# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>CHARLOTTE JUNE BLISS,<br><br>Appellant. | No. 37393-9-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Quinn-Brintnall, J. — In *State v. Bliss*, 153 Wn. App. 197, 222 P.3d 107 (2009), we held that the search incident to arrest warrant exception did not justify the search of Charlotte Bliss's vehicle under *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). But we retained jurisdiction over the appeal and remanded for a new CrR 3.6 suppression hearing to determine whether an alternative basis justified the officer's search. *Bliss*, 153 Wn. App. at 208. Because no lawful alternative justified the search of Bliss's vehicle, we reverse her unlawful possession of methamphetamine conviction and remand.

## FACTS

### Background Facts[1]

Shortly after midnight on June 23, 2007, Gig Harbor Police Officer Garrett Chapman was patrolling when he observed a white Plymouth van, illuminated by his headlights, driven by a white or light-skinned female with light-colored hair.[2] Chapman followed the white van and ran a registration check, which revealed that Bliss was the registered owner, that she had outstanding felony and misdemeanor warrants, and that she was a white female, 5 feet 6 inches tall, 140 pounds, with blond hair. Believing that the van's driver fit Bliss's description, Chapman stopped the van, verified that Bliss was the driver,[3] arrested Bliss, and searched the van about 10 to 15 minutes after arresting Bliss.

Behind the van's front passenger seat, Officer Chapman discovered a tan handbag which contained (1) a glass pipe that appeared to have been used to smoke narcotics, and (2) two small baggies containing a white powdery substance that field tested positive for methamphetamine. Chapman completed a property inventory before having the van towed.

### Procedural Facts

A. Bliss's Initial Appeal

After a jury convicted Bliss of unlawful possession of methamphetamine, she asserted on appeal that the trial court erred in denying her CrR 3.6 motion to suppress the methamphetamine.[4]

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[1]We restate the background facts as set forth in *Bliss*, 153 Wn. App. at 200.

[2] The van was not speeding or violating any traffic laws.

[3] Bliss was the sole occupant.

[4] Bliss also asserted that the trial court erred in concluding that the arresting officer acted reasonably in stopping her vehicle to verify that she was the registered owner, for whom there

Specifically, Bliss asserted that Officer Chapman's search of her vehicle was unlawful under *Gant* because (1) she was secured in the back of Chapman's patrol car when he searched her van, and (2) Chapman did not have reason to believe that the van contained evidence of the offense for which he arrested her. After determining that Bliss had properly preserved her *Gant* challenge for appeal, we held that the search incident to arrest warrant exception did not justify Chapman's search but remanded for a new suppression hearing to determine whether another exception to the warrant requirement validated the search.

B. CrR 3.6 Suppression Hearing on Remand

On February 2, 2010, the trial court held a CrR 3.6 suppression hearing pursuant to this court's remand order and, on March 5, 2010, entered the following findings of fact:

> I. Undisputed Facts.
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> 4. Officer Chapman arrested [Bliss], secured her in his patrol car and searched the van incident to [Bliss's] arrest. [Bliss] was the only person in the van.
> 5. Approximately 3.7 grams of methamphetamine was found during the search incident to arrest. The methamphetamine was discovered in a tan handbag located behind the front passenger seat. A glass pipe was also found in the handbag.
> 6. Officer Chapman confronted [Bliss] with the methamphetamine. [Bliss] appeared to experience a panic attack. Emergency medical personnel were called to the scene and treated [Bliss]. She was medically cleared and subsequently transported to jail.
> 7. While [Bliss] was receiving medical care[,] Officer[s] Chapman and Allen arranged for the van to be impounded. The van was parked in a sparsely settled, wooded area that had little traffic. The time was close to bar closing time. The officers reasonably believed that the van would have been a target of theft or vandalism if left where it had been stopped.
> 8. [Bliss's] address according to Department of Licensing records reviewed by Officer Chapman was in Quilcene.
> 9. Incident to impound the van was inventoried. The officers' purpose when inventorying the van was to document what[ was] located in the vehicle including

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were outstanding arrest warrants. *Bliss*, 153 Wn. App. at 199-200. We disagreed and held that the stop was lawful. *Bliss*, 153 Wn. App. at 206.

valuables, contraband or evidence. The inventory [was] made in good faith and was not a pretext for a general exploratory search of the van.

10. The impound inventory included unlocked containers that might contain valuables, the contents of such containers would be inventoried.

11. Before the impound inventory[,] the tan purse containing the methamphetamine had already been seized. Had the tan purse with the methamphetamine not already been seized incident to arrest, it would have been searched as part of the inventory.

12. The appearance and character of the purse would have led the officers to document it and its contents. The methamphetamine found inside the purse thus would have been found and seized during the impound.

II. Disputed Facts.

13. Although [Bliss's] Department of Licensing address was in Quilcene, she claimed in her testimony that at the time she lived in Gig Harbor a short distance from the location of the stop. [Bliss] furthermore claimed in her testimony that if asked she would have granted permission for her roommates to remove the van from the area of the stop thus making the impound inventory unnecessary.

III. Conclusions As To Disputed Facts.

14. [Bliss's] claim of having lived in Gig Harbor was credible. However she admitted and the court finds that at no time did she inform the officers that she lived in Gig Harbor. She also admitted and the court finds that she did not ask the officers to refrain from impounding the van, nor did she tell them that she had someone available to come and take custody of it. Finally, the court finds that the officers did not ask her if anyone was available to take custody of the van.

Clerk's Papers (CP) at 202-205.

The trial court also entered the following conclusions of law:

I. Conclusions of Law.

1. Under the impound statute, *RCW 46.55.113*, a law enforcement officer may take custody of a vehicle at his or her discretion and provide for its prompt removal to a place of safety if the driver is arrested or if the driver has not had a valid license for 90 days or more before the stop.

2. The impound of [Bliss's] van in this case was lawful.

3. Incident to a lawful impound of a vehicle a law enforcement officer may conduct a good faith inventory search without first obtaining a search warrant.

4. A law enforcement officer may not conduct an impound inventory search as a pretext for making a general exploratory search of a vehicle without a warrant.

5. The impound inventory search in this case was lawful because it was incident to a lawful impound of [Bliss's] van after she had been arrested. The inventory [was] made in good faith and was not a pretext for a general exploratory search of the van.

> 6. Contraband or other evidence found during a lawful impound inventory is admissible.
> 7. Under the inevitable discovery doctrine[,] if the state can establish by a preponderance of the evidence that the evidence would have ultimately or inevitably been found by a lawful means, the evidence need not be suppressed.
> 8. The state established by a preponderance of the evidence that the methamphetamine found in the tan purse would have ultimately or inevitably been found during the impound inventory and thus need not be suppressed under the inevitable discovery doctrine.
> 9. However under *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009), the inevitable discovery doctrine does not apply to any warrantless search, including an inventory search incident to a lawful impound. Thus the methamphetamine found in the tan purse must be suppressed.

CP at 206-208.

ANALYSIS

Under *Gant*, law enforcement officers may search a vehicle incident to arrest only if it is reasonable to believe that (1) the arrestee could access the vehicle at the time of the search or (2) the vehicle contains evidence related to the crime of the arrest. 129 S. Ct. at 1719; *see also State v. Valdez*, 167 Wn.2d 761, 778, 224 P.3d 751 (2009) (Because "arrestee no longer had access to any portion of his vehicle," the officers' warrantless search of the vehicle unlawful under *Gant*.); *State v. Scalara*, 155 Wn. App. 236, 241, 229 P.3d 889 (2010). Here, it is undisputed that Officer Chapman had secured Bliss in the back of his patrol car before conducting a warrantless search of her vehicle incident to her arrest. Thus, Bliss could not have accessed the vehicle to obtain weapons or destroy evidence during Chapman's search. The State also does not contend that Chapman had searched Bliss's vehicle for evidence related to the crime of her arrest.[5] Accordingly, under *Gant*, Chapman's search of Bliss's vehicle was unlawful absent another

[5] Because the State does not assert that Officer Chapman had searched Bliss's vehicle for evidence related to the crime of her arrest, we do not address the applicability of *Valdez*, 167 Wn.2d at 777, to the search for evidence related to crime of arrest rationale.

exception to the warrant requirement. 129 S. Ct. at 1723-24.

The State asserts that Officer Chapman's search was justified under the inventory search warrant exception. Specifically, the State asserts that law enforcement officers would have lawfully seized Bliss's purse during an inventory search following the impoundment of her vehicle. We disagree.

"Police officers may conduct a good faith inventory search following a lawful impoundment without first obtaining a search warrant." *State v. Bales*, 15 Wn. App. 834, 835, 552 P.2d 688 (1976), *review denied*, 89 Wn.2d 1003 (1977). Police may lawfully impound a motor vehicle "as part of the police 'community caretaking function,' if the removal of the vehicle is necessary (in that it 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." *State v. Williams*, 102 Wn.2d 733, 742-43, 689 P.2d 1065 (1984); *see* RCW 46.55.113(2)(d). Because impoundment is a seizure under the Fourth Amendment, it must be reasonable; impoundment is not reasonable when a reasonable alternative to impoundment exists. *Citizens for Des Moines, Inc. v. Petersen*, 125 Wn. App. 760, 768, 106 P.3d 290 (2005) (citing *State v. Houser*, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980)), *review denied*, 157 Wn.2d 1014 (2006).

Here, Officer Chapman was not inventorying the contents of Bliss's van for impound and he did not ask Bliss whether someone was available to take custody of her vehicle before having it impounded. In addition, Bliss's "panic attack" occurred *after* Chapman confronted her with the drugs he had unlawfully seized from a tan purse found in her vehicle during the search incident to arrest. Thus, the search of this purse was not conducted as part of[6] Chapman's community

[6] Because we hold that the inventory search warrant exception does not apply, we do not address the effect, if any, of our Supreme Court's decision in *Winterstein*, 167 Wn.2d at 636, on the

caretaking function.[7] The State has failed to prove an alternative basis justifying Chapman's search of Bliss's tan purse. Accordingly, we reverse Bliss's possession of methamphetamine conviction and remand for further proceedings consistent with this opinion.

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.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.P.T.

inevitable discovery doctrine.

[7] We note in this regard that, although not apparent in the partial transcript of the remand proceeding provided, the State conceded at oral argument that Bliss possessed two purses on the date of her arrest, one that she had with her and another "tan purse" containing drugs, which Officer Chapman had seized from her vehicle. We do not suggest that a medical emergency would not justify an officer's search of a vehicle pursuant to his community caretaking function under a different set of circumstances, for example, where an arrested suspect is suffering from a medical condition and her medication, identification, or other medically relevant information such as a medic-alert card, may be contained in her vehicle.

Hunt, P.J. (dissent) — I respectfully dissent and would resolve this case on different grounds. I disagree with the trial court that the Supreme Court's recent holding in *State v Winterstein*, 167 Wn 2d 620, 220 P 3d 1226 (2009), rejecting the inevitable discovery doctrine, applies to an inventory of items contained in a vehicle impounded following the driver's lawful arrest. Instead of responding to Justice J.M. Johnson's invitation to find the *Winterstein* majority "holding" to be dictum,[8] I distinguish *Winterstein* from the instant case on its facts and rationale; and, therefore, I conclude, that the *Winterstein* majority neither considered nor intended that its broadly worded "holding" would apply to vehicle impounds, which necessitate inventories of impounded vehicles' contents.

Here, the trial court found that the officers were going to impound Bliss's vehicle after they arrested her. Under the the circumstances of this case, although the vehicle impound was thus, in a sense, "inevitable," it was also in the normal course of standard operating procedure for an empty, otherwise abandoned car, subject to vandalism in a remote area. Such standard vehicle impound procedure, analogous to search and inventory of personal items in connection with booking arrestees, cannot constitute the type of "inevitable discovery" that our Supreme Court intended to eradicate.[9] In spite of the court's broad language, the *Winterstein* facts are narrow.

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[8] *See* Justice J.M. Johnson's concurrence in *Winterstein*, 167 Wn 2d at 637, in which Justices Owens and Fairhurst concur.

[9] As *Winterstein* and our state supreme court's recent decision in *State v. Afana*, suggest, instead of the inevitable discovery doctrine, it might be more appropriate, and less speculative, to apply the "independent source" doctrine here. *State v. Afana,* --- P.3d ---, 2010 WL 2612616 at *5 (Wash. July 1, 2010) (distinguishing the independent source doctrine from the inevitable discovery doctrine and the good faith exception to the warrant requirement; citing *Winterstein*, 167 Wn.2d at 634). *Afana*, however, like *Winterstein*, does not address an inventory of items contained in a vehicle impounded following the driver's lawful arrest.

The holding should be confined to analogous cases and not extended to standard police operating procedures such as impounding vehicles, without expressly so addressing.

The narrow focus of *Winterstein* is the standard required for a probation officer to conduct a warrantless search of a probationer's home where third parties might also reside, in particular the need for probable cause to believe that the probationer is living at the home searched:

> This case requires us to consider what standard a probation officer will be held to in determining a probationer's residence in order to justify a warrantless search of that residence. We hold that a probation officer must have probable cause to believe that a probationer resides at a particular residence before searching that residence. Additionally, we hold that the inevitable discovery doctrine is incompatible with article I, section 7 of the Washington State Constitution.

*Winterstein*, 167 Wn.2d at 624. We must take this last pronouncement concerning the inevitable discovery doctrine in the context of the *Winterstein* case, in which application of the doctrine would have unconstitutionally intruded on constitutionally protected privacy rights in the home, in spite of Winterstein's "lesser expectation of privacy" while under community supervision.[10] 167 Wn.2d at 628. Citing the Ninth Circuit Court of Appeals, the *Winterstein* majority notes:

> The Court of Appeals for the Ninth Circuit has addressed this issue. In *Motley v. Parks*, 432 F.3d 1072, 1080 (9th Cir. 2005), that court held that before conducting a warrantless search of a parolee's residence, law enforcement officials "must have probable cause to believe that they are *at* the parolee's residence." The court noted that *the probable cause requirement is important to protect the interests of third parties because it "'seek[s] to safeguard citizens from rash and*

[10] Insofar as this pronouncement arguably reaches beyond this context, then I agree with Justice J.M. Johnson's concurrence that "the majority's analysis of the inevitable discovery doctrine is an unnecessary discussion and therefore dictum." *Winterstein*, 167 Wn 2d at 637 (J.M. Johnson, J. concurring). The *Winterstein* majority's pronouncement in footnote three that its discussion of the inevitable discovery doctrine is not dictum does not affect my analysis, which goes to the scope of the majority's pronouncement and whether it applies to vehicle impounds, facts very different involving different considerations than those the majority addressed in *Winterstein*. *See* 167 Wn 2d at 632 n. 3.

> *unreasonable interferences with privacy and from unfounded charges of crime."*" *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)).

*Winterstein*, 167 Wn.2d at 629 (second emphasis added).

Underscoring the protection of third parties in a probationer's home, the court further comments:

> [P]rotection of third party privacy interests is implicated when there is a question about the residence of a person who is the target of a search. Even though probationers have a lessened expectation of privacy, third parties not under the control of the DOC do not. Anytime a question arises about the actual residence of a probationer, therefore, third party privacy interests must be considered. This is particularly important where, as here, DOC asserts the right to search a probationer's residence even when he is not home.

*Winterstein*, 167 Wn.2d at 630.

Warrantless intrusion into a person's home, perhaps the most highly protected zone of personal privacy, is far removed from a contents inventory of an impounded vehicle that an arrestee has been driving on a public road in view of the officers who arrested her on an outstanding warrant. *See State v. Valdez*, 167 Wn.2d 761, 771, 224 P.3d 751 (2009) (there is a "reduced expectation of privacy in an automobile" when compared to the expectation of privacy in a home; this reduced expectation of privacy affects whether or not there is justification for a warrantless search). The probation officer in *Winterstein* did not have probable cause to believe that Winterstein was a resident of the searched home.

Here, in contrast, there was no need for "probable cause" to believe Bliss was in the later-impounded vehicle because the officer had seen her inside it. Again, in contrast to *Winterstein*, there were no third parties whose privacy interests needed protecting or who needed to be shielded from "unfounded charges of crime"[11] after the officers arrested Bliss. Furthermore,

impounding a vehicle left on a public road, after the driver has been lawfully arrested, and inventorying its contents are routine procedures for public safety as well as for safe-guarding the arrested driver's vehicle and valuables inside,[12] as was the case here.

As the trial court found on remand, the officers decided to impound Bliss's van because it was "parked in a sparsely settled, wooded area that had little traffic [and] would have been a target of theft or vandalism if left where it had been stopped." Clerk's Papers (CP) at 203 (Finding of Fact (FF) 7). The officers then inventoried the van's contents "to document what[ was] located in the vehicle including valuables, contraband or evidence." CP at 203 (FF 9). Furthermore, the trial court found that "[t]he inventory [was] made in good faith and was not a pretext for a general exploratory search of the van." CP at 203 (FF 9). If the officers had not seized the tan purse that contained the methamphetamine incident to Bliss's arrest, as the trial court found, it would have been included in this inventory of the van's contents, independent of the warrantless vehicle search incident to Bliss's arrest.[13]

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[11] *Winterstein*, 167 Wn.2d at 629.

[12] *See State v. Houser*, 95 Wn.2d 143, 154, 622 P.2d 1218 (1980) (non-investigatory inventory searches secure the property of a detained person and protect against loss and also protect police and bailees from liability due to dishonest claims of theft); *State v. Mireles*, 73 Wn. App. 605, 611-12, 871 P.2d 162 (inventory searches are intended to perform an administrative or caretaking function by protecting property while in custody against loss or vandalism, protecting against false claims of loss, and guarding police from danger), *review denied*, 124 Wn.2d 1029 (1994).

[13] The trial court, which did not have the benefit of the Supreme Court's recent *Afana* decision, did not consider the independent source rule. *State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184 (1968) (identification evidence obtained during unlawful traffic stop did not defeat subsequent lawful arrest based on independent records check revealing that defendant had an outstanding warrant). Instead, the trial court on remand suppressed the purse's contents under *Winterstein*'s new, broadly worded rejection of the inevitable discovery doctrine.

In my view, inventorying a vehicle's content in connection with impounding the vehicle following a lawful arrest, as was going to occur here, falls outside and, therefore, does not run afoul of, *Winterstein*'s rejection of the inevitable discovery rule in the context of a probation officer's warrantless residential search. If *Gant*[14] had been decided at the time of Bliss's incident, the officer would not have searched her van incident to her arrest on the warrant. Thus, the tan purse containing the drugs would have remained in the van until its impound and contents inventory,[15] which would have included the purse. Again, neither *Winterstein* nor *State v. Afana,* --- P.3d ---, 2010 WL 2612616 (Wash. July 1, 2010) address the special circumstances of a vehicle impound following the driver's arrest; therefore, these holdings should not extend to Bliss's case.[16] I would affirm.

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Hunt, P.J.

[14] *Arizona v. Gant*, 556 U.S. ___ 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

[15] As previously noted, because the van was in an outlying isolated area and subject to vandalism, the officer impounded the van and inventoried its contents, which the trial court on remand found was not a pretext for a warrantless search.

[16] Instead, we should consider whether the independent source rule should apply to impound inventories in lieu of the inevitable discovery doctrine.