IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL GERALD SNAPP, Appellant.	No. 37210-0-II PUBLISHED IN PART OPINION

Bridgewater, P.J. — Daniel Gerald Snapp entered a *Newton*[1] plea to six counts of second degree identity theft on November 16, 2007. Within the plea agreement, the prosecutor's handwritten recommendation includes language stating that Snapp could appeal the trial court's decision regarding his CrR 3.6 suppression motion. Even though Snapp does not appeal the voluntariness of his plea, we hold that the State waived any objection to Snapp's appeal of the trial court's denial of his motion to suppress by including that language in his statement on plea of guilty. We also hold that under *Arizona v. Gant*, __U.S.__, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the search incident to arrest that resulted in the collection of evidence of identity theft was

[1] *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976); *see also North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

proper because the officer searched the car for evidence related to the crime for which Snapp was arrested. In the unpublished portion of this opinion, we also reject Snapp's argument that the officer's stop was pretextual. We affirm the convictions.

FACTS

At approximately 8:00 am on July 22, 2006, Washington State Trooper Keith Pigott observed a blue Ford Escort driving eastbound in the lane next to him. He initially noticed some debris hanging from the rearview mirror. As he got closer to the vehicle, Trooper Pigott thought that the seat belt was patched together with what appeared to be an aluminum rock-climbing carabiner. As a result, Trooper Pigott dropped back behind the Escort and pulled the car over.

The driver, later identified as Snapp, pulled into the Silver Dollar Casino parking lot. Trooper Pigott observed Snapp lean forward, as if hiding something under the seat. Trooper Pigott called for assistance, then approached Snapp and asked for his driver's license, registration, and proof of insurance. Snapp did not have a license, but he provided his Washington State Department of Corrections inmate identification card. Snapp quickly opened the glove box, grabbed the registration, and immediately closed the glove box. Nevertheless, Trooper Pigott observed what appeared to be a plastic bag with white powder in the glove box. The trooper, who is a drug recognition expert, also believed Snapp was under the influence of drugs because of his fidgety, restlessness, quick, and jerky movements.

Based on these observations, Trooper Pigott asked Snapp to exit the car. After he asked Snapp if he had any weapons, Snapp produced one knife voluntarily and Trooper Pigott recovered another knife during a pat down. He then conducted a field sobriety test and concluded

that Snapp exhibited signs of someone who was under the influence but not to the point where Trooper Pigott believed an arrest was warranted. Trooper Pigott asked Snapp if there were any drugs or paraphernalia in the car. Snapp admitted there was a methamphetamine pipe but no methamphetamine. Trooper Pigott retrieved the pipe from underneath the driver's seat.

Subsequently, Trooper Pigott advised Snapp of his *Miranda*[2] rights, arrested Snapp for drug paraphernalia, and placed Snapp in the trooper's patrol car. In addition, a driver's license check revealed that Snapp's license was revoked [and he had a no-bail felony warrant. Meanwhile, a second trooper arrived on the scene and removed the passenger from the car.

Trooper Pigott searched the car incident to Snapp's arrest. During the search, he recovered a clear, plastic, blue accordion file folder with items containing persons' identities. In addition, he found a black compact disc (CD) wallet containing identification cards and credit cards of various other people.[3] Neither the accordion file nor the CD wallet was locked or capable of being locked. The trooper was not looking for weapons, nor was he concerned that either item contained evidence that could be immediately destroyed. But he was searching for drugs. In addition, Trooper Pigott found three credit cards not belonging to Snapp in Snapp's wallet. Finally, Trooper Pigott folded down the back seat of the car and observed in the trunk area a large number of items. Snapp stated that the items were not his and that he had borrowed the car from his girlfriend. At that point, Trooper Pigott stopped his search, had the car impounded, and obtained a search warrant for the items in the rear of the car.

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] The record does not establish exactly where in the car the trooper discovered the accordion file or the black CD wallet.

The State charged Snapp with one count of first degree identity theft and twenty-one counts of second degree identity theft. The following July, Snapp filed a motion to suppress evidence, contending that (1) Trooper Pigott did not have probable cause to stop the car Snapp was driving for obstructed vision or defective equipment, (2) the search of the car was illegal, and (3) it exceeded the legal scope of a search incident to arrest. On October 3, 2007, after a CrR 3.6 hearing, the superior court denied Snapp's motion.

On November 16, 2007, the State filed an amended information, charging Snapp with six counts of second degree identity theft. That same day, Snapp entered a *Newton* plea, in which he pleaded guilty to all six counts. On Snapp's statement of defendant on plea of guilty, the prosecutor included a handwritten statement stating: "Alford [defendant] can appeal 3.6 motion." CP at 48. Snapp, his defense counsel, the prosecutor, and the trial court failed to address this notation during the plea and sentencing hearing. In fact, during the standard colloquy with the trial court, Snapp admitted that the declaration of probable cause established facts sufficient for a trial court to find him guilty of all six charges.

Snapp appeals the trial court's denial of his CrR 3.6 motion to suppress evidence.[4]

ANALYSIS

I. Appealability

As an initial matter, we must determine whether we can reach the merits of Snapp's appeal, given that he entered a guilty plea. The State maintains that Snapp's plea was voluntary

[4] Snapp originally filed his notice of appeal on January 3, 2008, over 30 days from the trial court's final decision. After this court apprised him of his untimely appeal, Snapp successfully moved this court to allow his late filing.

and thus he waived his right to appeal pretrial motions.

Generally, a voluntary guilty plea acts as a waiver of the right to appeal. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). "Due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent." *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). Moreover, a valid guilty plea generally waives all constitutional violations that occurred before the guilty plea, except those related to the circumstances of the plea or to the State's legal power to prosecute regardless of factual guilt. *Smith*, 134 Wn.2d at 853; *see also State v. Amos*, 147 Wn. App. 217, 225, 195 P.3d 564 (2008). When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *Smith*, 134 Wn.2d at 852. But a plea is not voluntary when the defendant, his or her attorney, and the trial court labor under a false impression that the defendant has a right to appeal. *Smith*, 134 Wn.2d at 853. The sole remedy available for an involuntary plea is for the appellate court to reverse and remand to the superior court to allow Snapp an opportunity to withdraw his guilty plea. *State v. Lusby*, 105 Wn. App. 257, 263, 18 P.3d 625, *review denied*, 144 Wn.2d 1005 (2001); *see also State v. Olson*, 73 Wn. App. 348, 353, 869 P.2d 110, *review denied*, 124 Wn.2d 1029 (1994).

This case presents a curious scenario because Snapp does not appeal the voluntariness of his plea. Rather, he appeals the superior court's CrR 3.6 rulings and does not assign error to his plea agreement. In his reply brief, however, Snapp cites *Olson* for the proposition that he has a right to appeal his pretrial motion.

Olson is distinguishable from the facts presented here. In *Olson*, the parties agreed during

oral argument before this court that Olson had not intended to enter a guilty plea. *Olson*, 73 Wn. App. at 353. Instead, the defendant had intended to have a bench trial on stipulated facts. *Olson*, 73 Wn. App. at 353. The *Olson* court then distinguished a stipulated bench trial from a guilty plea, stating, "In a bench trial on stipulated facts, it is the trial court, not the defendant, that makes the determination of guilt or innocence. Unlike a guilty plea, a stipulation preserves legal issues for appeal." *Olson*, 73 Wn. App. at 353.

Contrary to the circumstances of *Olson*, there is no evidence or admission here that Snapp intended to engage in a stipulated bench trial rather than to plead guilty to the charges. The verbatim report of proceedings from the plea and sentencing hearing, held on November 16, 2007, clearly show that Snapp intended to plead guilty to six counts of second degree identity theft. And Snapp does not argue that he did not intend to plead guilty in his appellate briefs. Accordingly, *Olson* does not aid Snapp in his argument that he has a right to appeal his pretrial motion.

The circumstances in *Smith* are closer to the circumstances presented here. In *Smith*, the State charged the defendant with possession of cocaine. *Smith*, 134 Wn.2d at 851. The defendant moved to suppress the cocaine evidence, claiming that officers illegally seized him. *Smith*, 134 Wn.2d at 851. The trial court denied Smith's motion, and Smith subsequently pleaded guilty, assuming that he could appeal the suppression ruling. *Smith*, 134 Wn.2d at 851. Defense counsel even stated in court that the defendant was reserving his right to appeal the suppression ruling. *Smith*, 134 Wn.2d at 851. The plea agreement, however, by its terms waived Smith's right to all appeals. *Smith*, 134 Wn.2d at 851.[5]

The Washington Supreme Court allowed the defendant's appeal in *Smith*, despite the written waiver, because the defendant did not intelligently waive his right to appeal. *Smith*, 134 Wn.2d at 853. The Supreme Court noted that although defense counsel's statements conflicted with the plea agreement, those statements went uncorrected by both the judge and the prosecutor. *Smith*, 132 Wn.2d at 853. Thus, the Supreme Court held that the defendant did not knowingly waive his right to appeal. *Smith*, 134 Wn.2d at 853.

Similarly, here the State's written notation conflicted with the plea agreement and went uncorrected by the trial court, the State, or defense counsel. We do not decide this issue on "voluntariness." But we do hold that the prosecutor's notation on the defendant's statement on plea of guilty waived any objection to Snapp's appeal of the CrR 3.6 decision by the State.

II. Lawful Stop and Search Incident to Arrest

A. Suppression under *Gant*

Snapp contended below that, among other reasons, the search incident to arrest was unlawful. He argues that the trial court erred when it denied his motion to suppress after the CrR 3.6 hearing. At oral argument before this court, Snapp argued that the United States Supreme Court's recent *Gant* opinion applied and required suppression of the evidence seized. For the purposes of our opinion, Snapp challenged the scope of the search incident to arrest and the trial court found that the search did not exceed the permitted scope.

1. Retroactivity

The United States Supreme Court issued *Gant* on April 21, 2009, while Snapp's appeal

[5] We note that Snapp could have still challenged the voluntariness of the plea even under the terms of the plea agreement.

was pending before this court. It is well settled that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); *State v. McCormack*, 117 Wn.2d 141, 145, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111 (1992). This retroactivity rule is consistent with "basic norms of constitutional adjudication" and the "integrity of judicial review," which requires that courts treat similarly situated defendants the same. *Griffith*, 479 U.S. at 322. Thus, to the extent that *Gant* is a "clear break" from the past, it applies with the same force as if it were on the books at the time of Snapp's arrest. We hold that *Gant* applies retroactively to all cases not yet final on April 21, 2009, including Snapp's case. *See Griffith*, 479 U.S. at 328; *McCormack*, 117 Wn.2d at 145. *See also State v. Millan*, 151 Wn. App. 492, 496, 212 P.3d 603 (2009) (holding that *Gant* applies retroactively to all cases pending on direct review or not yet final).

2. Error Not Waived

Washington appellate courts generally do not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986) (to the extent that a motion to suppress is a challenge to the admissibility of evidence, generally evidence may be challenged only on the grounds presented to the trial court). In a recent decision, this court held that a defendant may not challenge under *Gant* the admission of evidence seized during a search incident to arrest for the first time on appeal. *Millan*, 151 Wn. App. at 499-500. In that

case, the defendant did not file a suppression motion, and argued for the first time on appeal that *Gant* applied. *Millan*, 151 Wn. App. at 499. In contrast, Snapp challenged the scope of the vehicle search incident to arrest below. While he did not, and could not, have raised his challenge under *Gant*, which was not yet decided, he sufficiently challenged the scope of the search incident to his arrest. Thus, Snapp preserved this issue for appeal.

3. Admission of Evidence under *Gant*

Although *Gant* applies to this case, it does not warrant suppression of the evidence. In *Gant*, police officers arrested Gant for driving on a suspended license, handcuffed him, and placed him in the back of a patrol car. *Gant*, 129 S. Ct. at 1715. Officers then searched his vehicle and found cocaine in a jacket in the back seat. *Gant*, 129 S. Ct. at 1715. On appeal, the United States Supreme Court reversed, holding that police officers may search a vehicle incident to arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe that the vehicle might contain evidence of the offense of arrest. *Gant*, 129 S. Ct. at 1719.

Here, although Trooper Pigott searched Snapp's vehicle after placing Snapp in his patrol car, unlike in *Gant*, Trooper Pigott searched Snapp's vehicle for evidence related to the crime for which he arrested Snapp. Trooper Pigott arrested Snapp for escape; driving while license suspended; and, most relevant to this analysis, drug paraphernalia.

The use of drug paraphernalia is prohibited under RCW 69.50.412. That statute states in relevant part:

> It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process,

> prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

RCW 69.50.412(1). RCW 69.50.102 provides a detailed definition of the various types of drug paraphernalia. Subsection (b) of that statute lists a series of factors that may be considered in determining whether an object is drug paraphernalia:

> (b) In determining whether an object is drug paraphernalia under this section, a court or other authority should consider, in addition to all other logically relevant factors, the following:
> (1) Statements by an owner or by anyone in control of the object concerning its use;
> . . . .
> (4) The proximity of the object to controlled substances;

As Trooper Pigott had pulled Snapp over, he observed Snapp lean forward as if hiding something under his seat. Trooper Pigott suspected that Snapp was under the influence of drugs because of Snapp's fidgety, restless, quick, and jerky movements. When Snapp reached into his glove compartment, Trooper Pigott noticed a baggie containing a white substance that he suspected was drugs. Snapp admitted that a methamphetamine pipe was in the car, and Trooper Pigott found one under the driver's seat where Snapp had appeared to hide something. Based on Snapp's movements as if he were hiding something under the driver's seat, Snapp's odd behavior, the location of the methamphetamine pipe, and the plastic baggie containing the white substance, Trooper Pigott could have reasonably suspected that Snapp had used drug paraphernalia. *See State v. Neeley*, 113 Wn. App. 100, 108, 52 P.3d 539 (2002) (the timing and location of the appellant's car, her physical behavior, and the drug paraphernalia lying on the passenger seat, raised a reasonable inference that she used the paraphernalia to ingest a controlled substance);

State v. Lowrimore, 67 Wn. App. 949, 959, 841 P.2d 779 (1992) (holding that possession of paraphernalia, coupled with bizarre and emotionally unstable behavior gives rise to probable cause to arrest for violation of RCW 69.50.412(1)).

Trooper Pigott stated at the CrR 3.6 hearing that he searched the car for drugs. As proximity of the object to a controlled substance would help determine whether the pipe was drug paraphernalia, Trooper Pigott could search Snapp's vehicle for drugs. RCW 69.50.102(b)(4). Trooper Pigott therefore searched for evidence related to the crime for which he had arrested Snapp. We hold that although *Gant* applies, Trooper Pigott's search falls under the exception laid out in *Gant* because Trooper Pigott searched Snapp's vehicle for evidence related to the crime for which he arrested Gant. *Gant* does not warrant suppression of evidence.

The State urges us to hold that the trooper acted in good faith and that the "good faith" exception to the exclusionary rule should be applied. Suppl. Br. of Resp't at 12. Because applying *Gant* does not result in the suppression of any evidence, we do not address whether the good faith exception to the exclusionary rule applies, noting only that this state has not adopted the good faith exception. *State v. Kirwin*, 165 Wn.2d 818, 833, 203 P.3d 1044 (2009) (State of Washington has not adopted the good faith rule for arrests made under an unconstitutional statute); *State v. Crawley*, 61 Wn. App. 29, 35, 808 P.2d 773, *review denied*, 117 Wn.2d 1009 (1991) (Washington Supreme Court has not adopted the good faith rule allowing admission of evidence obtained by police acting in good faith upon a defective search warrant).

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for

public record pursuant to RCW 2.06.040, it is so ordered.

B. Traffic Stop

In addition, Snapp contended below that the traffic stop was an unlawful pretextual stop because: (1) Trooper Pigott lacked a reasonable and articulable suspicion that Snapp had committed a traffic violation, (2) the State failed to show that Snapp's view was obstructed by the debris hanging from the rear-view mirror, and (3) the State failed to demonstrate that Snapp violated any seatbelt laws.

We review findings of fact on a motion to suppress evidence for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Evidence is substantial when it is sufficient to persuade a fair-minded, rational person of the truth of the finding. *Hill*, 123 Wn.2d at 644. We review de novo the trial court's conclusions of law pertaining to suppression of evidence. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Finally, we will not disturb a trial court's credibility determinations on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A traffic detention is a seizure and must be justified in its inception to be lawful. *State v. Tijerina*, 61 Wn. App. 626, 629, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991). The detention must be based on a "well founded suspicion based on objective facts" that the person is violating the law. *State v. Sieler*, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). Officers need only a reasonable suspicion to stop a vehicle in order to investigate whether the driver committed a traffic infraction. *State v. Duncan*, 146 Wn.2d 166, 173-75, 43 P.3d 513 (2002).

Under RCW 46.37.010(1), it is a traffic infraction for a person to operate a vehicle in any

unsafe condition that may endanger any person. Additionally, it is a traffic infraction for a person to operate a vehicle with equipment that is not in proper working condition. RCW 46.37.010(1). RCW 46.37.510(1) requires that all automobiles are equipped with seat belts conforming to rules adopted by the state patrol. At the minimum, those standards cannot fall below the specified minimum requirements by the Society of Automotive Engineers on June 13, 1963.[6] RCW 46.37.510(1).

Here, Trooper Pigott observed debris hanging from the rearview mirror that he believed could potentially impair the driver's line of sight. Moreover, he observed that the seat belt was patched together with what appeared to be a carabineer and debris hanging in the rearview mirror that obstructed Snapp's view of the road. Either condition may have endangered Snapp or others on the road. Thus, Trooper Pigott had authority to stop the vehicle. *See* RCW 46.37.010(1). Once pulled over, Trooper Pigott had authority to detain Snapp for a reasonable time to identify him, check the status of his license, and check for outstanding warrants. *See* RCW 46.61.021(2). Trooper Pigott's background check of Snapp revealed a felony warrant for Snapp's arrest. Based on the warrant, Trooper Pigott legally stopped.

Furthermore, Snapp's contention that the traffic stop was pretextual lacks merit. Pretextual traffic stops are not permitted under article I, section 7 of the Washington State Constitution. *State v. Ladson*, 138 Wn.2d 353, 349, 979 P.2d 833 (1999). A traffic stop is pretextual if the police officer is pulling over a citizen for a traffic infraction or to conduct a criminal investigation unrelated to driving. *Ladson*, 138 Wn.2d at 352-53. Pretextual stops

[6] The minimum requirements by the Society of Automotive Engineers are not included in the record.

"generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations—violations for which the officer does not have probable cause." *State v. Myers*, 117 Wn. App. 93, 94-95, 69 P.3d 367 (2003), *review denied*, 150 Wn.2d 1027 (2004). Under this restrictive standard, courts must "look beyond the formal justification for the stop to the actual one." *Ladson*, 138 Wn.2d at 353. Courts must look to the totality of the circumstances. *Ladson*, 138 Wn.2d at 358-59. Finally, courts must look to both the objective reasonableness of the officer's behavior and to the subjective intent of the officer. *Ladson*, 138 Wn.2d at 359.

At the CrR 3.6 hearing, the trial court heard testimony from Trooper Pigott and Snapp. Trooper Pigott testified that his attention was first drawn to the car because it appeared the driver's vision was obscured due to the debris hanging from the rearview mirror. As Trooper Pigott pulled up along the car, he noticed that the seat belt seemed to be patched together with a carabiner. After pulling Snapp over, Trooper Pigott asked only for identification, license and registration materials, and he did not make inquiries unrelated to the infraction.

Conversely, Snapp testified that Trooper Pigott never pulled up alongside his car and, thus, could not have observed the seat belt before pulling him over. Additionally, Snapp could not remember if there was a carabiner holding his seat belt together. He maintained that he was wearing a properly functioning seat belt.

The trial court found Trooper Pigott's testimony credible, noting that he described the carabiner in detail. The trial court further noted that Trooper Pigott had sufficient reason to stop the car for an infraction based on the debris hanging from the rearview mirror. The trial court's

ruling was proper under the totality of the circumstances, particularly in light of its credibility determinations made during the hearing. *See Camarillo*, 115 Wn.2d at 71. The fact that Trooper Pigott did not issue a citation for the traffic infractions is of no consequence. He was not required to issue a citation because he stopped Snapp. RCW 46.64.015 (establishing that an officer *may* serve a traffic citation). In sum, the traffic stop was not pretexutal. *See Ladson*, 138 Wn.2d at 359. Trooper Pigott lawfully stopped Snapp. *See Duncan*, 146 Wn.2d at 173-75.

Affirmed.

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Bridgewater, P.J.

I concur:

Quinn-Brintnall, J.

Hunt, J. (concurring) — I concur in the majority's result and in most of the majority's analysis. And, because at trial Daniel Snapp challenged the scope of the vehicle search incident to his arrest, I agree with the majority's narrow holding that *Arizona v. Gant*, ____U.S.____, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) applies retroactively to Snapp's case. I write separately, however, to articulate my disagreement with the majority's broad holding that "*Gant* applies retroactively to all cases not yet final on April 21, 2009." Majority at 8. In my view, inclusion of such a broad holding here is unnecessary dicta. *See* my similar concurrence in *State v. Millan*, 151 Wn. App. 492, 503-04, 212 P.3d 603 (2009).

Hunt, J.