COLORADO COURT OF APPEALS

Court of Appeals No. 07CA1257
Pitkin County District Court Nos. 05CR50 & 06CR62
Honorable James B. Boyd, Judge
Honorable Robert A. Brown, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jeffrey Allen Key,

Defendant-Appellant.

JUDGMENT AND SENTENCE AFFIRMED

Division VI
Opinion by JUDGE BERNARD
Carparelli and Loeb, JJ., concur

Announced March 18, 2010

John W. Suthers, Attorney General, Patricia R. Van Horn, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Rebecca R. Freyre, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, Jeffrey Allen Key, appeals the judgment of conviction entered on jury verdicts finding him guilty of felony theft, misdemeanor theft, and unlawful use of a financial transaction device. Defendant also challenges the manner in which his sentence was imposed. We affirm.

I. Facts

On a night in August 2006, two women reported to the police that, when they were in a nightclub, someone stole a cell phone from a coat and a wallet from a purse. The wallet contained $15 in cash and two debit cards – one that belonged to the victim, which had been placed in an envelope that contained the card's PIN number, and another that belonged to the victim's employer. A nightclub bouncer told police that he saw defendant go in and out of the nightclub several times that night.

The next day, a bank surveillance system videotaped a man – whose face and body were partially shrouded by a T-shirt or a blanket – using the stolen debit cards to make five, $200 withdrawals from one of the victim's bank accounts, and attempting to withdraw funds from the employer's bank account. Later, a detective watched this bank surveillance video and concluded the

culprit was defendant – a man he had known for approximately seven years.

Less than two weeks later, a police officer stopped and arrested defendant for driving under restraint. After the arrest, the officer searched the passenger compartment of defendant's car, and he found the cell phone that had been stolen from the nightclub.

Defendant said that the phone was not his. He stated that he had found it in a park, and he was planning on turning it in. Phone records revealed that phone numbers associated with defendant were dialed from the cell phone around the same time as the ATM withdrawals. The police never found the wallet or debit cards that had been stolen.

The police later searched defendant's car again pursuant to a warrant, and found other evidence.

The court subsequently denied defendant's motion to suppress the evidence that was seized in the searches.

Defendant's trial was held in April 2007. On the morning of trial, defendant pled guilty to driving under restraint and to two misdemeanor theft counts. The guilty pleas for theft were based on

the evidence that was recovered during the search of his car conducted pursuant to the search warrant.

The prosecution introduced the bank surveillance video as evidence during the trial, along with photographs that police took of defendant with a T-shirt draped over his head and body, in positions similar to those of the man in the surveillance video. Over defendant's objection, the trial court granted the jury unrestricted access to the video during its deliberations.

The jury convicted defendant of felony theft and misdemeanor theft based on items seized during the warrantless search of defendant's car, and unlawful use of a financial transaction device.

In May 2007, the trial court found that defendant had violated the terms of his probation for a felony theft that he committed in 2004.

A different judge presided over the sentencing hearing. Defendant did not object to this substitution at the hearing. Defendant requested a continuance of the sentencing hearing, which the court denied.

The court sentenced defendant to a one-year jail term for the misdemeanors to which he had pled guilty on the morning of trial; a

six-month jail term for the misdemeanor of which he was convicted at trial; three years in prison for unlawful use of a transaction device; and six years for felony theft. The court ordered that these sentences were to run concurrently with each other, and consecutively to a three-year prison sentence imposed in the 2004 felony theft case.

II. Fourth Amendment Claim

A. Introduction

Defendant argues that we should reverse the convictions arising out of his trial because the search of his car that discovered the incriminating evidence on which these convictions were based violated the Fourth Amendment. He contends that the United States Supreme Court's recent decision of *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710 (2009), expressly holds that certain searches of automobiles incident to arrest, such as the one here, are unconstitutional. In the alternative, defendant submits that we should remand this case to the trial court for further findings in light of *Gant*.

We agree that *Gant* must be applied to resolve his case because this direct appeal was pending when *Gant* was decided.

However, we disagree that *Gant* requires us to reverse defendant's convictions, or to order a remand for additional findings, for the following reasons.

The trial court determined, and we agree, that the search of the car was permissible under our supreme court's pre-*Gant* jurisprudence. This major premise leads us to a minor premise: the officers who conducted the search acted reasonably in good faith when they relied on this jurisprudence. We complete this syllogism by concluding that, although *Gant* indisputably overrules our supreme court's jurisprudence in this area, in this case its effect is only to render the search a good-faith "technical violation" of the law, which means that the evidence remains admissible under section 16-3-308, C.R.S. 2009.

In reaching this conclusion, we recognize that the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Therefore, in order to understand the contours of the exclusionary rule, and any potential constitutional effect that those contours might have on

section 16-3-308, we must discuss how the United States Supreme Court and our supreme court have interpreted the exclusionary rule and the good faith exception to the rule. It is important to do so here because (1) the United States Supreme Court has not yet considered whether the good faith exception applies when the police rely on a judicial precedent that is later overruled; and (2) our supreme court has only considered such applicability where, unlike here, the case involved a stricter standard under the Colorado Constitution than that required by the United States Constitution.

B. Motion to Suppress

1. Background

Before trial, defendant filed a motion to suppress the cell phone, arguing that the search of the car that discovered it was illegal. A hearing was held on this motion in February 2007.

In a written response to defendant's motion, the prosecution stated that (1) the police had lawfully arrested defendant after he was stopped driving a car; (2) the search of the car that discovered the incriminating evidence, the cell phone, was a lawful search incident to defendant's arrest; and (3) citing *People v. Savedra*, 907 P.2d 596, 598 (Colo. 1995), "[t]he passenger compartment of the

automobile may be searched by police pursuant to arrest even where [the] arrestee is away from the vehicle and safely within police custody at the time of the search."

The evidence at the suppression hearing established that a police officer had reason to believe that defendant had stolen property in his car. The officer was aware that defendant's driving privileges were revoked. When the officer saw defendant driving his car, the officer stopped defendant and arrested him. The officer handcuffed defendant, and placed him in a patrol car. The officer then searched defendant's car, and discovered the cell phone on the floor.

Subsequently, the car was searched pursuant to a warrant. As a result, the police also recovered additional evidence.

Defendant argued that the arrest was not lawful. Therefore, in his view, the search incident to the arrest was not lawful.

The prosecution contended that the arrest was legal, and that the cell phone had been seized incident to that lawful arrest. The prosecution also submitted that, because the car was later searched pursuant to a search warrant, the cell phone inevitably would have been discovered, and that defendant did not have standing to

contest the seizure of the cell phone because he told the police that he had found it and did not own it.

The trial court determined that the arrest was valid. Therefore, the court decided that the cell phone was properly seized incident to defendant's arrest, and denied the motion to suppress. The court stated that the cell phone would be admissible evidence because defendant "asserted [that it] was not his," suggesting that the court determined that defendant did not have standing to contest the search of the car that led to the seizure of the cell phone. The court also determined that the other items were lawfully seized in the second search of the car, which had been conducted with a search warrant. Last, the court did not respond to the prosecutor's inevitable discovery argument.

Defendant filed a timely appeal from his convictions, which was pending when *Gant* was decided in April 2009.

2. General Principles Guiding Our Review

When reviewing a motion to suppress, we defer to the trial court's findings of fact if they are supported by competent evidence in the record, but we review the trial court's legal conclusions de novo. *People v. Heilman*, 52 P.3d 224, 227 (Colo. 2002). We may

determine the legal effect of undisputed facts. *See Turbyne v. People*, 151 P.3d 563, 572 (Colo. 2007)("When the controlling facts are undisputed . . . the legal effect of those facts constitutes a question of law.").

We conclude that a remand is unnecessary to resolve the issues in this case because of the nature of our review of this issue, and because all the pertinent facts were fully developed during the suppression hearing. First, our review "'is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Herring v. United States*, ___ U.S. ___, ___, 129 S.Ct. 695, 703 (2009)(quoting *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984)). Here, based on the clear Colorado judicial authority that preceded *Gant*, we conclude that a reasonably well trained police officer would *not* have known that the search of defendant's car was illegal when it was conducted.

Second, there are no conflicts in the evidence concerning (1) defendant's ownership of the car that was searched; (2) the basis for defendant's arrest; (3) the fact that the officer handcuffed defendant and placed him in a patrol car; and (4) the fact that the officer then

conducted a warrantless search of defendant's car that yielded the cell phone. *See People v. Kirk*, 103 P.3d 918, 921 (Colo. 2005)(where the record does not indicate any conflict in the evidence concerning the details of an encounter, a remand is unnecessary because an appellate court can apply the proper legal test).

C. Standing

As a threshold matter, the prosecution argues that defendant lacks standing to challenge the seizure of the cell phone because he told the police that it was not his, and that he had found it. This issue was raised at the suppression hearing, and the court made a comment suggesting that it agreed with the prosecution's position. However, we disagree with the prosecution's position because defendant's car had to be searched to find and seize the cell phone.

Defendant bore the burden of demonstrating that he was entitled to protection under the Fourth Amendment. *People v. Galvadon*, 103 P.3d 923, 927-28 (Colo. 2005). A defendant "may challenge the constitutional validity of a search only if he has 'a legitimate expectation of privacy in the invaded place.'" *People v. Savage*, 630 P.2d 1070, 1072 (Colo. 1981)(quoting *Rakas v. Illinois*,

439 U.S. 128, 143 (1978)). To determine whether a defendant possesses this legitimate expectation of privacy, courts consider, among other factors, whether the defendant has a "possessory or proprietary interest in the areas or items which are the subject of the search." *People v. Naranjo*, 686 P.2d 1343, 1345 (Colo. 1984)(citing *Rakas*, 439 U.S. at 148)). In the context of automobiles, a motorist's privacy interest in his vehicle is "important and deserving of constitutional protection." *See Gant*, ___ U.S. at ___, 129 S.Ct. at 1720 (citing *Knowles v. Iowa*, 525 U.S. 113, 117 (1998)).

Here, based on defendant's testimony, he had no possessory or propriety interest in the cell phone itself. However, he had a possessory interest in his automobile, the search of which produced the cell phone.

The prosecution does not contest defendant's ownership of the car when it was searched. Therefore, defendant had a legitimate expectation of privacy in the car that was protected by the Fourth Amendment. *Virgin Islands v. Williams*, 739 F.2d 936, 939 (3d Cir. 1984)("Because [defendant] owned the car that was searched and seized . . . we believe that he satisfied the 'legitimate expectation of

privacy' requirement of successful Fourth Amendment claims."); *see also Naranjo*, 686 P.2d at 1346 (finding that defendant had a legitimate expectation of privacy in an automobile where the automobile's owner – a family member of defendant – had given defendant permission to drive).

Hence, defendant has standing to challenge the introduction of the cell phone into evidence.

D. The Propriety of the Search – Then and Now

1. Then

a. United States Supreme Court Decisions

The doctrine of search incident to arrest was established in *Chimel v. California*, 395 U.S. 752, 762-63 (1969). It allows police officers, who have made a lawful custodial arrest, to conduct two searches without a warrant. First, they may search the person who has been arrested at the time of the arrest. Second, they may search the immediate area surrounding this person in order to remove weapons he or she might use to resist arrest or to escape, or to prevent him or her from hiding or destroying evidence. For an arrest in a building, the scope of this search does not extend to any rooms other than the one in which the person is arrested, or to

closed or concealed areas in the same room that are beyond the person's reach. *Id.*

The issue of the proper scope of a search of an automobile incident to a lawful custodial arrest of its occupants was decided in *New York v. Belton*, 453 U.S. 454, 460 (1981). There, the Supreme Court held that, once a lawful custodial arrest has been made, police officers "may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* The Court made clear that its holding did not alter the principles in *Chimel* concerning the scope of searches incident to arrest. *Id.* n.3.

The Court stated that it was supplying a simple standard to govern these situations because of an important public policy consideration: police officers working on the street must have simple and clear rules to follow in order to understand the scope of their authority.

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and

> requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

Id. at 458 (quoting Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. Rev. 127, 141 (1974)).

Thus, Fourth Amendment rights will only be protected when the police "act[] under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Id.* (quoting LaFave, *"Case-by-Case Adjudication"* at 142).

b. Colorado Supreme Court Decisions

In August 2006, when defendant's car was searched, the relevant principles concerning searches of automobiles incident to the arrest of an occupant in Colorado were expressed in cases like *Savedra*. There, our supreme court observed that

> [t]he *Belton* standard was developed in response to the need for a workable, straightforward rule that police could apply in searching an automobile passenger

> compartment after making a custodial arrest of an occupant or recent occupant of that automobile. In setting out the rule, the Court noted that the police were confused about what parts of the automobile were in the actual reach of an arrestee under the *Chimel* standard. *Belton* created a "bright line rule" defining the passenger compartment of an automobile as being within the hypothetical immediate control of an occupant or recent occupant of the vehicle.

Savedra, 907 P.2d at 598 (citation omitted).

Our supreme court then stated that "[t]he passenger compartment is within the *Belton* zone even where the arrestee is away from the vehicle and safely within police custody at the time of the search." *Id.* at n.1. This statement was supported by case citations from four federal circuits, including the Tenth Circuit, which had reached the same result. In cases decided before and after the search in this case, our supreme court cited this concept approvingly at least four more times before the Supreme Court decided *Gant*. *People v. Marquez*, 195 P.3d 697, 699 (Colo. 2008); *Kirk*, 103 P.3d at 922; *People v. Daverin*, 967 P.2d 629, 632-33 (Colo. 1998); *People v. H.J.*, 931 P.2d 1177, 1183 (Colo. 1997). Divisions of this court did likewise. *People v. Veren*, 140 P.3d 131, 136 (Colo. App. 2005); *People v. Roth*, 85 P.3d 571, 576 (Colo. App.

2003); *People v. Graham*, 53 P.3d 658, 661-62 (Colo. App. 2001); *People v. Roy*, 948 P.2d 99, 101 (Colo. App. 1997).

This interpretation of *Belton* was not unique to Colorado. By the time *Gant* was decided, the number of cases was "legion" that held the police could search the passenger compartment of a car incident to an occupant's arrest even if the occupant had been restrained. *Thornton v. United States*, 541 U.S. 615, 628 (2004)(Scalia, J., concurring)(collecting cases); *see also People v. Branner*, 180 Cal. App. 4th 308, 319, 103 Cal. Rptr. 3d 256, 264 (2009)(collecting cases). Indeed, the majority in *Gant* observed that this "reading of *Belton* has been widely taught in police academies and . . . law enforcement officers have relied on [this] rule in conducting vehicle searches during the past 28 years" between *Belton* and *Gant*. *Gant*, ___ U.S. at ___, 129 S.Ct. at 1722.

2. Now

Gant changed the legal landscape. The Supreme Court concluded that the practice of conducting the search incident to a lawful arrest after the car's occupant had been handcuffed and rendered harmless exceeded the boundaries prescribed by *Chimel*. The Court held 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*, ___ U.S. at ___, 129 S.Ct. at 1719. When a defendant is secured and beyond reaching distance of the car's passenger compartment, a search of the car is unreasonable unless the police are searching for evidence of the "offense of arrest," they obtain a warrant, or they conduct the search under another recognized exception to the warrant requirement. *Id.* at ___ U.S. ___, 129 S.Ct. at 1723-24.

We must apply *Gant* to defendant's case because it was pending on direct appeal when *Gant* was announced. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *Lopez v. People*, 113 P.3d 713, 716 (Colo. 2005); *see United States v. Peoples*, ___ F. Supp. 2d ___, ___ 2009 WL 3586564 at *2 (W.D. Mich. 2009)("*Gant*'s holding must undoubtedly apply to all cases pending on direct review.")(citing *Griffith*, 479 U.S. at 328).

Here, the facts support the trial court's conclusion that defendant's arrest was lawful. The police officer who stopped defendant was aware that his driving privileges had been revoked,

which is clearly sufficient probable cause to believe that defendant had committed a crime. *See Veren*, 140 P.3d at 135.

However, in the course of the arrest, the officer handcuffed defendant and placed him in the patrol car before searching the automobile. Therefore, he was not within reaching distance of the passenger compartment at the time of the search.

Defendant was arrested for driving under restraint. The record indicates that there was little or no likelihood that defendant's car contained evidence of this offense because (1) the officer confirmed that defendant's driving privileges had been revoked before the stop; and (2) the officer saw defendant driving.

Therefore, under *Gant*, we conclude that the police officer violated defendant's Fourth Amendment rights when he searched defendant's car incident to defendant's lawful arrest. However, that conclusion does not end our inquiry. We turn to considering what the appropriate remedy should be for this constitutional violation.

E. Remedy

Based on the violation of his Fourth Amendment rights, defendant seeks suppression of the evidence seized during the search of his car incident to the arrest, and the reversal of the

convictions based on that evidence. The prosecution argues that these remedies are inappropriate because the good-faith exception to the exclusionary rule, as expressed in Colorado in section 16-3-308, applies in this case. We agree with the prosecution.

1. Propriety of Considering the Prosecution's Argument

We recognize that the prosecution did not raise the good-faith exception at the trial court level. However, on appeal, a party may defend the trial court's judgment "on any ground supported by the record, regardless of whether that ground was relied upon or even contemplated by the trial court." *People v. Eppens*, 979 P.2d 14, 22 (Colo. 1999); *see also United States v. McCane*, 573 F.3d 1037, 1040-41 (10th Cir. 2009)(applying good-faith exception to search that violated *Gant* because appellate court may affirm trial court on any basis supported by the record), *cert. denied*, ___ S.Ct. ___, 2010 WL 680526 (No. 09-402, Mar. 1, 2010).

We are aware of cases in which our supreme court has declined to consider the applicability of the good-faith exception found in section 16-3-308 on appeal because the prosecution did not raise that argument before the trial court. *See People v. Crippen*, 223 P.3d 114, 116-17 (Colo. 2010); *People v. Titus*, 880

P.2d 148, 152 (Colo. 1994); *People v. Donahue*, 750 P.2d 921, 923 (Colo. 1988).

Those cases are distinguishable from this one for two reasons. First, they were interlocutory appeals filed by the prosecution. Thus, unlike in *Eppens*, the prosecution was seeking to overturn the trial court's order, rather than to defend it.

Second, the prosecution here had no reason to argue that the search of defendant's car incident to his lawful arrest was justified under the good-faith exception at the time of the suppression hearing. Then, the search complied with Colorado's interpretation of *Belton.* The prosecution defended the search with an express citation to *Savedra*, in which that interpretation was clearly stated, and the trial court denied defendant's motion to suppress on those grounds.

However, once *Gant* was decided and properly introduced into this case by defendant on direct appeal, the prosecution's reason for relying on the good-faith exception came into existence. It would be inconsistent to allow defendant to cite new authority helpful to his cause to seek to overturn the trial court's order denying the motion to suppress, but to deny the prosecution the opportunity to

respond to that new precedent with arguments to support the order.

Therefore, we conclude that, under *Eppens*, the prosecution may now contend that, under section 16-3-308, the evidence in this case should not be suppressed because the police officer reasonably acted in good faith when he searched defendant's car.

2. The Exclusionary Rule

The Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Herring,* ___ U.S. at ___, 129 S.Ct. at 699 (quoting *Arizona v. Evans*, 514 U.S. 1, 10 (1995)). Nevertheless, courts have created the exclusionary rule, which, when applied, excludes evidence that was obtained in violation of the Fourth Amendment from being admitted at trial. *Id.*

The exclusionary rule is not a compulsory remedy for every Fourth Amendment violation, *id.* at 700, because the exclusionary rule is a "drastic measure." *United States v. Janis*, 428 U.S. 433, 459 (1976); *see also People v. Shreck*, 107 P.3d 1048, 1054 (Colo. App. 2004)(quoting *People v. Shinaut*, 940 P.2d 380, 383 (Colo. 1997)). The exclusionary rule is an "extreme sanction." *Herring*,

___ U.S. at ___, 129 S.Ct. at 700 (quoting *Leon*, 468 U.S. at 897). Indeed, application of the exclusionary rule should always be a "last resort, not [the] first impulse." *Id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

The primary purpose of the exclusionary rule is to deter police misconduct. *See Leon*, 468 U.S. at 906. Hence, the exclusionary rule should only apply where it "result[s] in appreciable [police] deterrence." *Id.* (quoting *Janis*, 428 U.S. at 454). Assessing the flagrancy of the police misconduct in question is an important step in deciding whether to apply the exclusionary rule. *Id.* at 911. Moreover, to apply the exclusionary rule, the "benefits of deterrence must outweigh the costs." *Herring*, ___ U.S. at ___, 129 S.Ct. at 700.

Even if the exclusionary rule could provide "some incremental deterrent, that possible benefit must be weighed against [its] 'substantial social costs.'" *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987)(quoting *Leon*, 468 U.S. at 907). These social costs include "letting guilty and possibly dangerous defendants go free – something that offends basic concepts of the criminal justice system." *Herring*, ___ U.S. at ___, 129 S.Ct. at 701.

3. The Good-Faith Exception

One principle that limits application of the exclusionary rule is the good-faith exception. The Supreme Court embraced this principle in *Leon*, holding that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 919.

Even before *Leon* was announced, Colorado's legislature enacted a good-faith exception to the exclusionary rule in 1981. § 16-3-308. The General Assembly's purpose behind enacting this exception was to "apply an objective standard substantially similar to the reasonableness requirement later announced in *Leon*." *People v. Leftwich*, 869 P.2d 1260, 1272 (Colo. 1994).

Our supreme court has adopted the good-faith exception to the exclusionary rule announced in *Leon* for purposes of both federal and state constitutional analysis. *People v. Blehm*, 983 P.2d 779, 795 (Colo. 1999). Colorado courts "naturally look to federal precedent for guidance on the issue of whether the good-faith exception should apply in a particular context." *Id.*

a. Federal Precedent – Supreme Court

In *Leon*, the Court stated that the exclusionary rule should not apply where police reasonably and in good faith relied upon a warrant subsequently declared invalid because it was not adequately supported by probable cause when issued. 468 U.S. at 922. The Supreme Court reasoned that: (1) the exclusionary rule was "designed to deter police misconduct," not to "punish the errors of judges and magistrates"; (2) no evidence exists "suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment"; and (3) application of the exclusionary rule would not have "a significant deterrent effect" on judges and magistrates issuing warrants, as they are "neutral judicial officers" who "have no stake in the outcome of the particular criminal prosecutions." *Id.* at 916-17.

Since *Leon*, the Court has broadened the scope and strength of the good-faith exception. *See generally* Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule after* Herring v. United States, 43 Creighton L. Rev. 175, 176 (2009). In *Krull*, the Court extended the good-faith exception to warrantless administrative searches performed in

good-faith reliance on a statute that was later declared unconstitutional. 480 U.S. at 349-53. The Court observed that a police officer relying on the statute was "simply fulfill[ing] his responsibility to enforce the statute as written." *Id.* at 350. Applying the exclusionary rule would not "logically contribute to the deterrence of Fourth Amendment violations," because it was the legislature that made the error, not the police officer. *Id.* (quoting *Leon*, 468 U.S. at 921). "[E]vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 348-49 (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)).

In *Evans*, 514 U.S. at 14-16, the Court applied the good-faith exception to a police officer's reliance on an arrest warrant that a judicial employee had mistakenly listed as active. The Court explored the same three issues it considered in *Leon*, explaining that the exclusionary rule was not established to deter judicial employees, no evidence existed that judicial employees were likely to "ignore or subvert the fourth amendment," and no grounds existed for believing that application of the exclusionary rule would

deter the conduct in question, as the employee was "not [an] adjunct[] to the law enforcement team" and had "no stake in the outcome of particular criminal prosecutions." *Id.* at 14-15.

Most recently, in *Herring*, the Court extended the good-faith exception to police reliance upon a negligent mistake of a fellow law enforcement employee, as opposed to an error by a magistrate, a judicial employee, or a legislature. ___ U.S. at ___, 129 S.Ct. at 704. In *Herring*, police officers arrested the defendant because a police computer database indicated that there was an active arrest warrant for the defendant. *Id.* at ___, 129 S.Ct. at 698. But there was no active arrest warrant; a law enforcement employee had made a record-keeping error. *Id.* The Court declined to apply the exclusionary rule, acknowledging that the record-keeping error was different from the situations giving rise to the exclusionary rule, which included "intentional conduct that was patently unconstitutional." *Id.* at ___, 129 S.Ct. at 702.

b. Federal Precedent – Circuit Courts

The Tenth Circuit has concluded that the good-faith exception applies in circumstances like those we face here. *McCane*, 573 F.3d at 1045. As in Colorado, before *Gant* was decided, the Tenth

Circuit had settled case law that permitted police officers to search a car incident to a lawful arrest after the occupant had been handcuffed and placed in a patrol car.

In *McCane*, the Tenth Circuit agreed that it had to apply *Gant*. In doing so, however, it observed that the issue it faced was not whether *Gant* applied, but what the proper remedy should be when applying it. The court decided to go beyond simply automatically applying *Gant* and suppressing the evidence because

> [i]n *Leon*, the Supreme Court considered the tension between the retroactive application of Fourth Amendment decisions to pending cases and the good-faith exception to the exclusionary rule, stating that retroactivity in this context "has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct." The lack of deterrence likely to result from excluding evidence from searches done in good-faith reliance upon settled circuit precedent indicates the good-faith exception should apply in this context.

McCane, 573 F.3d at 1044 n.5 (citation omitted)(quoting *Leon*, 468 U.S. at 897).

The court then concluded:

> Two inseparable principles have emerged from the Supreme Court cases and each builds upon the underlying purpose of the

> exclusionary rule: deterrence. First, the exclusionary rule seeks to deter objectively unreasonable police conduct, i.e., conduct which an officer knows or should know violates the Fourth Amendment. Second, the purpose of the exclusionary rule is to deter misconduct by law enforcement officers, not other entities, and even if it was appropriate to consider the deterrent effect of the exclusionary rule on other institutions, there would be no significant deterrent effect in excluding evidence based upon the mistakes of those uninvolved in or attenuated from law enforcement.

Id. at 1044 (citation omitted).

Based on these principles, the court concluded that the exclusionary rule should not apply to exclude evidence when police officers searched an automobile in reliance "upon the settled case law of a United States Court of Appeals," a reliance that "certainly qualifies as objectively reasonable law enforcement behavior." *Id.* at 1045; *accord United States v. Gray*, 2009 WL 4739740, at *7 (D. Neb. 2009) (unpublished memorandum and order); *United States v. Grote*, 629 F. Supp. 2d 1201, 1206 (E.D. Wash. 2009); *United States v. McGhee*, ___ F. Supp. 2d ___, ___, 2009 WL 4152798, at *6 (S.D. Ohio 2009); *Branner*, 180 Cal. App. 4th at 318-22, 103 Cal. Rptr. 3d at 263-67; *Brown v. State*, 24 So. 3d 671, 679-82 (Fla. Dist. Ct.

App. 2009); *State v. Riley*, ___ P.3d. ___, ___, 2010 WL 427118, at *4 (Wash. Ct. App. 2010). *But see Peoples*, ___ F. Supp. 2d ___, 2009 WL 3586564, at **2-8 (holding that the retroactivity doctrine does not bar application of the good-faith exception, but ruling that the good-faith exception should not extend to police reliance on case law).

The Ninth Circuit Court of Appeals has reached a different result, concluding that principles of retroactivity bar the application of the good-faith exception to *Gant* cases. In *United States v. Gonzalez*, 578 F.3d 1130, 1132-33 (9th Cir. 2009), the court concluded that applying the good-faith exception would create an "untenable tension" with existing Supreme Court law concerning the retroactive application of new decisions. *Accord United States v. Buford*, 623 F. Supp. 2d 923 (M.D. Tenn. 2009)(holding that the retroactivity doctrine precludes application of the good-faith exception where police search violated *Gant*); *People v. Arnold*, 914 N.E.2d 1143, 1157-58 (Ill. App. Ct. 2009); *Smith v. Commonwealth*, 683 S.E.2d 316, 326-28 (Va. Ct. App. 2009); *State v. Harris*, ___ P.3d ___, ___, 2010WL45755 *6-*7 (Wash. Ct. App., Jan. 7, 2010); *State v. McCormick*, 216 P.3d 475, 477-78 (Wash. Ct. App. 2009).

However, *Gonzalez* did not refer to *McCane*, nor to the language in *Leon* upon which *McCane* relied when concluding that retroactivity principles did not bar the application of the good-faith exception. Two cases that have been decided since *Gonzalez* point to *McCane*'s reasoning concerning the applicability of the exclusionary rule as the reason to follow *McCane* rather than *Gonzalez*. *Riley*, ___ P.3d at ___, 2010 WL 427118, at *3; *Gray*, 2009 WL 4739740, at *4-*6. One decision disagreed with *Gonzalez*'s outcome because the applicability of the good-faith exception was not argued in *Gant*. *Peoples*, ___ F. Supp. 2d ___, ___ 2009 WL 3586564, at *3.

c. Colorado Law

As pertinent here, section 16-3-308 states:

> (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer . . . as a result of a . . . technical violation.
>
> (2) As used in subsection (1) of this section . . .
>
> > (b) "Technical violation" means a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

"[T]he ultimate question under [Colorado's good-faith exception] statute must still be whether the officer undertook the search in the reasonable, good[-]faith belief that it was proper." *People v. Altman*, 960 P.2d 1164, 1168-69 (Colo. 1998).

The only case in Colorado concerning the application of the good-faith exception to a police officer's reliance on judicial precedent is *People v. Corr*, 682 P.2d 20, 26-28 (Colo. 1984). There, our supreme court rejected the argument that an officer's reliance on a United States Supreme Court decision qualified as a "technical violation" under section 16-3-308(2).

However, *Corr* involved the intersection of a United States Supreme Court case and a Colorado Supreme Court case that applied a stricter standard under the Colorado Constitution. Our supreme court found reliance on the United States Supreme Court case to be misplaced. This was because, at the time of the search, under existing Colorado authority and our constitution, the United States Supreme Court case "supplied no basis for good faith reliance." 682 P.2d at 27.

We do not face that situation here. At the time of the search in this case, the search was authorized by Colorado cases such as

Savedra. Thus, this case is unlike *Corr*. There is no Colorado decision that suggests that searches of cars incident to lawful arrests are governed by a different standard under the Colorado Constitution. We conclude that *Corr* is distinguishable from this case, and, therefore, that it does not control the outcome.

Like the United States Supreme Court, our supreme court has emphasized that the exclusionary rule exists primarily to deter police misconduct. *People v. Doke*, 171 P.3d 237, 240 (Colo. 2007). "Where the exclusionary rule would not result in 'appreciable deterrence, then, clearly, its use . . . is unwarranted.'" *Blehm*, 983 P.2d at 794 (quoting *Janis*, 428 U.S. at 454). In applying the good-faith exception, our supreme court has used the same reasoning the Supreme Court has used. *Blehm*, 983 P.2d at 795 (applying the three main considerations found in *Leon* and *Evans*). The exclusionary rule will not be applied if its purposes would be more costly than beneficial. *People v. Gall*, 30 P.3d 145, 150 (Colo. 2001).

Our supreme court has also noted that the exclusionary rule is not a personal right connected to the Fourth Amendment; rather, it is a "judicially created remedy," the application of which is not

automatically triggered by a Fourth Amendment violation. *See Blehm*, 983 P.2d at 794 (quoting *Leon*, 468 U.S. at 907).

d. Determination of the Proper Remedy

Based on our review of federal precedent and Colorado law, we conclude for several reasons that the good-faith exception to the exclusionary rule applies in this case.

First, we are persuaded by the reasoning in *McCane*. By recognizing that there is a difference between finding the Fourth Amendment violation and determining the proper remedy for that violation, *McCane* employed logic similar to that employed by our supreme court. *See Doke*, 171 P.3d at 240.

Second, we are not persuaded by the reasoning in *Gonzalez.* *Gonzalez* does not confront the language from *Leon* upon which *McCane* relied. Our analysis of cases decided before and after *Gonzalez* convinces us that this is a flaw in *Gonzalez*'s reasoning.

This is so because *Leon* clearly stated that

> [w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."

Leon, 468 U.S. at 906 (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)). Therefore, because there is a clear dichotomy between Fourth Amendment violation and remedy, the retroactive application of *Gant* here to conclude that there was a violation does not inevitably lead to the conclusion that the good-faith exception cannot be considered to determine the appropriate remedy. In other words,

> [i]f suppression of the truth by the exclusion of evidence is not mandated by the Fourth Amendment, and presentation of the truth by the introduction of evidence secured through violation of the Fourth Amendment works no new Fourth Amendment wrong, then retroactive application of the new constitutional rule announced in *Gant* does not require the suppression of evidence obtained in compliance with *Belton* prior to the decision in *Gant*.

Branner, 180 Cal. App. 4th at 323, 103 Cal. Rptr. 3d at 267 (citation omitted).

Further, *Leon* was decided two years after *United States v. Johnson*, 457 U.S. 537, 542-43 (1982), and three years before *Griffith*. *Johnson*, a direct antecedent of *Griffith*, required retroactive application of opinions that did not represent a clear break with prior precedent to criminal cases pending on appeal.

Leon referred to *Johnson*, and observed that nothing in it "precludes adoption of a good-faith exception." *Leon*, 468 U.S. at 912 n.9.

Griffith extended *Johnson*'s retroactivity reasoning to opinions that announced a clear break with prior precedent. *Griffith*, 479 U.S. at 328. *Griffith* involved the retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986), and, therefore, did not address the issue we face here. However, although *Johnson* and *Griffith* addressed retroactivity from somewhat different perspectives, those differences are not sufficient to suggest to us that *Griffith* repudiated or modified *Leon*'s observations about *Johnson*. *See State v. Riley*, ___ P.3d. at ___, 2010 WL 427118, at *4.

Third, applying the exclusionary rule here would not advance its central purpose: deterrence of police misconduct. At the time they conducted the search in this case, the police "did nothing wrong." *Gray*, 2009 WL 4739740, at *7. The error committed by the police was not a flagrant violation of constitutional principles; rather, the police reasonably relied on a binding court opinion.

Thus, analogously to the police officers in *Krull* who were enforcing a statute, the officer here was simply enforcing the law by following our supreme court's jurisprudence. *See Krull*, 480 U.S. at

350. The officer had no knowledge that his search of the automobile would subsequently be rendered unconstitutional by a decision of the Supreme Court, nor, given Colorado courts' interpretation of *Belton*, can the officer properly be charged with such knowledge. Under the reasoning in *Leon* and *Evans*, the exclusionary rule is not designed to punish the "errors" of police officers when they rely, reasonably and in good faith, on binding decisions issued by state appellate courts. Application of the exclusionary rule in such circumstances will not deter police misconduct.

Fourth, we are convinced that the police officer in this case committed a "technical violation," as defined by section 16-3-308(2). That statute clearly contemplates that evidence obtained by police officers reasonably relying on a court precedent later overturned is admissible. Therefore, the cell phone seized as a result of that technical violation should not be suppressed based on Colorado statutory law.

Fifth, not applying the good-faith exception in this case would undermine confidence in the criminal justice system. Public confidence in the criminal justice system may erode where reliable

evidence of guilt is suppressed even though it was obtained by police acting in good faith. *Gates*, 462 U.S. at 257 (White, J., concurring). Suppressing the cell phone in this case also would have an adverse effect on the confidence that law enforcement personnel have in the criminal justice system. It is one thing to explain to police that evidence must be suppressed because they obtained it in a manner contrary to law, or that, although when they acted in a vacuum because there was no pertinent law, now new law requires suppression. But it is an entirely different matter to tell police that evidence must be suppressed when they did everything "by the book."

Sixth, as the Supreme Court indicated in *Belton*, it is important that we provide the police with clear and simple rules. Courts do not want the police to start thinking that evidence will be suppressed regardless of whether they follow the law. We want to deter police misconduct, and we want to encourage police compliance with the law. As noted above, applying the exclusionary rule in this case deters no police misconduct, and may only serve to sow confusion among police officers.

Accordingly, although we recognize that, under *Gant*, the police violated defendant's Fourth Amendment rights, we decline to apply the remedy of suppressing the cell phone, holding that the statutory good-faith exception supports the trial court's denial of defendant's motion to suppress.

III. Video Evidence

Next, defendant contends that the trial court erred by permitting the jury, over his objection, to have unrestricted access to the bank surveillance video during deliberations. We disagree.

We review the trial court's decision regarding the use of exhibits by a jury during deliberations for an abuse of discretion. *Frasco v. People*, 165 P.3d 701, 705 (Colo. 2007).

Unless a specific rule of exclusion applies, "trial courts exercise discretionary control over jury access to trial exhibits during their deliberations." *Id.* at 704. In criminal proceedings, trial courts have an "obligation . . . to assure that juries are not permitted to use exhibits in a manner that is unfairly prejudicial to a party." *Id.* Trial courts must be guided by the "ultimate objective" of assessing "whether the exhibit will aid the jury in its proper consideration of the case, and even if so, whether a party will

nevertheless be unfairly prejudiced by the jury's use of it." *Id.* at 704-05. A party may be unfairly prejudiced by evidence if an exhibit is used by the jury in a manner where "there is a likelihood of it being given undue weight or emphasis by the jury." *Id.* at 706 (Martinez, J., concurring)(quoting *Settle v. People*, 180 Colo. 262, 264, 504 P.2d 680, 681 (1972)).

Several divisions of this court have distinguished testimonial exhibits from non-testimonial exhibits, upholding trial court decisions that allow juries unsupervised or unrestricted access to non-testimonial exhibits. *People v. Russom*, 107 P.3d 986, 988 (Colo. App. 2004)(during deliberations, jury allowed to have access to an audio recording of defendant purchasing drugs from police informant); *People v. Ferrero*, 874 P.2d 468, 472-73 (Colo. App. 1993)(describing an uncoerced confession as the "strongest kind of physical evidence the prosecution may produce," and allowing the jury to have unsupervised access to a videotape of such a confession where admitted into evidence); *People v. Aponte*, 867 P.2d 183, 188-89 (Colo. App. 1993) (jury permitted to take into jury room videotape and transcript of a drug sale); *see also People v. Blecha*, 940 P.2d 1070, 1078 (Colo. App. 1996)(no grounds for a

mistrial where jury had unsupervised access to a videotape that was non-testimonial, and was not shocking or inflammatory; "the videotape was similar in character to still photographs which jurors are normally permitted to review during deliberation"), *aff'd*, 962 P.2d 931 (Colo. 1998).

Non-testimonial exhibits are "tangible exhibits" that "depict[] the actual commission of the crime itself." *Russom*, 107 P.3d at 989. Non-testimonial exhibits are not witness statements that provide a narrative of events. *Aponte*, 867 P.2d at 188. In contrast, testimonial exhibits present the testimony of witnesses who "bear testimony" against the accused. *See Crawford v. Washington*, 541 U.S. 36, 51 (2004).

On the facts of this case, we conclude that the surveillance video was non-testimonial evidence, and that the trial court did not abuse its discretion in allowing the jury to have unfettered access to it. This exhibit shows a man making and attempting to make ATM withdrawals using stolen debit cards. It does not contain any witness statements charging defendant with a crime; rather, it shows the "actual commission of the crime itself."

The video would assist the jury in identifying the perpetrator by allowing comparisons between it and the photographs subsequently taken by the police of defendant wearing a T-shirt over his head. Moreover, the surveillance video would allow the jury to evaluate the credibility of a detective who testified that, from this video, he was able to identify defendant. Hence, the probative value of this evidence is significant. Unlike a testimonial exhibit, the bank surveillance video presents no witness providing a "narrative of events" that could render it unduly prejudicial.

Further, beyond alleging that the jury had an opportunity to watch the video more than once, which defendant claims gave the exhibit undue weight, defendant has not pointed to any specifics in the videotape that would render viewing it repeatedly during jury deliberations to be unduly prejudicial. *See Frasco*, 165 P.3d at 705. Finally, there is a diminished likelihood that the jury would place undue weight on the recording because it was played in open court during the presentation of evidence. *See People v. DeBella*, 219 P.3d 390, 403 (Colo. App. 2009)(*cert. granted*, Nov. 23, 2009).

Therefore, we conclude that the trial court did not err by allowing the jury unfettered access to the bank surveillance video.

IV. Closing Argument

Defendant contends that, because prosecutorial misconduct during closing argument denied him a fair trial, we must reverse his convictions. We disagree.

Here, defendant did not object to the allegedly improper argument; hence, we review for plain error. *Domingo-Gomez v. People*, 125 P.3d 1043, 1053 (Colo. 2005); *People v. Constant*, 645 P.2d 843, 847 (Colo. 1982). Plain error occurs when a prosecutor's misconduct is flagrant or glaringly or tremendously improper and so undermines the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction. *Liggett v. People*, 135 P.3d 725, 735 (Colo. 2006). Moreover, the fact that defense counsel did not object to the alleged misconduct may indicate counsel's "belief that the live argument, despite its appearance in a cold record, was not overly damaging." *Domingo-Gomez*, 125 P.3d at 1054 (quoting *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990)). Accordingly, prosecutorial misconduct during closing argument rarely constitutes plain error.

In determining whether prosecutorial misconduct mandates a new trial, an appellate court must evaluate the misconduct's

severity and frequency and the likelihood that it constituted a material factor leading to the defendant's conviction. *See People v. Merchant*, 983 P.2d 108, 114 (Colo. App. 1999). During closing argument, a prosecutor "may employ rhetorical devices and engage in oratorical embellishment and metaphorical nuance, so long as he or she does not thereby induce the jury to determine guilt on the basis of prejudice or passion, inject irrelevant issues or evidence into the case, or accomplish some other improper purpose." *People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003). A prosecutor's closing argument must be based on the facts in evidence and reasonable inferences drawn from those facts, *People v. Moody*, 676 P.2d 691, 697 (Colo. 1984), and a prosecutor may also comment on a defendant's theory, strategy, arguments, and characterization of the facts, *People v. Dunlap*, 124 P.3d 780, 809 (Colo. App. 2004).

Defendant argues that the prosecution's closing argument was improper because the prosecutor:

- Expressed her personal opinion by repeatedly using the term "remarkable" to describe the likeness between defendant and the images on the bank surveillance video;

- Argued facts not in evidence by (1) stating that defendant got rid of the victim's wallet after pocketing the money in it; and (2) arguing that, when the police were taking pictures of defendant in positions similar to images of the man in the surveillance video, defendant knew that police might use them against him later, and so he sucked in his belly; and
- Denigrated defense counsel by describing one of defense counsel's arguments – that the contents of the cell phone admitted at trial did not match the testimony of the woman who reported the cell phone stolen – as a "side show."

In this case, the prosecution did nothing improper during closing argument. First, the prosecution's use of the word "remarkable" to comment on the degree of similarity between defendant and the images in the video was firmly grounded in the evidence presented and the inferences that could reasonably be drawn from that evidence. Second, the arguments that defendant pocketed the money and got rid of the wallet, and that defendant intentionally sucked in his belly, are also fair and reasonable inferences based on the evidence. Third, the prosecutor's comment that defendant's argument was a "side show" was a permissible

comment on evidence presented by the defense. *See People v. Kenny*, 30 P.3d 734, 741 (Colo. App. 2000)(permissible to call counsel's closing argument a "smoke screen").

V. Motion for Continuance

Next, defendant argues that the court erred by denying his request for a continuance of the sentencing hearing. We disagree.

A trial court's decision to grant or to deny a continuance is entitled to deference, and it will not be reversed on appeal absent a gross abuse of discretion. *People v. Cruthers*, 124 P.3d 887, 888 (Colo. App. 2005). A trial court abuses its discretion only when it acts in a manner that is manifestly arbitrary, unreasonable, or unfair. *People v. Hagos*, ___ P.3d ___, ___ (Colo. App. No. 05CA2296, Oct. 29, 2009). "[A] conviction will not be overturned on appeal unless an analysis of the totality of the circumstances shows that the trial court's denial of the continuance was an abuse of discretion." *People v. Roybal*, 55 P.3d 144, 150 (Colo. App. 2001). Moreover, a trial court's decision to deny the defendant's request for a continuance will not be reversed unless the defendant demonstrates that actual prejudice arose from the denial. *Cruthers*, 124 P.3d at 888-89.

Defendant argues that the court abused its discretion because it violated section 16-11-102(1)(a), C.R.S. 2009, which mandates that "[n]o less than seventy-two hours prior to the sentencing hearing, copies of the presentence report, including any recommendations as to probation, shall be furnished to the prosecuting attorney and defense counsel or to the defendant if he or she is unrepresented." Here, however, the record shows that the seventy-two-hour requirement was satisfied because defense counsel received the presentence report on May 17, 2007, and the sentencing hearing was held on May 21, 2007.

Next, defendant asserts that the court abused its discretion because he should have been given more time to present mitigation evidence from a psychologist he had been seeing, and to present evidence of acceptance into a community corrections program. *See* § 16-11-102(5), C.R.S. 2009 (requiring court to permit the defendant to speak on his own behalf and to "present any information in mitigation of punishment").

This argument fails for two reasons. First, under the totality of the circumstances, the court did not rule in an arbitrary or unreasonable manner. The prosecution stated that it opposed a

community corrections program; defendant had recently been rejected by two programs; and the court indicated it would give defendant until later that day to present evidence of acceptance into a program. Defense counsel and defendant never stated that the psychologist he had been seeing would actually present mitigating evidence. Defendant could have disclosed the fact he had been seeing a psychologist to his counsel earlier, a point raised by the sentencing court.

Second, defendant has not demonstrated that he was prejudiced because of the court's denial of a continuance. The record does not contain any report from defendant's psychologist that could have mitigated his sentence. The record does not contain any evidence that he was ever accepted into a community corrections program after the jury entered its guilty verdicts in April 2007. And the court sentenced defendant to the Department of Corrections, ruling that a community corrections program was "not the answer" for defendant. Therefore, we uphold the court's order denying defendant's motion for a continuance.

VI. Substitution of Judge

Defendant argues that the court violated Crim. P. 25 and his constitutional right to due process because the judge that imposed his sentence was not the same judge who presided over trial. Assuming, without deciding, that this issue is properly before us, *see People v. Tillery*, ___ P.3d ___. ___ (Colo. App. No. 06CA1853, Oct. 1, 2009)(Bernard, J., specially concurring)(questioning whether plain error review applies to sentencing proceedings), we disagree with defendant's argument.

Crim. P. 25 states:

> If by reason of absence from the district, death, sickness, or other disability, the judge before whom the defendant was tried is unable to perform the duties to be performed by the court after a verdict or finding, any other judge regularly sitting in or assigned to the court may perform those duties.

A division of this court has held that this rule permits a substitution of judges "so long as a justifiable reason is shown." *People v. Little*, 813 P.2d 816, 818 (Colo. App. 1991). In *Little*, a division of this court concluded that a remand was necessary to determine why a judge who did not preside over the trial imposed the sentence. *Id.* "If the reason [was] one of those specified in

Crim. P. 25, the sentence [shall be] affirmed; if not, the sentence [shall be] vacated and the defendant shall be resentenced by the judge who presided over the trial." *Id.*

In *Little*, the record did not contain a reason for the substitution of judges, but the opinion does not address whether the defendant objected to the substitution before the sentencing hearing began. Here, it is clear that defendant did not object to the substitution of a different judge for sentencing.

We conclude that defendant has not established that any error occurred. *See United States v. Bruguier*, 161 F.3d 1145, 1153 (8th Cir. 1998)(applying Fed. R. Crim. P. 25; no objection made to substitution of judges; no error, let alone plain error). We reach this conclusion because:

- Defendant did not raise this issue below. Therefore, the substitute judge's attention was not called to the need to make a record about why he, and not the trial judge, was presiding over the sentencing hearing. *See id.*
- Defendant's argument does not implicate a potential violation of his constitutional rights, including his right to due process. *See People v. Banuelos-Landa*, 109 P.3d 1039,

1040 (Colo. App. 2004)(defendant does not have a constitutional right to be sentenced by the same judge who presided over the trial); *People v. Koehler*, 30 P.3d 694, 696 (Colo. App. 2000)(same).

- Defendant does not point us to any prejudice that he may have suffered because of the substitution of judges. The sentencing judge "wanted to hear what each side had to say" regarding the sentence to be imposed. He reviewed defendant's prior criminal history and the presentence investigation report, and he considered facts that defense counsel and defendant offered in mitigation.
- The record indicates that the sentencing court properly based its sentence on defendant's seven prior felony convictions, the convictions in this case, and his violation of probation.

The judgment and sentence are affirmed.

JUDGE CARPARELLI and JUDGE LOEB concur.