IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRIAN EDWARD BRIDGES, Appellant.	No. 40765-5-II UNPUBLISHED OPINION

Penoyar, C.J. — Brian Edward Bridges appeals his conviction for possession of methamphetamine and use of drug paraphernalia. He contends that the trial court erred by failing to grant his pretrial suppression motion. He also raises a new argument on appeal contending that the post-arrest search of his vehicle was improper under *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), and he contingently argues that his trial counsel was ineffective. We affirm.

Facts

On May 12, 2009, Bridges was driving his Camaro on Mossyrock Road West in Lewis County. RP (4-19-10) at 35-36. As he approached Mossyrock Police Officer Jeremy Stamper's residence, Stamper was in his patrol car leaving his circular driveway. Stamper observed that the Camaro appeared to be going faster than the 35 miles per hour posted speed limit. When the driver of the vehicle saw Stamper's patrol car, he braked the Camaro sharply. As the Camaro passed Stamper, he noticed that the year tab on the Camaro's license plate had expired in 2006.

As Stamper drove his patrol car onto the roadway, the Camaro turned into the other end of Stamper's circular drive and stopped. Stamper turned on his emergency lights and parked behind the Camaro. Stamper approached the Camaro and recognized the driver as Bridges. There was also a female passenger in the front seat. When Stamper told Bridges that he stopped the Camaro because of expired tabs, Bridges explained that he had just purchased the car and knew that the tabs were expired. Stamper asked for Bridges's driver's license and registration, but Bridges had neither. Stamper then ran a license and registration check. Bridges had a valid driver's license, but the check revealed that the car's registration had expired in 2002. Given the discrepancy between the registration's 2002 expiration and the license tab's 2006 expiration, Stamper returned to the car to get the vehicle identification number (VIN), but there was no VIN visible.

As Stamper returned to the Camaro after running the check, Washington State Trooper Nathan Hovinghoff arrived on the scene and stood by the Camaro's passenger door. Hovinghoff observed the next interaction between Stamper and Bridges. When Stamper returned to talk with Bridges, he saw a small plastic baggie (bindle 1) on the driver's side floorboard.[1] Stamper asked Bridges what was in bindle 1, and Bridges replied that it was empty and, unprompted, handed it to Stamper. Stamper observed a small amount of translucent crystalline material in bindle 1, consistent with methamphetamine. Stamper "alert[ed]" Hovinghoff about bindle 1. Report of Proceedings (Feb. 10, 2010) at 20.

[1] Stamper described bindle 1 as a one inch by one inch plastic Ziploc baggie.

Stamper still thought that the vehicle might be stolen, and he continued to look for a VIN. He found no VIN on the vehicle's dash, and he opened the driver's door to see if the VIN was on the inspection plate. As he knelt down, he set bindle 1 on the floorboard behind the driver's seat. Stamper found nothing, and then walked around to the passenger's side and opened that door to look for an inspection sticker.

As Stamper moved to the passenger's side, Trooper Hovinghoff moved to the driver's side and picked up bindle 1 from the back floorboard where Stamper had set it down. Hovinghoff observed white crystals in bindle 1and field tested it. The contents of bindle 1 tested positive for methamphetamine. Hovinghoff arrested Bridges and put him in the back of his patrol car.

After arresting Bridges, Hovinghoff searched the Camaro and found another small plastic baggie (bindle 2) containing white crystal residue, later verified to be methamphetamine, on the floorboard behind the passenger's seat. Hovinghoff transported Bridges to jail, and an intake search revealed a syringe and a small baggie with methamphetamine residue (bindle 3) in Bridges's clothing.

The state charged Bridges with possession of a controlled substance (methamphetamine) in count I and use of drug paraphernalia in count II. At a pretrial CrR 3.6 hearing, Bridges moved to suppress the physical evidence (bindles 1, 2, and 3 with methamphetamine residue and one syringe), arguing that Hovinghoff lacked authority to reach into the car after Stamper set bindle 1 down behind the driver's seat.

The trial court denied the motion to suppress, and entered findings of fact and conclusions of law. The post-arrest search of Bridges's Camaro was not argued at the suppression hearing, and, thus, the findings and conclusions did not address that search. A jury convicted Bridges as charged. Bridges appeals.

analysis

I. Warrantless Vehicle Search (Bindle 1)

Focusing on Trooper Hovinghoff's retrieval of bindle 1 from the back floorboard behind the driver's seat, Bridges first argues that Hovinghoff's warrantless search violated Bridges's right to privacy under Washington Constitution article 1, section 7, and his Fourth Amendment right to be free of unreasonable searches and seizures. He contends that because Hovinghoff's search was improper, all evidence following that event must be suppressed. We disagree.

When a party claims state and federal constitutional violations, we look first at the state constitution. *State v. Patton*, 167 Wn.2d 379, 385, 219 P.3d 651 (2009). "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. 1, § 7. Washington courts recognize a privacy interest in automobiles and the contents therein. *Patton*, 167 Wn.2d at 385. Under article I, section 7, "a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement." *Patton*, 167 Wn.2d at 386. Even where probable cause to search exists, a warrant must be obtained unless excused under one of a narrow set of exceptions to the warrant requirement. *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). Washington courts recognize exceptions for consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and investigative stops pursuant to *Terry v. Ohio*, 392 U.S. 1, 88

S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *Tibbles*, 169 Wn.2d at 369.

Relying on *Tibbles*, Bridges argues that there were no exigent circumstances justifying Hovinghoff's warrantless intrusion into the car.[2] But Bridges's argument ignores the context in which Hovinghoff's actions occurred, and, particularly, what immediately preceded Hovinghoff's act of picking up bindle 1.

Hovinghoff was part of the "police presence" on the scene; that is, he was the second of two officers conducting the traffic stop. The other officer, Stamper, observed bindle 1 in open view[3] on the driver's floorboard as he talked with Bridges. When Stamper asked what was in bindle 1, Bridges voluntarily handed the bindle to Stamper, unprompted. Thus, bindle 1 moved into police possession with Bridges's consent and without a search. Stamper alerted Hovinghoff to the presence of bindle1 and then continued to investigate whether the Camaro was stolen. In the process of doing so, Stamper set bindle 1 down in the back floorboard while he knelt down to

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[2] *Tibbles* stands for the notion that expediency is not exigency. *See Tibbles*, 169 Wn.2d at 371-73. In asserting exigent circumstances regarding the preservation of evidence, the State must establish the necessity for haste; that is, it must show that the destruction of evidence is imminent. *Tibbles*, 169 Wn.2d at 371.

[3] The open view doctrine applies when an officer observes a piece of evidence from a nonconstitutionally protected area. *State v. Jones*, 163 Wn. App. 354, 361, 266 P.3d 886 (2011).

> [I]f an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car. Because there has been no search, article [I], section 7 is not implicated. Once there is an intrusion into the constitutionally protected area, article [I], section 7 is implicated and the intrusion must be justified if it is made without a warrant.

Jones, 163 Wn. App. at 361(quoting *State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986)).

inspect the car's driver's side door frame. As Stamper walked around to the passenger door, Hovinghoff moved around to the driver's side and reached through the still open driver's door to retrieve bindle 1 that Stamper had set down on the back floorboard. Hovinghoff, as did Stamper, recognized the crystalline residue in bindle 1 as methamphetamine. He field tested the substance and arrested Bridges.

Bridges voluntarily and clearly relinquished control of bindle 1 to the police officers at the scene when he handed the bindle to Stamper. Notably, Stamper did not hand bindle 1 back to Bridges, but put it down out of Bridges reach, placing it in a convenient spot for himself as he continued his investigation of another matter. Hovinghoff, as part of the police presence on the scene, immediately picked up bindle 1 and proceeded to field test it.

Under these circumstances, we hold that Bridges voluntarily gave bindle 1 to police on the scene. Stamper did not relinquish control of bindle 1 back to Bridges by setting it down on the back floorboard in order to facilitate his investigation of another matter. Thus, Hovinghoff's act of picking up bindle 1, after Stamper had just set it down, did not amount to an improper warrantless search of Bridges's car. *See Jones*, 163 Wn. App. at 361 (where there has been no search, article 1, section 7 of the Washington State Constitution is not implicated).

II. Post Arrest Search of Vehicle (Bindle 2)

Bridges next argues that Hovinghoff's post-arrest search of the Camaro was improper under *Gant*, 556 U.S. 332.[4] We disagree.

In *Gant*, the United States Supreme Court announced a new rule governing the automobile search incident to arrest exception to the Fourth Amendment's warrant requirement. *See State v. Robinson*, 171 Wn.2d 292, 301-03, 253 P.3d 84 (2011) (discussing *Gant*). In *Gant*, the Court held that "the exception applies in only two circumstances: (1) 'when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search' and (2) 'when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."'" *Robinson*, 171 Wn.2d at 301 (quoting *Gant*, 556 U.S. at 334 (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring))).

Bridges misconstrues *Gant*. His brief cites only the first circumstance noted above and completely ignores the second, which is applicable here. Relevant here, *Gant* directs that, under the Fourth Amendment, police may search a vehicle incident to arrest where it is reasonable to believe that evidence relevant to the crime of arrest may be found in the vehicle. *Gant*, 556 U.S. at 334. That is precisely the circumstance here. Bridges was arrested based on the presence of methamphetamine residue in bindle 1 that he handed to Stamper. The subsequent search of the Camaro, following Bridges's arrest based on bindle 1, was for the purpose of finding more drugs.

[4] Bridges did not challenge the post-arrest search below but now claims his trial counsel was ineffective if his challenge under *Gant* is now barred because it was not raised below. Because of this claim and because all the facts necessary to adjudicate the claimed error are in the record on appeal, we will consider Bridges's claim. *See Jones*, 163 Wn. App. at 359-60.

We hold that the post-arrest search of the Camaro was not improper under *Gant*.[5]

III. Ineffective Assistance

Finally, Bridges argues that if his *Gant* challenge was not preserved for review, his counsel was ineffective for failing to raise *Gant* below. We disagree.

As discussed above, we do reach Bridges's *Gant* challenge, but conclude that *Gant* does not assist Bridges. Accordingly, Bridges identifies no basis for a claim of ineffective assistance.[6]

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[5] We acknowledge that Washington Constitution article 1, section 7, "provides more extensive privacy protections than the Fourth Amendment." *State v. Swetz*, 160 Wn. App. 122, 129, 247 P.3d 802 (2011). Our Supreme Court articulated a post-*Gant* re-evaluation of vehicle search requirements under article 1, section 7, in *Patton*, stating:

> [T]he search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, *and that these concerns exist at the time of the search*.

Patton, 167 Wn.2d at 394-95 (emphasis added). Thus, the Washington rule requires not only that the subsequent vehicle search for evidence be based on the crime of arrest (as *Gant* requires), but *also* that there be an immediate need to secure that evidence. *See Swetz*, 160 Wn. App. at 129-32. Put another way, unlike the Fourth Amendment, article 1 section 7 of the Washington State Constitution does not allow officers to search a vehicle for evidence of the crime of arrest, once the arrestee is secured elsewhere, *unless* there is also an immediate need to protect such evidence. *See Swetz*, 160 Wn. App. at 129-32.

But here, Bridges's appellate briefing, addressing Hovinghoff's post-arrest search of the Camaro, argues and discusses only *Gant*, which applies the Fourth Amendment. He makes no argument on this issue based on Washington Constitution article 1, section 7. At the end of his *Gant* discussion, Bridges states as follows: "Accordingly, the search was not properly incident to Mr. Bridges'[s] arrest. *Gant*, *supra*; *see also State v. Afana*, 169 [Wn.2d] 169, 233 P.3d 879 (2010); *State v. Valdez*, 167 [Wn.2d] 761, 224 P.3d 751 (2009)." Appellant's Brief at 11. Although he earlier discusses *Gant* in this section, he only cites without discussion *Afana* and *Valdez*. Those cases apply Washington Constitution article 1, section 7. But Bridges's mere citation of *Afana* and *Valdez*, without discussion, is not sufficient to raise an article 1 section 7 challenge to the post-arrest search of the Camaro. *See State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (reviewing court will not review issues for which inadequate argument has been briefed or only passing treatment has been made).

[6] To establish ineffective assistance of counsel, Bridges must show both deficient performance and

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Van Deren, J.

Worswick, J.

resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690–91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-36, 899 P.2d 1251 (1995). Bridges has shown neither.