2d at 743.

As in Williams, Rathbun gave Volkart no opportunity to reject whatever protection an inventory search may have provided. Instead, after Volkart expressed concern about the property she had in the van, the officer simply told her the property would be inventoried and she could recover it later from either the towing firm or the registered owner, Mr. Hernandez. RP 22-23. Therefore, even if the impound was reasonable, the inventory search was not. Absent the inventory search, the heroin residue found on the scale inside the van would have been suppressed because the initial discovery of the drug resulted from use of an unconstitutional search incident to arrest.

There is another reason to reverse the trial court's denial of Volkart's motion to suppress the heroin. Rathbun explained he searched the van incident to arrest because it was standard police practice and because he "anticipated having to do an inventory for the impound of the vehicle." RP 17. It was only after he found the syringes and scales, however, that he decided to impound the van and do the standard inventory search. RP 19-20, 35. Rathbun thus justified the impoundment

not on the reasons set forth in RCW 46.55.113, but rather on his tainted discovery of contraband found during the unlawful search incident to arrest. This post hoc rationalization does not justify an impound and resulting inventory search. See State v. Gant, 216 Ariz. 1, 7, 162 P.3d 640, 646 (Ariz. 2007) (because officers testified they decided to impound car only after they searched passenger compartment and found contraband, search cannot be characterized as inventory search), aff'd., 129 S. Ct. at 1723-24.

2. THE "GOOD FAITH" EXCEPTION DOES NOT SAVE THE SEARCH INCIDENT TO ARREST.

The state may contend Rathbun's unconstitutional search incident to Volkart's arrest should be excused because he acted in good faith under the case law as it existed before Gant. Volkart asks this Court to reject such an argument.

More specifically, there is a distinction between an officer's mistaken, but good faith belief that a law is valid and an officer's mistaken, but good faith belief that he is acting in conformity with one of the recognized exceptions to the warrant requirement. This Court has declined to apply the exclusionary rule in the former category, but has always applied the exclusionary rule in the latter. This case fits within the

latter category. The state's attempt to force a square peg into a round hole should be rejected.

Our Supreme Court first addressed the good faith exception in State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982). White was arrested for obstruction after lying to a policeman about where he lived. After a night in jail, White confessed to burglarizing a garage and stealing food. White, 97 Wn.2d at 95. The trial court found portions of the obstruction, or "stop-and-identify," statute unconstitutionally vague, however, and granted White's motion to suppress. White, 97 Wn.2d at 95.

On appeal, the Court agreed portions of the statute were unconstitutional. White, 97 Wn.2d at 100. In fact, before White, this Court affirmed a Court of Appeals decision invalidating a similarly worded statute on vagueness grounds. White, 97 Wn.2d at 102.

Despite the statute's unconstitutionality, the state asked this Court to reverse the suppression order based on the good faith exception recognized in Michigan v. DeFillippo, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). In DeFillippo, the Michigan Court of Appeals invalidated a stop-and-identify statute like the one at issue in White. People v. DeFillippo, 80 Mich. App. 197, 262 N.W.2d 921 (1977).

Because DeFillippo was arrested pursuant to the invalidated statute, the court ruled the arrest and search were invalid. Id.

The Supreme Court reversed, reasoning the officer should not have been required to anticipate a court would later hold the ordinance invalid:

On this record there was abundant probable cause to satisfy the constitutional prerequisite for an arrest. At that time, 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.

Approving of an earlier decision in a civil case, the Court stated: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." DeFillippo, 443 U.S. at 38 (quoting Pierson v. Ray, 386 U.S. 547, 555, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967)). The court concluded the purpose of the exclusionary rule was to deter unlawful police action and would not be served by suppressing evidence that was the product of a lawful arrest and search when found. DeFillippo, 386 U.S. at 38. As indicated, there was never a question that the officer had probable cause to arrest under the statute.

Turning to the state's request in White, this Court first found applicable the exception reserved in DeFillippo. White, 97 Wn.2d at 103-

04. As stated in DeFillippo:

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.

DeFillippo, 443 U.S. at 38.

Due to the Court's approval of the appellate court's decision invalidating a similarly worded statute, the White Court held a reasonable person would recognize the infirmities of the provision at issue and would be foreclosed from enforcing it. White, 97 Wn.2d at 104. As such, the evidence of White's burglary was found inadmissible. Id.

But White did not end there. Ordinances aside, the Court held all seizures were subject to the Fourth Amendment reasonableness test. White, 97 Wn.2d at 105. Applying that test, the Court held the officer's suspicion of criminal activity was reasonable. White, 97 Wn.2d at 105-06. The length of the detention, however, was not. White, 97 Wn.2d at 106. Accordingly, this Court held the stop-and-identify statute constituted an unwarranted extension of the "Terry"⁴ stop. White, 97 Wn.2d at 106-07.

⁴ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

In the final portion of White, the Court held the good faith exception was incompatible with the Washington Constitution:

The result reached by the United States Supreme Court in DeFillippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. As a remedial measure, evidence is excluded only when the purposes of the exclusionary rule can be served. This approach permits the exclusionary remedy to be completely severed from the right to be free from unreasonable governmental intrusions. Const. art. 1, § 7 differs from this interpretation of the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.

White, 97 Wn.2d at 110. Under our state constitution, therefore, the exclusionary rule applies whenever an individual's right to privacy is unreasonably invaded. White, at 112.

One could argue White's second and third holdings were dicta, because the Court first held the stop-and-identify statute fit within the DeFillippo exception as flagrantly unconstitutional. State v. Kirwin, 165 Wn.2d 818, 834, 203 P.3d 1044 (2009) (Madsen, J., concurring) ("On the one hand, it is arguable that the first section of the [White] opinion is dispositive[.]"). In later decisions, however, the Supreme Court relied on White's third holding to reject the good faith exception in other circumstances. See e.g. Morse, 156 Wn.2d at 9-10.

In Morse, the Court held the "apparent authority" exception of the Fourth Amendment does not exist under our state constitution. The Court noted the textual differences between the Fourth Amendment and article I, section 7. The Court observed the analysis under the Fourth Amendment focuses on whether the police have acted reasonably under the circumstances. Morse, 156 Wn.2d at 9.

In contrast, article I, section 7 focuses on the rights of the individual, rather than on the reasonableness of the government action:

Unlike in the Fourth Amendment, the word "reasonable" does not appear in any form in the text of article I, section 7 of the Washington Constitution. We have also 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 one of the recognized exceptions to the warrant requirement. State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) ("the language of our state constitutional provision ... shall not be diminished by ... a selectively applied exclusionary remedy."). We have also repeatedly held that article I, section 7 provides greater protection of individual privacy than the Fourth Amendment.

Morse, 156 Wn.2d at 9-10.

Accordingly, this Court held a police officer's good faith subjective belief that a consenting party has authority to consent cannot be used to validate a warrantless search under article I, section 7. Morse, 156 Wn.2d at 12.

The Court reiterated its rejection of the good faith exception in State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008). At issue was the private search doctrine and alternatively, the officers' good faith belief that a repairman had authority to consent to a search of Eisfeldt's home. Eisfeldt, 163 Wn.2d at 635-66.

The Court held the private search doctrine inapplicable under our state constitution. Eisfeldt, 163 Wn.2d at 636-38. More importantly, the Court rejected the state's alternative argument that the police reasonably believed the repairman had authority to consent to the search:

Furthermore the police officers' reasonable belief that [the repairman] had authority to consent to the search is irrelevant. The State argues the officers' reasonable belief provides a good-faith exception to the warrant requirement. But unlike the Fourth Amendment, article I, section 7 "focuses on the rights of the individual rather than on the reasonableness of the government action." Morse, 156 Wn.2d at 12, 123 P.3d 832. Rejecting an exception to the warrant requirement based on apparent authority to consent, we have indicated, "while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7, we focus on expectations of the people being searched and the scope of the consenting party's authority." Id. at 10, 123 P.3d 832. The detective's beliefs, no matter how reasonably held, cannot be used to validate a warrantless search under the Washington Constitution.

Eisfeldt, 163 Wn.2d at 639.

The Court reiterated that unlike article I, section 7, the Fourth Amendment allows good-faith exceptions to the warrant requirement. Eisfeldt, 163 Wn.2d at 639, n.10 (citing Morse, 156 Wn.2d at 9).

Between Morse and Eisfeldt came State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), and State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2007). At first blush, these cases appear inconsistent with the Court's rejection of the good faith exception in Morse and Eisfeldt. Upon closer inspection, however, Potter and Brockob are inapposite.

In Potter, the Court held its decision in Redmond v. Moore, invalidating portions of the driving while license suspended statute, did not retroactively render invalid an officer's probable cause arrest for a violation of that statute. The Court reasoned that information from Department of Licensing records provided officers with reasonably trustworthy information to establish probable cause to believe the petitioners' licenses were suspended. The later invalidation of some of the license suspension procedures did not void the probable cause that existed to arrest petitioners for the crime of DWLS. Potter, 156 Wn.2d at 842.

In rejecting the petitioner's contrary argument, the Court also clarified its holding in White:

Petitioners rely on State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), where we recognized a narrow exception to the

general rule that police are charged to enforce laws until and unless they are declared unconstitutional. Under this general rule, an arrest under a statute that is valid at the time of the arrest and supported by probable cause remains valid even if the basis for the arrest is later held unconstitutional. The rule comes from . . . Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979), that “[t]he 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.”

Potter, 156 Wn.2d at 842-43.

As the Potter Court explained, it excluded the burglary evidence in White, based on the exception to the general rule in DeFillippo for flagrantly unconstitutional statutes. Because there were no cases at the time of Potter’s arrest holding that license suspension procedures generally are unconstitutional, the DeFillippo exception did not apply in Potter’s case. Potter, 156 Wn.2d at 843.

In Brockob, one of the consolidated petitioners, Dusten Gonzales, also argued his arrest was unlawful due to the later invalidation of the DWLS statute. Gonzales asserted that by supporting an officer’s authority to arrest based on a statute later declared invalid, the State was effectively urging the court to adopt a good faith exception to the exclusionary rule in violation of the privacy rights granted under our state constitution. As

support, Gonzales cited Division Two's decision in State v. Nall, 117 Wn. App. 647, 72 P.3d 200 (2003). Brockob, 159 Wn.2d at 341, n.19.

The Court rejected Gonzales's argument because the situation in Nall was different. There Oregon authorities knew the arrest warrant was invalid before it was served, and their knowledge bound the arresting officers and deprived them of probable cause. Brockob, 159 Wn.2d at 342, n.19.

In contrast, Officer Black indisputably had probable cause at the time of he arrested Gonzales. Only after the arrest did the Court eliminate the basis for the arrest. Gonzales sought to suppress the evidence derived from the arrest because the legal circumstances changed after the fact. Brockob, 159 Wn.2d at 342, n.19. Gonzales relied primarily on White for his argument. But as the state correctly pointed out, White held 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 or a prior dispositive judicial holding that it may not serve as the basis of a valid arrest." White, 97 Wn.2d at 103. Brockob, 159 Wn.2d at 342, n.19.

Thus, the Supreme Court has recognized a distinction under our state constitution between an officer's mistaken, but good faith belief in

the validity of a law he is enforcing within constitutional dictates and an officer's mistaken, but good faith belief he is acting within constitutional dictates. As the Court stated in DeFillippo regarding the former scenario, "the enactment of a law forecloses speculation by enforcement officers concerning its constitutionality." DeFillippo, 443 U.S. at 38.

But the same is not true when an officer mistakenly believes he is acting within constitutional dictates. Warrantless searches and seizures are generally unconstitutional. The state bears the burden of proving a warrantless search and seizure is justified by probable cause or some other jealously and carefully drawn exception to the warrant requirement. When an officer intrudes into a Washington citizen's privacy interests without a warrant, it makes sense he must do so cautiously. For example:

"Authority" to consent is a matter of status or control and a question of law. The subjective beliefs and understandings of law enforcement officers are irrelevant to the question of "authority." Law enforcement officers, who seek to conduct a warrantless search based upon the exception of consent, are well advised to ask for the woman and/or man of the house before seeing consent to search a home. If the man or woman of the house is not present, a brief inquiry could determine the identity of the person present and their authority to give consent; this would give police officers the information needed to properly proceed and to assure protection of constitutional rights.

Morse, 156 Wn.2d at 5. The exclusionary rule thus applies when an officer acts without authority of law, regardless of his subjective beliefs.

Turning to Volkart's case, Rathbun believed he was authorized to search the van incident to Volkart's arrest. He was mistaken, however, under Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), as well as pre-Gant law.

Well before Gant, the United States Supreme Court held a search incident to arrest may only include the arrestee's person and "the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed.2d 685 (1969). If it is not possible for an arrestee to reach into the area police seek to search, neither justification for the search-incident-to-arrest exception – officer safety or evidence preservation – exist and the exception to the warrant requirement does not apply. Preston v. United States, 376 U.S. 364, 367-68, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964).

Following Chimel, the Supreme Court considered the search-incident-to-arrest exception in the automobile context. New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). The Court held when an officer lawfully arrests the occupant of an automobile, he may contemporaneously search the passenger compartment and containers therein. Belton, 453 U.S. at 460.

As the Court recently observed, Belton “has 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.” Gant, 129 S. Ct. at 1718. But as the Gant Court explained, Belton's unusual facts drove its opinion.

A lone police officer stopped a speeding car in which Belton was one of four occupants. While asking for the driver's license and registration, the officer smelled burnt marijuana and observed an envelope marked “Supergold” – a name the officer associated with marijuana. Having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees, the officer split them up into four separate areas to prevent them from touching each other, searched the car, and found marijuana and cocaine. Belton, 453 U.S. at 455-56.

The Gant Court emphasized that “[t]here was no suggestion by the parties or amici that Chimel authorizes a vehicle search incident to arrest when there is no realistic possibility that an arrestee could access his vehicle.” Gant, 129 S. Ct. at 1717.

Thus, the Gant Court clarified that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. Gant, 129 S. Ct. at 1714. On the contrary, "the Chimel rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Gant, 129 S. Ct. at 1719.

Consistent with its holding in Thornton v. United States,⁵ however, the Court also held that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe evidence of the offense of arrest might be found in the vehicle. Gant, 129 S. Ct. at 1719. The Court recognized that in many cases, as when a recent occupant is arrested for a traffic violation, however, there will be no reasonable basis to believe the vehicle contains relevant evidence. Gant, at 1719.

Gant therefore highlights the unwarranted expansion of Chimel that occurred post-Belton. In short, Chimel announced the general rule for searches incident to arrest, while Belton was based on a factual distinction that only coincidentally involved the search of a vehicle.

⁵ 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004).

Gant makes this clear. The Court stated it was not changing the search-incident-to-arrest exception, but merely clarifying that courts had misinterpreted Belton by giving it an overly broad reading:

To read Belton as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the Chimel exception – a result clearly incompatible with our statement in Belton that it “in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests.” 453 U.S., at 460, n. 3, 101 S. Ct. 2860. Accordingly, we reject this reading of Belton and hold that the Chimel rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Gant, 129 S. Ct. at 1719.

In other words, the post-Belton belief that officers were entitled to search a vehicle's interior whenever they arrested a driver for any offense and wherever an arrestee was located during the search ignored the seminal holding in Chimel. Put simply, the belief was not in good faith. As applied to Volkart's case, Rathbun's search of the van incident to arrest for driving with a suspended license cannot be justified by the good faith exception.

This conclusion is buttressed by a review of lower court cases. See Gant, 129 S. Ct. at 1719, n.2 (comparing United States v. Green, 324 F.3d 375, 379 (5th Cir. 2003) (holding Belton did not authorize a search of an

arrestee's vehicle when he was handcuffed and lying facedown on the ground surrounded by four police officers 6-to-10 feet from the vehicle), with United States v. Weaver, 433 F.3d 1104, 1106 (9th Cir. 2006) (upholding a search conducted 10-to-15 minutes after an arrest and after the arrestee had been handcuffed and secured in the back of a patrol car)).

The same is true in Washington. The facts of each case are determinative: "Police officers will have to determine whether a vehicle that the arrestee has recently occupied is within the area of the arrestee's immediate control at the time they initiate the arrest." State v. Porter, 102 Wn. App. 327, 334, 6 P.3d 1245 (2000). Other pre-Gant Washington cases also militate against application of a "good faith" exception in Volkart's case.

In State v. Rathbun,⁶ police had no legal authority to search a defendant's truck after the defendant, who had been working under the hood of the truck, ran 40 feet to 60 feet before he was arrested. The Court held the truck was not within the defendant's control because, from a distance of at least 40 feet, the defendant had no opportunity to destroy evidence or obtain a weapon from within the truck. Rathbun, 124 Wn. App. at 378.

⁶ 124 Wn. App. 372, 378, 101 P.3d 119 (2004).

In another case, the defendant and a companion parked their car in a store parking lot shortly after allegedly robbing a youth. Johnston, 107 Wn. App. 280, 282, 288, 28 P.3d 775 (2001), review denied, 145 Wash.2d 1021 (2002). They left the car, closed the doors and went into the store. When they left the store, they walked toward and past their car as well as officers who has arrived to investigate the robbery allegation. Johnston, 107 Wn. App. at 282-83. The officers arrested the men in the “immediate vicinity” of their car. Johnston, 107 Wn. App. at 283. One officer searched the defendant and found keys to the car, suspected methamphetamine, and cash. Johnston, 107 Wn. App. at 283. Officers then searched the car and found a larger quantity of methamphetamine. Johnston, 107 Wn. App. at 283.

On review, the court rejected a claim the car search was valid as incident to arrest. The court found because the arrest occurred in the unspecified “immediate vicinity of the car,” the state failed to show the men had sufficient control of the car’s passenger compartment. Johnston, 107 Wn. App. at 288.

State v. Quinlivan⁷ and State v. Webb⁸ are in accord. In the former, the court found a search incident to arrest invalid where an officer

⁷ 142 Wn. App. 960, 176 P.3d 605, review denied, 164 Wn.2d 1031

arrested a driver only after the driver left his vehicle, locked the door, and sat on a nearby curb. Quinlivan, 142 Wn. App. at 970-71. By that time, the court held, the driver no longer has access to the passenger compartment of his car. Id.

In Webb, the trial court's findings did not articulate Webb's proximity to either the passenger compartment or his vehicle at the time of his arrest. Webb, 147 Wn. App. at 270. Calling this "a critical fact," this Court found that without the finding, the state failed to show the search of Webb's vehicle incident to his lawful arrest fell within an exception to the warrant requirement. Id.

Finally, even under the Fourth Amendment, the Ninth Circuit has refused the state's invitation to apply the good faith exception to circumstances such as these, because it would undermine the rule that a decision construing the Fourth Amendment must apply retroactively to all convictions that were not yet final when the decision was made. United States v. Gonzales, 578 F.3d 1130, 1132 (2009). Because Gant was decided before Volkart's case became final, it applies retroactively here as well.

(2008).

⁸ 147 Wn. App. 264, 195 P.3d 550 (2008).

In summary, the exclusionary rule applies when police incorrectly apply an exception to the warrant requirement. Here there was an incorrect application of the search incident to arrest exception, even under the law before Gant. Rathbun therefore did not have a good faith basis to believe he properly searched Volkart's van incident to arrest. The heroin residue found inside the van must therefore be suppressed.

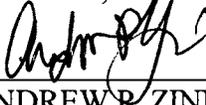
D. CONCLUSION

There is no inevitable discovery rule under article I, section 7. Furthermore, there were reasonable alternatives to impounding Volkart's van, thus rendering the inventory search invalid. Finally, the trial court was correct in finding the search incident to arrest unlawful, as it may not be excused by the good faith exception to the warrant requirement. For these reasons, the trial court erred by failing to suppress the heroin found in Volkart's van. Without the heroin, the conviction cannot stand. This court should therefore reverse the trial court's denial of Volkart's motion to suppress and remand for dismissal of her conviction with prejudice.

DATED this 17 day of March, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER
WSBA No. 18631
Office ID No. 91051

Attorneys for Appellant

APPENDIX A

SCANNED 2

FILED

NOV 23 2009

WHATCOM COUNTY CLERK

By: M

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

15	THE STATE OF WASHINGTON,)	
)	No.: 09-1-00301-0
17	Plaintiff.)	
)	
19	vs.)	FINDINGS AND CONCLUSIONS: 3.6
)	HEARING
21	PAIGE CHRISTINE VOLKART,)	
)	
23	Defendant.)	

I. FINDINGS OF FACT:

1. On March 11th, 2009 Officers conducted a traffic stop of a vehicle seen driving in Whatcom County.
2. Paige Volkart was the driver and sole occupant of the van.
3. A records check showed that Volkart's license was suspended, and she was arrested for that crime.
4. After Volkart was arrested, the deputy conducted search of the van incident to the arrest. This search consisted of a visual and "hand search" of the passenger compartment of the vehicle.
5. During this search, the deputy found ten syringes, a heroin kit and a functioning scale containing a brown residue. The residue field-tested positive for the presumptive presence of heroin, and is the basis for the instant charge.
6. Volkart claimed ownership of the van, but it was registered to a Simon J. Hernandez.
7. The deputy was not able to contact Simon J. Hernandez.

STATE'S RESPONSE TO MOTION TO SUPPRESS

43

Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
(360) 676-6784
(360) 738-2532 Fax

- 1 7. Whatcom County Sheriff's Office policy mandates that when a driver is arrested for driving
3 while license is suspended and that driver is not the registered owner of the car, the car must be
5 impounded.
7 8. Whatcom County Sheriff's Office policy further mandates that prior to impound, the deputy
9 conduct an inventory search of the vehicle.
11 9. Pursuant to this policy, the deputy conducted a visual and hand search of the passenger
13 compartment of the van Volkart had been driving. The scope of this search necessarily included
15 the area of the van in which the deputy found the drug kit and drug scale. The scale with residue
17 that is the basis of this charge would have been discovered during the inventory search had it not
19 been discovered during the search incident to arrest.
21 10. After the inventory search, the van was impounded to Johnson's towing.

19 **II. LEGAL CONCLUSIONS:**

- 21 1. The deputy's initial search of the van driven by Volkart incident to her arrest for DWLS was
23 not lawful.
25 2. The deputy's inventory search of the van driven by Volkart prior to its impound was lawful.
27 3. The deputy did not act unreasonably or attempt to accelerate discovery.
29 4. The deputy would have inevitably discovered the drug kit and scale with residue during the
31 inventory search had he not conducted the search incident to arrest.
33 5. The drug kit and the scale with residue are admissible.

31 DATED this 23 day of Nov. ~~October~~, 2009.

37 IRA J. UHIG
39 Superior Court Judge.

41 Prepared by:

43 JAMES T. HULBERT, WSBA #27399
45 Deputy Prosecuting Attorney

Copy Received.

LANCE HENDRIX
Attorney for Volkart

APPENDIX B

SCANNED 2

FILED

NOV 23 2009

WHATCOM COUNTY CLERK
By: M

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,

Plaintiff.

vs.

PAIGE CHRISTINE VOLKART,

Defendant.

No.: 09-1-00301-0

FINDINGS AND CONCLUSIONS:
STIPULATED BENCH TRIAL

I. FINDINGS OF FACT:

1. On March 11th, 2009 Officers conducted a traffic stop of a van seen driving in Whatcom County.
2. Paige Volkart was the driver and sole occupant of the van.
3. A records check showed that Volkart's license was suspended, and she was arrested for that crime.
4. After Volkart was arrested, the deputy conducted search of the van. This search consisted of a visual and "hand search" of the passenger compartment of the vehicle.
5. During this search, the deputy found ten hypodermic syringes, a heroin kit and a functioning scale containing a brown residue.
6. Volkart claimed ownership of one of the syringes. She also claimed ownership of the scale.
7. Testing at the Washington State Crime lab established that the brown residue on the scale contained heroin.

STATE'S RESPONSE TO MOTION TO SUPPRESS

Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
(360) 676-6784
(360) 738-2532 Fax

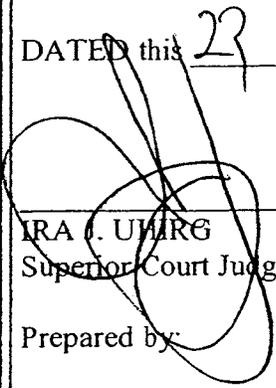
44

1
3
5
7
9
11
13
15
17
19
21
23
25
27
29
31
33
35
37
39
41
43
45
47

II. LEGAL CONCLUSIONS:

1. The state has proven beyond a reasonable doubt that on March 11, 2009, Paige Volkart was in possession of the scale containing the brown residue.
2. The state has proven beyond a reasonable doubt that the residue on said scale contained heroin.
3. Paige Volkart is guilty of the crime of Unlawful Possession of a Controlled substance, to wit: heroin, as charged in Count I of the information.

DATED this 23 day of November, 2009.



IRA J. ULLRICH
Superior Court Judge.

Prepared by:

JAMES T. HULBERT, WSBA #27399
Deputy Prosecuting Attorney

Copy Received.

LANCE HENDRIX
Attorney for Volkart

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64191-3-I
)	
PAIGE VOLKART,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JAMES HULBERT
WHATCOM COUNTY PROSECUTOR'S OFFICE
SUITE 201
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] PAIGE VOLKART
3765 E SMITH RD
BELLINGHAM, WA 98226

2010 MAR 17 PM 4:01
COURT OF APPEALS
STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF MARCH, 2010.

x *Patrick Mayovsky*