No. 48317-3-II

IN THE COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JEREMY JAMES, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

BRIEF OF APPELLANT

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D. The trial court erred when it entered Finding of Fact 34:

"The affidavit for the search warrant did not contain any facts that were illegally obtained. Thus it contained sufficient probable cause to search the car the defendant had been riding in and all items within."

E. The trial court erred when it entered Conclusion of Law 3: "Officer Moody's search of the vehicle was lawful and reasonable in scope. Since the owner of the blue jacket was not readily recognizable to

the officers before and during the search, the officers lawfully searched it and lawfully found the 9mm round."

F. The trial court erred when it entered Conclusion of Law 4: "After they found the 9mm round in the car and discovered the defendant could not lawfully possess firearms, the officers had probable cause to believe there would be other evidence in the car relating to a violation of Title 9.41, such as firearms and ammunition."

G. The trial court erred when it entered Conclusion of Law 5: "The search warrant was validly issued because the affidavit's contents were sufficient to establish probable cause to believe there was evidence of firearms crimes within the vehicle."

H. Officers invaded Mr. James' right to privacy under Washington Constitution, article I,§7, by seizing him without probable cause or reasonable suspicion.

I. The trial court erred in denying the motion to suppress because the evidence was obtained illegally and there was no probable cause to issue a search warrant.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Where the basis for constructive possession of a firearm is mere proximity, is the evidence sufficient to sustain a conviction for unlawful possession of a firearm?

2. Did the trial court err by finding that 3 of the 5 people in the vehicle left the scene, when officers testified 4 of 5 people were released at the scene, including the driver who had a suspended license and possessed the Percocet pill ?

3. Was Mr. James illegally seized when officers directed him to wait near the car for over 40 minutes when they had no reasonable or articulated suspicion that he was involved in criminal activity?

4. Did the trial court err when it found the jacket was not readily recognizable as belonging to Mr. James, even though officers testified it appeared to be a man's jacket and based on its location, they suspected it belonged to him?

5. Did the trial court err when it found the affidavit for the search warrant did not contain any facts that were illegally obtained and there was sufficient probable cause for the warrant?

6. Did the trial court err when it concluded that the ammunition round gave officers probable cause to believe "there would be other evidence in the car relating to a violation of Title 9.41, such as firearms and ammunition."

7. Was the search warrant unconstitutionally overbroad?

II. STATEMENT OF FACTS

Pierce County prosecutors charged Jeremy James with unlawful possession of a firearm first degree. (CP 1). The matter proceeded to trial, which resulted in a mistrial because the jury could not reach a unanimous verdict. (CP 56). On retrial, the jury convicted Mr. James following his unsuccessful motion to suppress the gun that was the basis for the charge. (CP 89).

At the hearing on motion to suppress, Lakewood police officer Ryan Moody testified that around 1:40 a.m. on January 17, 2015, he and his partner, Maxwell Criss, were on patrol. They ran a registration check on a passing car and learned the car had been sold, but the title had not been transferred within the requisite 45 days. (1RP 33-34).[1] They conducted a stop for the infraction. (1RP 34).

Jeremy James rode as a passenger in the left side backseat of that car, driven by Leon Oya. Two women and one other male were also passengers. (1RP 8). Officers noticed Mr. James and the other male passenger were not wearing seat belts. (1RP 9; 21).

Within 6 minutes of making contact with Oya, Moody learned Oya had a suspended license third degree and placed him under arrest. (1RP

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[1] For purposes of this brief, the hearing date of 7-24-15 will be referred to as 1RP page #; 10-12-15 as 2RP page #; 10-13, 10-14, 2015 as 3RP page #; 10-19, 10-29-15 as 5RP page #.

34; Pl. Exh. 5).[2] In a search incident to arrest, Moody found a piece of foil that had char marks on it, and a portion of a pill burnt onto the foil. (1RP 20). Mr.Oya did not have a prescription for the Percocet pill. (1RP 10).

After finding the pill, the officers suspected there was contraband in the car, testifying that it was common to find additional items of evidence or contraband or narcotics in a vehicle. (1RP 10;20;37). Aside from the charred pill portion, Moody testified there were no statements made or any other indicia that would have led him to believe there was contraband in the car. (1RP 50). Nevertheless, officers reported they asked to search the vehicle.

They did not present Mr. Oya with a written consent form. (1RP 10;22;37). While the other passengers remained in the car, according to the officers, Mr. Oya gave a verbal consent[3]. (1RP 10;37) There was no testimony that any of the passengers heard or could have heard the conversation between Oya and the police.

Officers ordered the passengers out of the car. They could not remember if they told the passengers why they had to get out of the car. (1RP 15; 21;49). Moody and another officer removed the passengers and

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[2] DVD police cam at 7:01 minutes.

[3] Although issued a microphone to wear on his uniform, Officer Moody did not wear his because it was "charging" in the car. A microphone in the backseat of the car was on, but because the radio was so loud it was impossible to hear what the officers said to the defendant and others at the scene. (Vol. 1 RP 44; Pl. Exh. 5).

conducted pat down searches. (P. Exh. 5).[4] Criss noted there was property belonging to the passengers that remained in the car, a purse in the backseat and another on the front passenger floorboard. (1RP 22).

Although officers did not report seeing any passengers making furtive movements or rearranging items in the vehicle prior to or during the stop, the women were not allowed to remove their purses. (1RP 25' Pl. Exh. 5[5]). Moody testified he was suspicious because the women denied consent to search their handbags. (1RP 45-46).

Moody also testified he saw a blue jacket in the backseat and based on its location, believed it belonged to Mr. James. (1RP 40;48). Like the women, Mr. James was not allowed to remove anything because "we had contraband located on the driver, we didn't want other things to be taken from the vehicle because it was still under investigation." (1RP 25). Although he testified he never saw the blue jacket, Criss said the officers were determined to make sure the jacket and purses stayed in the car. (1RP 16-17;29).

When questioned about whom he thought the jacket belonged to Moody testified:

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[4] DVD police cam at 14:15 – 16:10).
[5] DVD police cam at 19:00

A. Based on the fact that it was a male's coat and there was three males inside the vehicle, I believed it could have been all three of them."…
Q. Okay. Based on the location of the jacket, did you have –did you suspect Mr. James more than the other two male passengers?"
A. Based on location, yeah.
Q. Did you read Ferrier warnings to people other than Mr. Oya?
A. No.
Q. Did you-- so you didn't indicate to Mr. James he had the right to stop a search or limit a search?
A. I did not, no.

(1RP 48-49).

Officer Moody searched the backseat of the car for approximately two minutes before moving on to search the front seat again. (P. Exh. 5[6]). Approximately 21 minutes into the stop, Moody placed a single round of ammunition on the hood of the police car. (Pl. Exh. 5)[7].

He testified that he searched the jacket and found a single round of ammunition inside one of the pockets. (1RP 29). He said he removed the bullet and left the blue jacket in the vehicle. (1RP 45). Moody said Mr. James denied ownership of the ammunition, but stated the jacket belonged to him. (1RP 42).

The two women were released from the scene. (Pl. Exh. 5)[8]. After approximately 41 minutes, Mr. James was also released. (Pl. Exh. 5).[9]

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[6] DVD police cam at 16:10-18:00).
[7] DVD police cam at 21:00-22:09.
[8] DVD police cam at 25:00 onward
[9] DVD police cam at 41:47.

(1RP 25). There was no evidence Mr. James was ever cited for the infraction of failure to wear his seat belt.

Officers impounded the car, " ...for a search warrant due to the fact that we believed there was probably more paraphernalia or narcotics in the purses or anywhere else in the vehicle" (1RP 30). Although officers believed Mr. James was prohibited from possessing ammunition based on his prior convictions, they testified they did *not* impound the car based on the discovery of the round, but rather the Percocet pill. (Vol. 1 RP 30; 42).

However, the application for the warrant stated:

> **"That for a period of time up to and including 01-17-15, in Pierce County Washington, felonies to-wit: UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE R.C.W. 69.50.401, and UNLAWFUL POSSESSION OF A FIREARM, R.C.W. 9.41.040, was committed by the act, procurement or omission of another...**

Based on the felonies allegedly committed, the warrant requested a search for the following evidence:

> (1) Controlled substances
> (2) Narcotics paraphernalia, including syringes, pipes, packaging materials, and/or weighing equipment
> (3) Documents showing dominion and control
> (4) Weapons to include firearms, ammunition, and firearm accessories
> (5) Books, records, receipts, notes, ledgers and other papers relating to the possession, distribution, transportation, ordering, and/or purchasing of firearms.

(Pl. Exh. 4, p. 1: 7/24/2015).

At the 3.6 hearing, defense counsel argued Mr. James was illegally seized. Defense contended the bullet should have been excised from the probable cause warrant because it was illegally obtained: officers knew or had reason to know the jacket belonged to Mr. James and failed to seek consent before searching the item. (1RP 52-53). Counsel argued police were allowed to look under the jacket and around the jacket, but not inside of it.

Defense also contended there was no probable cause for the warrant to search the car based on a single pill found in the driver's pocket. (1RP 54). Lastly, the affidavit for the search warrant cited the crime of unlawful possession of a firearm, RCW 9.41.040 when in fact, it was a single round of ammunition. (1RP 56). The court denied the motion to suppress evidence and the matter proceeded to a jury trial. (1RP 76).

TRIAL EVIDENCE

After obtaining the warrant, officers completed a search of the vehicle. The inventory sheet listed the following items:

(1) the vehicle
(2) burnt foil with pill
(3) one round of 9 mm ammunition
(4) photo disk

(5) suspected methamphetamine[10]
(6) Ms. Perez' ID card
(7) 15 rounds of 9 mm ammunition
(8) handgun

A blue jacket was not listed in the inventory. (4RP 156). Officer Criss testified he took photos of the car prior to beginning his search. A blue jacket was not in any photos of the front or back areas of the car. (4RP 237).

The officer located a loaded Glock weapon up under the rear portion of the driver's seat. (3RP 78). Because the weapon was found on the floorboard near Mr. James' foot area, he was charged with unlawful possession of a firearm first degree. (CP 1).

Officer Criss testified he had no idea when the weapon had been placed in the car and agreed that everyone in the car indicated they did not have a weapon. (4RP 193). Officer Johnson testified he did not recover any fingerprints on the weapon and had no evidence that Mr. James ever touched it. (4RP 179).

Mr. James was found guilty of unlawful possession of a firearm first degree. (CP 89). He makes this timely appeal. (CP 106).

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[10] Recovered from one of the purses. (3RP 101)

III. ARGUMENT

A. The Evidence Was Insufficient To Sustain A Conviction For Unlawful Possession Of A Firearm First Degree.

A challenge to the sufficiency of the evidence may be raised for the first time on appeal as a due process violation. *State v. Moore,*7 Wn.App. 1, 499 P.2d 16 (1972). Under the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and the United States Constitution, Fourteenth Amendment, the State must prove every element of a crime beyond a reasonable doubt. *State v. Baeza,* 100 Wn.2d 487, 488, 670 P.2d 646 (1983). In a challenge to the sufficiency of the evidence, the test is whether, in viewing it in a light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). While all inferences are construed in favor of the state, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. G.S.,* 104 Wn.App. 643, 651, 17 P.3d 221 (2001); *State v. Aten,* 130 Wn.2d 640, 927 P.2d 210 (1996).

RCW 9.41.040 defines the crime of first degree unlawful possession of a firearm: A person is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his

possession, or has in his control any firearm after having previously been convicted in this state of elsewhere of any serious offense.

Under Washington law, possession may be actual or constructive. *State v. Callahan, 77* Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession requires physical custody. *State v. Cantabrana,* 83 Wn.App. 204, 206, 921 P.2d 572 (1996). Here, Mr. James was not in actual possession of the weapon.

Rather, the State claimed that Mr. James' proximity to the weapon and his statement that he did not know if his fingerprint would be found on the weapon was sufficient evidence to prove he unlawfully constructively possessed the weapon.

The Court in *Chouinard* reversed the conviction for unlawful possession of a firearm, holding the State demonstrated proximity to and knowledge of the presence of a weapon, but failed to prove other facts necessary to show constructive possession, including dominion and control over the weapon. *State v. Chouinard,* 169 Wn.App. 895, 900, 282, P.3d 117 (2012).

There, Chouinard rode as a passenger in the backseat of a car. Police stopped the vehicle based on reports that shots had been fired out of a car matching its unique description. Officers cleared the car of its passengers and saw a rifle, with an attached flash suppressor, protruding

up from the trunk of the car through a gap between the backrest and rear dash. Chouinard denied knowing anything about the gunshots, but acknowledged he had seen the gun in the backseat. Chouinard was convicted of unlawful possession of a firearm first degree.

On review, the Court noted that Washington courts "hesitate to find sufficient evidence of dominion or control where the State charges passengers with constructive possession." *Chouinard,* 169 Wn.App. at 900. In reviewing case history on unlawful possession of contraband based on constructive possession the Court noted that in each case the convictions were upheld based on the defendant owning, driving, or solely occupying the vehicle or admitting to having the weapon and moving it so police could not see it. *Chouinard,* 169 Wn.App. at 901. (*See State v. Bowen,* 157 Wn.App. 828, 239 P.3d 1114 (2010); *State v. Echeverria,* 85 Wn.App. 777, 934 P.2d 1214 (1997); *State v. Turner,* 103 Wn.App. 515,13 P.3d 234 (2000); *State v. Reid,* 40 Wn.App.319, 698 P.2d 588 (1985)).

Like Chouinard, Mr. James rode as a backseat passenger in a vehicle stopped by police. Also like Chouinard, the weapon was found right next to his seat. There, Chouinard actually admitted to knowing the weapon was next to him. Here, the State presented no evidence that Mr. James had any knowledge the weapon; it was tucked up under the front

seat in such a manner that the police officer, who searched the backseat for over two minutes, did not notice it.

Even with the proximity of the weapon, the report of shots having been fired from the vehicle, and Chouinard's acknowledgment that he knew the weapon was there, the Court reversed the conviction because there was insufficient evidence to establish dominion and control to convict for constructive possession.

The reasoning of the Chouinard Court should be applied to this case. The State demonstrated Mr. James' mere proximity to the weapon. There was no evidence he knew of the weapon, or as a passenger, had dominion and control. The evidence does not sustain a conviction for constructive possession of a firearm. Mr. James respectfully asks this Court to reverse the conviction for unlawful possession of a firearm for insufficient evidence and remand to the trial court to dismiss the charge with prejudice.

B. The Trial Court Erred When It Denied Mr. James' Motion To Suppress Evidence.

This Court should reverse the conviction and remand for suppression of the evidence. The officers illegally seized Mr. James, and illegally searched his jacket. The seizure was unconstitutional because there was no articulated reason to hold Mr. James for longer than issuing a

traffic citation for failure to wear a seat belt. The search was illegal because officers knew or had reason to know the jacket belonged to Mr. James and they searched inside the jacket absent a warrant or consent. The remedy for an illegal search or seizure is suppression of the evidence as fruit from the poisonous tree. *State v. Ladson,* 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Further, the search warrant was flawed and overbroad. If, after review, a search warrant is found to be overbroad it is invalid and taints all items seized without regard to whether they were specifically named in the warrant. *State v. Perrone,* 119 Wn.2d 538, 834 P.2d 611 (1992).

1. Standard of Review

A trial court's ruling on a suppression motion is reviewed for substantial evidence to support the challenged findings and a de novo review of challenges to the trial court's conclusions of law. *State v. Ross,* 106 Wn.App. 876, 880, 26 P.3d 209 (2001), *rev. denied,* 145 Wn.2d 1016 (2002); *State v. Carneh,* 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

2. The Evidence Did Not Support The Trial Court's Finding That Three of the Five Vehicle Occupants Were Released At Scene.

The only individual arrested was the male in the right rear backseat because he had an outstanding warrant. (Vol. 1 RP 25; Vol. 3 RP 63;Pl. Exh. 4 7/24/15 RP 3). Mr. Oya, who was originally arrested for driving

with a suspended license third degree, a misdemeanor, was released at the scene, along with the women and Mr. James. (Pl. Exh. 4 7/24/15 RP 3; Vol. 3 RP 56).

3. The Evidence Should Have Been Suppressed Because Mr. James Was Unlawfully Seized.

Under Article 1, § 7 of the Washington Constitution, a person is "seized" when an officer restrains, either physically or by a show of authority, that person's freedom of movement to such an extent that a reasonable person would not feel free to leave or to decline the officer's request and terminate the encounter. *State v. O'Neill,* 148 Wn.2d 564, 574, 62 P.3d 489 (2003). For the duration of a traffic stop, a police officer effectively "seizes" everyone in the vehicle. *State v. Marcum,* 149 Wn.App. 894, 910, 205 P.3d 969 (2009).

In the context of a traffic stop, officers are not justified in intruding on the rights of passengers beyond those steps necessary to control the scene, or steps justified by a circumstance, such as officer safety. *State v. Byrd,* 110 Wn.App. 259, 262, 39 P.3d 1010 (2002). Without an independent, articulable, lawful basis for their actions, officers may not extend their control of passengers. *Byrd,* 110 Wn.App. at 263. Rather, a passenger should be free to leave once "any exigent circumstances regarding control of his or her movements dissipates." *Id.*

Officers seized Mr. James when they stopped Mr. Oya's vehicle for an infraction. After arresting and searching Mr. Oya, the officers wanted to search the car and obtained consent from him. In the interest of officer safety and to control the scene, they ordered the passengers out of the vehicle one at a time and conducted pat downs of each individual, including Mr. James. (Pl. Exh. 5).

Where a driver consents to a vehicle search, it does not independently justify a seizure of passengers. *State v. Reichenbach,* 153 Wn.2d 126, 136, 101 P.3d 80 (2004). Here, rather than issue Mr. James a citation for failure to wear a seat belt and release him, officers extended their control and directed him to sit on the bumper of the car, escalating his initially justifiable detention to a warrantless seizure. Even though there were three officers on scene, Mr. Oya and the other male passenger were safely in police custody, officers seized Mr. James for over 40 minutes.

The Fourth Amendment to the United States Constitution guarantees "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A warrantless seizure is presumed unreasonable under the Fourth Amendment. *State v. Smith,* 145 Wn.App. 268, 274, 187 P.3d 768 (2008). An exception to the warrant requirement is the circumstance

where the officer has probable cause to believe the individual has committed a crime, or can provide specific and articulable facts that give rise to a reasonable suspicion that the *individual* has been or is about to be involved in a crime. *State v. Armenta,* 134 Wn.2d 1, 10, 948 P.2d 1280 (1997); *Smith* 145 Wn.App. at 275.

Here, there was no individualized suspicion that Mr. James had done anything more criminal than fail to buckle his seat belt. His mere presence in a car, whose driver had a small piece of a charred Percocet pill in his pocket, did not create a reasonable suspicion that Mr. James was involved in criminal activity.

Where the reason for the initial police contact is discharged, any further seizure is without legal authority and evidence obtained as a result of that seizure should be suppressed. *State v. Coyne,* 99 Wn.App. 566, 570, 95 P.2d 78 (2000).

Mr. James' infraction was failure to wear a seat belt. The officers were authorized to give him a citation, and release him. RCW 46.61.688 (3)(5). Where an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Suppression is constitutionally required. *State v. Ladson,* 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

4. The Evidence Did Not Support The Trial Court's Finding or Conclusion That The Jacket Was Not 'Readily Recognizable' As Belonging To A Particular Individual And Was Irrelevant To The Test Justifying A Search Of Passenger Belongings.

Where a driver consents to a vehicle search, it does not automatically confer a right on officers to search property belonging to non-arrested passengers. *State v. Reichenbach,* 153 Wn.2d 126, 101 P.3d 80 (2004). Rather, a passenger has an independent, constitutionally protected privacy interest in his property, which is "not diminished merely upon stepping into an automobile with others." *State v. Parker,* 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

In *Parker,* the Court held that Article 1 § 7 does not authorize the search of non-arrested vehicle passengers, which includes their personal belongings. *Parker,* 130 Wn.2d at 502-503. The Court presented the framework for analyzing the question of whether items belonging to a passenger may be searched incident to the arrest of a driver. The Court must first consider whether the item searched was a personal effect of the passenger and second, whether officers *knew or should have known* the item was a personal effect of a passenger who was not independently suspected of criminal activity and third, whether there was reason to

believe contraband was concealed within the personal item *immediately prior to the search*. *Parker*, 139 Wn.2d at 503.

Thus, as a passenger, Mr. James held an independent constitutionally protected privacy interest in his person and items that officers knew or should have known belonged to him. Officer Moody believed the blue jacket belonged to Mr. James, as it appeared to be his size and was on the seat he had just vacated. (1RP 48; 4RP 151; CP 59). Mr. James was not independently suspected of any criminal activity. The state presented no evidence there was any reason to believe contraband had been concealed within the jacket immediately prior to the search.

The trial court erred when it concluded "Officer Moody's search of the vehicle was lawful and reasonable in scope. Since the owner of the blue jacket was not 'readily recognizable' to the officers before and during the search, the officers lawfully searched it and lawfully found the 9 mm round." The "readily recognizable" language is a reference from *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). The court, in its oral opinion, relied on *Hill* in its ruling on the suppression motion.

In *Hill*, officers conducted a search warrant looking for narcotics and paraphernalia. *Id.* at 643. They encountered a naked man, who asked if he could put on a pair of sweatpants laying on the floor near him. The officer did a pat down of the pants and crumbs of rock cocaine fell to the

floor. *Id.* There, the trial court entered a finding of fact that the sweatpants were not obviously associated with the defendant. On appeal, Hill argued the pants were readily recognizable items of personal effects. The Supreme Court pointed out that Hill did not assign error to the court's finding, thus it was considered a verity on appeal, without ever addressing the question of whether the items were "readily recognizable" as belonging to another not subject to the search. *Id.* at 644.

Here, Mr. James assigns error to the court's finding (FF31) distinguishing it from *Hill.* In *Lohr*, the Court addressed the "readily recognizable" issue, holding that whether the defendant controlled the item or tried to maintain its privacy were not independently dispositive factors. *State v. Lohr,* 164 Wn.App. 414, 424, 263 P.3d 1287 (2011). There, Lohr was being released from the premises being searched. She asked to take her pants and boots when the officer noticed a purse sitting with those items. He asked if it was her purse and she stated it was and she wanted to take it with her. The officer searched the purse, found contraband, and she was arrested. *Id.* at 417.

Likening it to *Worth,* the Court noted in *Worth* the purse rested against the chair on which *Worth* had been seated, stating it was clear that she owned the purse. *Id.* at 420. The *Lohr* Court reasoned that to require an individual to be in control of the item or to tell the officer to stop the

search "would turn on its head the concept of requiring consent to a search otherwise unauthorized by law." *Id.*

Likewise, here it was clear the jacket was in the seat where Mr. James had been riding earlier. The officer testified he believed it belonged to James. The trial court ending a finding that the officer suspected the jacket belonged to James based on its position in the car. The officer should have obtained his consent before searching the jacket.

In this case, the State argued that under *Cantrell*, officers do not have to obtain consent of each passenger to search an area of common authority. (CP 26) *State v. Cantrell,* 124 Wn.2d 183, 875 P.2d 1208 (1994). The case is distinguishable from the present case. There, after a traffic stop for speeding, the passenger consented to a search of his father's car; the driver did not consent. The evidence obtained from the search was used to prosecute both individuals. *Id.* at 186. The Court ultimately held the prolonged detention was illegal and tainted an otherwise valid consent.

The *Cantrell* Court specifically noted it did <u>not</u> reach the question of whether mere passengers, as opposed to a permissive driver as in *Cantrell*, had a reasonable expectation of privacy in a vehicle or its contents. However, the Court did hold that passengers had a reasonable expectation of privacy in their own belongings. *Id.* at 187. *Cantrell* does

not stand for the proposition that a passenger's belongings can be opened or searched without his consent, despite the consent of the driver. It does, however, stand for the rule that where an unconstitutional search or seizure occurs, the remedy demands that all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.

It is Washington law that an individual who is not the subject of a warrant, or an enumerated exception to the warrant, fully maintains his privacy interest in his own belongings. Mr. James was illegally seized and his jacket, which officers knew or should have known belonged to him, was searched. There is an absence of any articulable, objective suspicion that he was armed or dangerous, or had secreted any contraband obtained from Mr. Oya. There was no justification for the search and the evidence obtained later should have been suppressed. *Ladsen,* 138 Wn.2d at 359.

C. The Search Warrant Was Overbroad And Not Supported By Probable Cause.

1. Standard of Review

A warrant is overbroad if either it fails to describe with particularity items for which probable cause exists, or because it describes items for which probable cause does not exist. A warrant may also be found overbroad if some portions are supported by probable cause and

other portions are not. *State v. Higgs,* 177 Wn.App. 414, 427, 311 P.3d 1266 (2013). At a suppression hearing, the trial court acts in an appellate-like capacity in determining whether the affidavit supports probable cause. A trial court's assessment of probable cause is a legal conclusion reviewed de novo. The validity of a search warrant is also reviewed de novo. *State v. Neth,* 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

2. The Evidence Did Not Meet The Requirements For Probable Cause to Search For Drugs Or A Firearm.

Probable cause for a search warrant "requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched." *State v. Neth,* 165 Wn.2d at 183. There must be an adequate showing of circumstances that go beyond mere suspicion and personal belief that criminal acts have taken place and that evidence will be found in the premises to be searched. *Id.*

Multiple pieces of evidence cited as evidence of probable cause for a search warrant were deemed insufficient to justify a reasonable belief that evidence of a crime would be found in a car in *Neth.* There, officers cited the driver's nervous behavior, his prior conviction for distribution of heroin, his inability to provide identification or proof of vehicle ownership, statements about the presence of thousands of dollars in cash somewhere in the vehicle, and plastic baggies, common in drug

transactions, in the defendant's pocket. Absent more, the Court concluded there was not probable cause to issue the search warrant for the vehicle. *Neth,* 165 Wn.2d at 179;183-184.

Here, the officers admitted and the trial court entered findings that officers had no knowledge of drug activity in the car beyond the single charred pill and foil found in Oya's pocket. Officers based their suspicions for the warrant upon their experience that it is common for evidence to be within a car under similar circumstances. (CP 59). "Generalizations do not substitute for facts and investigation." *State v. Thein,* 138 Wn.2d 133, 149, 977 P.2d 582 (1999). The affidavit must demonstrate a reasonable inference that evidence of criminal activity will be found in the place to be searched. Generalized statements about the habits of people in particular criminal enterprises are insufficient to establish probable cause. *State v. Nordlund,* 113 Wn.App. 171, 182-184, 53 P.3d 520 (2002). Here, apart from the single charred pill, officers testified they had no other indicia of evidence that drugs might be found in the car. As in *Neth,* there was not probable cause to issue the search warrant.

Further, the complaint for the warrant stated the crime of unlawful possession of a firearm had been committed. (Pl. Exh. 4 page 1, paragraph 2). This was manifestly false. What the officer found was a

single round of ammunition. RCW 9.41.040, the unlawful possession of a firearm statute cited does not define possession of ammunition as a criminal offense. Citing the crime as a basis for the search was a reckless disregard for the truth.

Where a defendant can establish by a preponderance of the evidence that the affidavit submitted in support of a search warrant contains false statements made knowingly and intentionally or with reckless disregard for the truth, and if that false statement is necessary for a finding of probable cause, the misrepresentation must be stricken, and if the affidavit then fails to support a finding of probable cause, the search warrant will be held void and the evidence excluded. *State v. Cord,* 103 Wn.2d 361, 367,693 P.2d 81 (1985)(internal citations omitted).

The affidavit noted that Mr. James was a convicted felon and prohibited from carrying a *firearm*. (Pl. Exh. 4 page 2). There was no evidence that he was involved in criminal activity by having the bullet in the jacket pocket. The affidavit did not demonstrate that Mr. James, or anyone else in the car, was involved in illegal activity prohibited under RCW 9.41.040. The round of ammunition should have been excised from the warrant. The trial court wrongly affirmed probable cause to search based on the round of ammunition. There was no probable cause to search for a firearm and the evidence should have been excluded.

3. The Warrant Was Overbroad Because It Described Items For Which Probable Cause Did Not Exist.

The complaint for the search warrant listed 5 categories of evidence officers sought to search for, based on the alleged commission of two felonies: unlawful possession of a controlled substance (RCW 69.50.401) and unlawful possession of a firearm (RCW 9.41.040)[11]. (Pl. Exh. 4 page 1).

Under *Thein*, probable cause must be based on more than conclusory predictions. *Thein,* 138 Wn.2d at 147-148. Nothing in the affidavit established probable cause to believe there would be evidence of books, records, receipts, notes, ledgers, and other papers relating to the possession, distribution, transportation, ordering, and/or purchasing of firearms. There was no suggestion that any of these items existed or that they were located within the vehicle. The affidavit relied only on the single round of ammunition, which was not illegal to possess.

The use of the broad categories of items to be seized, books, records, papers relating to dealing in firearms was overbroad. Distribution, transportation, ordering, and/or purchasing of firearms had nothing to do with legal possession of a bullet and is therefore, overbroad.

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[11] As argued above, the allegation of unlawful possession of a firearm was false.

Because the warrant was overbroad, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. *State v. Perrone,* 119 Wn.2d at 545; *Higgs,* 177 Wn.App. at 427.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. James respectfully asks this Court to reverse his conviction and remand to the trial court to dismiss the charge with prejudice.

Respectfully submitted this 27th day of May 2016.

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I, Marie J. Trombley, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the appellant's brief was sent by first class mail, postage prepaid on May 27, 2016 to:

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