NO : 68725-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

James E. Ballou 2nd,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Janet E. Ellis, Judge

BRIEF OF APPELLANT

(S.A.G.)

James E. Ballou 2nd
Appellant

C/O Maling address
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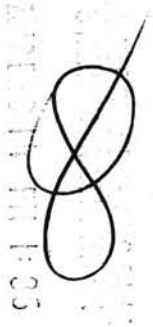

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

COA NO. 68725-5-1

Appellant:James E. Ballou 2nd

I ask for your patience in that I am not an Attorney and I will present my statement of additional grounds to the best of my ability and as precise as possible.

I ,James E. Ballou 2nd., am appealing to you for relief in that I have been convicted by a jury ,not of my peers and questionable evidence of second degree burglary and as a result sentenced and imprisoned (51months) .

The evidence relied upon during trial to prosecute me ,was hearsay and insufficient to sustain a criminal conviction as it is not the best evidence under the rules of Evidence and it should not have been accepted as such during trial.

The testimony about the person or persons in the survellance tape is hearsay and it deprived me of my right to dispute the testimony given by the Prosecution's witness or witnesses regarding the contents of the video tape.

If defense counsel failed to make timely and proper objections to prevent the D.A. /Prosecutor from bringing in witnesses to testify on the evidence that had not been properly maintained ,it constituted (Ineffective Assistance of Counsel).

If defense counsel made timely objections and the objection and the objection was over ruled by trial court ,then it would be a legal issue regarding the trial court's abuse of judicial discretion.

1. Obligation and standards for competent legal representation:

See: Strickland -v-Washington (1984) 466 US 668 ,688,80L.Ed 2d 674 ,693,104 s.ct. 2052.

The Trial Court has broad discretion in determining whether the evidence has sufficient probative value to sustain the verdict. See : Hudson v. Louisiana (1981) 450 u 540 ,67 Led 2d 30 ,101 s.ct 970.3.

Bad Faith: The state is responsible for perserving evidence not the store. Officer Gann did not do diligence to retrieve the surveillance tape from the store. The video would have been exculpatory for me. The officer requested that the store manager make a copy of video to be picked up later. At that time the manager became an agent of the state. Due to negligence and sloppy Police work ,I was unable to challenge the video because it no longer existed. The prosecutor errored in not providing the behavior of the alleged crime which is an essential element necessary in a charging document. This alone warrants a

vacation order reversing conviction. The Video tapes of the alledged crime scene should have been maintained by Police Department and their failure to do so Deprived both Leonard Peggs and me of Critical Exculpatory Evidence to establish our Innocence to the charged offense. Both Attorneys representing the legal interest of both Leonard and me should have filed Writs of Habeas Corpus ,Writs of Mandate or Prohibition to prevent the State from a consolidated trial. Trial counsel had a strong legal standing to request severance of the trials because when the Police failed to preserve the evidence that would have shown that I ,James was not an accomplice to any crime because there's no evidence to a crime being committed.

The error of one Attorney will have an adverse affect on both defendants, There is reason to believe that a motion for the Court to order severence of trial pursuant to Criminal Rule 4.4 C*R 4.3.1 (a) should have been presented by both our Attorneys and taken up for review on Writ if it had been denied by Trial Court .

The right to receive a fair trial is a Federal Constitutional guarantee and failure of Counsel to request Severence would constitute Ineffective Assistance of Counsel and the failure of the Trial Court to grant a Timely Motion for Severance would be an Abuse of Discretion.The evidence was insufficient to support a finding of guilt before a trial of fact.(Jury).bThe trial court allowed testimony of what Prosecution witness claim to have seen on video tape .Hearsay is not the best evidence under the rules of Evidence and it cannot be used during a trial. Several of the State's witnesses were Impeached numerous times during their sworn testimonies. As an example ,Officer Gann stated on deposition and first trial that he did not recognize a face on the surveillance video .One month after 1st trial during second trial he testified that he recognized Leonards profile. All testimony on the video tape by the Prosecution witnesses should have been objected to by both Defense Counsels. Even though the court denied motion to dismiss ,Counsel did not press issue of 3.6 motion to suppress evidence,based on fact that there was no evidence. It should not have been mentioned due to prejudice and violating due process. Ground one,"Hearsay ,Ground two "Facts not into evidence" .There are several other important objections relevant to the issue of evidence and the lack there of. The Prosecutor errored in not providing the behavior of the crime which is an Essential element necessary in a (C)harging Document . This warrants a Vacation order from this Court- Reversing Conviction CRRLU 2.2 for me James E.Ballou 2nd.,11-1-0007-3 and Leonard Pegs Jr. 11-1-00008-1 State -v-Carl L. Jones. Failure to call witness violate U.S.C. A6 . This Court did not rule as a matter of law. Error 801 (C) Statue State-v- Simon 120 wash. 2d 196,199,340,F.2d 172 (1992) I appeal to you to dismiss all charges:

U.S.C. A 14th Amendment- Straden -v- west Virginia,100 U.S. 303 (1880) 100 U.S. 303 (1880).

Mr. Pegg's and my Liberty Interest have been violated in procedural due process in law on same Criminal Conduct Statue R.C.W. 99 4A.589. Count 1 and 2 have the same Criminal Behavior of (Possession) under R.C.W. 9.94A.589 (1) (6) to encompass the (S)ame Criminal Conduct shall be calculated as one offense ,one offender score to reduce to the lesser.Included offense of Attempted Burglary R.C.W. 9.9 4 A.505 (2)(6) =misdomeanor omitted at Jury Trial punishment stage of Trial ,connecting my sentence .

I ask for Restoring the Constitution of the United States Fourteenth Amendment ,persuant State-v-Doering ,87311-9 ,August 9th.2012 . Washington State Supreme Court Decision. The trial court violated my due process right to a fair trial by denying her motion to suppress the destroyed video. Moreover there was insufficient evidence to prove that I committed the charged crime.The conviction should be reversed. To protect the defendants due process right to a fair trial under the sixth and fourteenth amendment ,criminal defendants must have access to the evidence against them. United States v.Valezuelia-Bernal 458u.s.858.867,102s.3440,73 L.Ed. 2d 1193 (1982). To protect the right ,the state must protect produce upon request favorable to an accused where the evidence is material either to guilt or to punishment. Brady v.Maryland,373 u.s.83,87,83 s.ct.1194,10L.Ed.2d 215 (1963). After Brady ,the court extended the rule to evidence that is destroyed before it can be disclosed to the defense. The court held that where the state has lost or destroyed the evidence supression is required when the defendant shows that the state lost or destroyed the evidence in bad faith. Arizona v. Youngblood,488 U.S. 51,58,109 S.ct.333,102 L.Ed.2d 281 (1988). Evidence must also be disclosed when it possesses "an exculpatory value that was apparent before the evidence was destroyed" and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable available means. California v. Trom betta,467 U.S. 479,489,104 s.ct. 2528 ,81 L.Ed.2d 413 (1984).

In city of Seattle v.Fettig,10 wn.App.773,776,519 P.2d 1002 (1974). The court held the negligent destruction of a video recording taken of the defendant compelling a sobriety test violated due process. In that case ,the officers were allowed to testify to their observations regarding Fettig's performance of the test.Id,at 775. The court held that : The video tape was a record of that performance,either substantiating or rebutting the officer's testimony. It was there fore material to Fettig's case since the testimony of the officers was the only evidence admitted against him,except the rebuttal presumption of intoxication evidenced by the .12 breath alyzer reading. The court noted that to affirm the denial of a motion to suppress,the reviewing court must find that the trial court would have given "no weight to such evidence "Id.at 776,citing Barbee v. Warden,Marilyn Penitentiary ,331-F.2d 842 ,845, (4th circuit 1964). The court held therefore,that the video tape was "Material

and favorable too the defendant". Fettig at 776. Further it was irrelevant whether the destruction of the video was negligent or deliberate,the defendant's due process rights are affected in either case" Id.at 775,,citing Giglio v. United States,405 u.s. 150,153,92s.ct.763,31 Led.2d 104 (1972); Thomas v. United States,343 F.2d 49 ,53-54 (9th circuit 1965);Hanson v.Cupp ,5or .App.312 ,484 P.2d 847 (1971)

In my case cast,the surveillance video was intact when officer Gann responded to the scene. It was After Officer Gann viewed the video with the manager ,he requested a copy of the video from the manager .The manager told Officer Gann that he would make him a copy. Instead of officer Gann collecting the hard drive to permit trained professionals to recover the footage .In my case the court erred when it denied the defense motion to suppress testimony about the contents of the video. In this case as in Fettig, the destroyed evidence was material to the case. Without the video,I could not directly challenge the witnesses testimony about what could be seen on the video and particularily whether it was possible to identify anyone on it. Normally controlling law prohibits a lay witness from giving opinion testimony as to the identity of a person in a surveillance video because this unfairly prejudices the defendant and invades the province of the jury.

It is true that in my case,unlike Fettig,that the video was not in the custody of the police at the time it was destroyed. However in my case ,officer Gann knew that the video was crucial evidence and he redirected the store manager to make a copy for the state rather than taking the hard drive or calling some one from police evidence department to take hard drive into evidence. Generally the actions of a private citizen can only be inputed to the state when the private citizen was in some way "instigated ,encouraged, ,counseled ,directed,or controlled " by the state or it's officers. State v. Agee,15 wn.App.709,713-14, 522 p.2d 1084,1087 (1976); also see,State v. Gonzales 24 wn.App.437 ,439 ,604 p.2d 168 (10790 (Warrantless search) Officer Gann made the Toy's R Us Manager an agent of the state by directing him to attempt to make a copy of the video rather than taking the hard drive with him to preserve the evidence. Consequently ,the distruction of the videpo can be imputed to the state. In summary,Ballou and Peggs due process rights to a fair trial were violated when the trial court denied their motion for suppress the testimony about a video that was destroyed due to the negligence of the state.

The state failed to provide sufficient evidence to prove beyond a reasonable doubt Peggs /Ballou as purpetrators of the charged crimes. Due process requires the state to prove all elements of a crime beyond a reasonable doubt . State v. Aver,109 wn.2d 303,310,745p.2d,479 (1987). Evidence is insufficient to support a conviction when ,viewed in the light most favorable to the prosecution,it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Green 94 wn. 2d

216 ,221,616 p.2d 628 (1980). In this case ,there is insufficient evidence to convince a rational trier of fact that I ,Ballou was one of the men to burglarize the Toys R Us Store. The trial court violated my (Ballou) due process right to a fair trial by denying my motion to suppress the destroyed video. Moreover ,there was insufficient evidence to prove (Ballou) / I committed the charged crime .Once having driven off from the Toys R Us store ,Officer Gann stopped the car and placed us under arrest within seven minutes of leaving the store according to official Police records. The car was then confiscated along with empty cardboard box which was placed into evidence. Officer Gann lacked authority to stop and arrest us outside of his territorial limits of his jurisdiction. It is well established that as a general rule ,a police officer has no authority to seige and arrest any individual outside of the territorial boundaries of his jurisdiction. Irvin v. Department of Motor Vehicles,10 Wn. App. 369-371,517 P. 2d 619 (1974). Wenatchee v. Durham, 43 Wn. App. 547,718 P.2d 819 (1986) .

I pray for relief.
Respectfully

James E Ballou 2nd COA: NO. 68725-5-1

As noted in *Durham, Id.* at 549:

> The concept of reasonableness embodied in the Fourth Amendment, and article I, section 7 of the Washington Constitution presupposes an exercise of lawful authority by a police officer. When a law enforcement official acts beyond his or her jurisdiction, the resulting deprivation of liberty is just as unreasonable as an arrest without probable cause. *See United States v. Di Re,* 332 U.S. 581, 595, 92 L.Ed. 210, 68 S.Ct. 222 (1948). *See also State v. Bonds*, 98 Wn.2d 1, 8, 653 P.2d 1024 (1982)., *cert. denied*, 464 U.S. 831, 78 L.Ed.2d 112, 104 S.Ct. 111 (1983).

In 1985, the legislature enacted the Mutual Aid Peace Officers Powers Act, RCW 10.93, which expands the common law authority of certain police officers to act outside of the territorial limits of their jurisdiction in specifically defined circumstances.

These circumstances include (1) prior written consent by the sheriff or chief of police in the foreign jurisdiction; (2) response to an emergency involving immediate threat to human life or property; (3) response to a request for assistance pursuant to a mutual aid agreement or to a request from an officer with enforcement authority; (4) transport of a prisoner; (5) execution of an arrest or search warrant; or (6) fresh pursuit. RCW 10.93.070.

None of these circumstances apply to expand the limits of Officer Gann's authority beyond the territorial limits of the City of Lynnwood.

1. Prior Written Consent. The first requirement of RCW 10.93.070 requires prior written consent of the sheriff or chief of police in whose primary jurisdiction the exercise of the powers occurs. No such written consent agreement has been provided by the State.

2. Response to Emergency. The second requirement requires a response to an emergency involving an immediate threat to human life or property. No such emergency existed.

3. Response to Request for Assistance Pursuant to a Mutual Aid Agreement or the Request of a Police Officer with Enforcement Authority. This section addresses responses to requests for assistance, either based upon a mutual law enforcement assistance agreement or a specific request from another peace officer.

The officer does not allege that he was responding to a request for assistance pursuant to a mutual law enforcement assistance agreement. Nor has the State produced such an agreement with the agency of primary territorial jurisdiction.

Any such agreement must in any event be properly ratified by the legislative bodies of the respective signatories and properly filed with the respective auditors. *State v. Plaggemeier,* 93 Wn.App. 472, 969 P.2d 519 (1999). No such agreement has been produced by the State.

Nor does Officer Gann allege that he was responding to a request for assistance from another peace officer with enforcement authority.

4. Transporting a Prisoner. Officer Gann was not transporting a prisoner.

5. Executing an Arrest Warrant or Search Warrant. Officer Gann was not executing an arrest warrant or a search warrant.

6. Fresh Pursuit. RCW 10.93.120 provides in pertinent part as follows:

> (1) Any peace officer who has authority under Washington law to make an arrest may proceed in fresh pursuit of a person (a) who is reasonably believed to have committed a violation of traffic or criminal laws,
> (2) The term "fresh pursuit," as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.

The common law definition of fresh pursuit contained five elements as outlined in *Wenatchee v. Durham, supra* at 551:

> (1) that a felony occurred in the jurisdiction; (2) that the individual sought must be attempting to escape to avoid arrest or at least know he is being pursued; (3) that the police pursue without unnecessary delay; (4) that the pursuit must be continuous and uninterrupted, though there need not be continuous surveillance of the suspect nor uninterrupted knowledge of his location; and (5) that there be a relationship in time between the commission of the offense, commencement of the pursuit, and apprehension of the suspect.

In *Wenatchee v. Durham,* a City of Wenatchee police officer observed the defendant driving within the city limits of Wenatchee committing traffic infractions. The officer followed the defendant across the county line and outside the territorial boundary of his jurisdiction. The officer initiated a traffic stop which resulted in the defendant being citied for Driving on a Suspended License and Obstructing a Police Officer.

The court held that the common law definition of fresh pursuit did not apply to civil traffic infractions. The court also noted that a pursuit requires more than a mere "following" and that the defendant was not in "flight."

Significantly, the court found that the concept of reasonableness embodied in both the Fourth Amendment and article 1, section 7 of the Washington Constitution presupposes an exercise of lawful authority by a police officer.

> When a law enforcement officer acts beyond his or her jurisdiction, the resulting deprivation of liberty is just an unreasonable as an arrest without a probable cause. *See, United States v. Di Re,* 332 U.S. 581, 595, 92 L.Ed. 210, 68 S.Ct. 222 (1948). *See also State v. Bonds,* 98 Wn.2d 1, 8, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831, 78 L.Ed.2d 112, 104 S.Ct. 111 (1983). *Durham* at 550.

The court therefore applied the exclusionary rule to exclude evidence obtained from the illegal arrest. *Durham* at 552.

The statute has superseded element (1) insofar as fresh pursuit may be undertaken for traffic offenses and criminal offenses, as well as felonies. *City of Tacoma v. Durham,* 95 Wn.App. 876, 880, 978 P.2d 514 (1999).

In *City of Tacoma,* the defendant was observed driving erratically in the City of Tacoma. A Tacoma police officer was dispatched to the scene, but the defendant had crossed into the City of Lakewood before the Tacoma officer caught up to him. Under these circumstances, the court upheld the stop of the defendant's vehicle, even though the record did not support common law element (2), that the driver must know he is being pursued prior to leaving the jurisdiction of the officer.

Here the officer initiated pursuit within his jurisdiction and was justified in crossing out of his jurisdiction to apprehend the defendant, even though the defendant was not actually fleeing from the officer within the officer's jurisdiction. Under the

specific circumstances of this case, the court upheld the stop as involving "fresh pursuit." *Tacoma v. Durham* at 881.

Even the expanded definition of fresh pursuit still envisions a pursuit requiring the officer to cross his jurisdictional line, even if the offender is not technically "fleeing" the officer when the offender leaves the jurisdiction. *Vance v. Department of Licensing,* 116 Wn.App. 412, 416 (2003).

Vance was speeding. Police therefore had a reasonable belief that he posed a danger to the public. The King County sheriff's deputy pursued Vance's vehicle, without unreasonable delay, across a jurisdictional boundary within an urban area. Vance's stop occurred as a result of fresh pursuit and was lawful. The court emphasized the need to protect the public:

> Given the inherent mobility of a driving offense, the fresh pursuit doctrine is a necessary means of cooperatively enforcing traffic laws to ensure public safety." *Vance* at 416.

And as noted in *Tacoma v. Durham, supra* at 881, "According to RCW 10.93.07(2), a police officer may *cross over to another jurisdiction* and make an arrest 'in response to an emergency involving an immediate threat to human life or property.'" (emphasis added).

Most recently, in *State v. King,* 167 Wn.2d 324, 219 P.3d 642 (2009), the State Supreme Court has retreated from the more expansive interpretation of the statute represented by the *Durham* decision. In *King*, a City of Vancouver police officer driving

to work north of the city limits observed the defendant stand on the foot pegs of his motorcycle and accelerate at a high speed well in excess of the speed limit. The officer pursued the defendant and pulled him over and arrested him for reckless driving.

The court noted that the facts did not support a finding of "fresh pursuit" under the statute. *King* at 20. Nor did the evidence justify a stop based upon an emergency involving an immediate threat to life or property. *King* at 22.

Adopting a more restrictive reading of RCW 10.93.070, the court stated at 22:

> We choose not to broaden or water down the meaning of this emergency exception to include speeding such as King's. Furthermore, we note that police officers are still authorized to effect extraterritorial arrests in circumstances where a valid interlocal agreement between jurisdictions exists or where the fresh pursuit exception applies.

In the instant case, there was no continuous and uninterrupted pursuit as required by the common law definition of "fresh pursuit" articulated in *Wenatchee v. Durham.* Officer Gann went to the areas of Toys R Us to conduct an "area check". He almost immediately left the city limits of the City of Lynnwood, driving north on Alderwood Mall Parkway to 164th Street SW. Unable to locate the suspect vehicle, Officer Gann abandoned his search and turned around, driving south on the Parkway. He was no longer searching for the vehicle. He was certainly not "pursuing" the vehicle. He was driving back to the Toys R Us store to meet with witnesses when he happened upon the suspect vehicle.

As in *State v. King,* this court should adhere to the Supreme Court's admonition

not to water down the meaning of the statute or the common law definition of "fresh pursuit" to apply the doctrine to facts where the officer is not in fact crossing jurisdictional boundaries in continuous and uninterrupted pursuit of a suspect as a basis for justifying a seizure beyond the territorial limits of the officer's authority.

II.

OFFICER GANN LACKED PROBABLE CAUSE TO STOP THE DEFENDANT'S VEHICLE

The Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington State Constitution guarantee a right to privacy to be free from unreasonable search and seizure. A "seizure" occurs when an officer stops a vehicle. *State v. Takesgun,* 89 Wn.App. 608, 610-611 (Div.3 1998) (Driver seized when police stopped his vehicle for failure to dim lights.). Washington's Constitution gives greater protection to the privacy of individuals in automobiles than does the United States Constitution. *State v. Mendez,*137 Wn.2d 208, 220 (1999) (Police had probable cause to stop a vehicle for failing to obey a stop sign but lacked reasonable suspicion to further detain the passenger). "A traffic stop is constitutional if the officer had probable cause to believe a person has violated the traffic code." *Clement v. Dept. of Licensing,* 109 Wn.App. 371, 375 (2001), *review denied,* 146 Wn.2d 1017 (2002). Probable cause exists where the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed. *State v.*

Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

Where the officer's stop and detention of a suspect driver is based on an informant's tip, the tip must contain "*indicia* of reliability." *Campbell v. Department of Licensing,* 31 Wn.App. 833, 644 P.2d 1219 (1982). The tip must satisfy the two prongs of the reliability test. There must be information from which the officer can conclude that (1) the source of the information is reliable, and (2) that the tip contains enough information about the basis for the informant's tip to conclude that the information is reliable. *Campbell* at 835.

Citizen informants, as opposed to "professional" police informants, are generally presumed to be reliable sources, but only if the informant provides a name, address, phone number, and other background information from which the police can conclude the tip comes from a reliable source. *State v. Wakeley,* 29 Wn.App. 238, 241, 628 P.2d 835 (1981).

In addition to providing *indicia* of reliability that the informer is personally reliable, the tip must provide objective facts from which it can be determined that the source of the informant's information is reliable. It cannot be presumed that the informant is an eye witness or is providing first-hand information. *State v. Vandover,* 63 Wn.App. 754, 822 P.2d 784 (1992).

Thus, in *Campbell,* an anonymous motorist pointing to a passing vehicle and stating to the officer that the driver was drunk was not a sufficiently reliable tip to justify

COA - 687251
Ballou

the stop and detention of the defendant, in the absence of independent corroborative observations by the officer, to the effect that the defendant was a drunk driver.

In the instant case, Officer Gann knew only that a shoplift had been reported, occurring at Toys R Us. The source of this information was not known to the officer. No other identifying information was presented to the officer. Under these circumstances, the first prong of establishing a reliable informant is not satisfied. *State v. Sieler,* 95 Wn.2d 43, 621 P.2d 1272 (1980). In addition, no facts regarding the underlying basis for this information were known to the officer. In the absence of a sufficient factual basis for an informant's tip, the police cannot rely upon that tip as the basis to stop a driver. *State v. Jones,* 85 Wn.App. 797, 934 P.2d 1224, *rev. denied,* 133 Wn.2d 1012, 946 P.2d 402 (1997).

In the absence of probable cause, the police may make an investigatory stop if the officer has a reasonable and articulable suspicion that the individual is involved in criminal activity. *Terry v. Ohio,* U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). However, even the "reasonable suspicion" standard requires a "substantial possibility that criminal conduct has or is about to occur." *State v. Walker*, 66 Wn.App. 622, 626, 834 P.2d 41 (1992). The information provided by an informant must still satisfy the requirements of *indicia* of reliability. *State v. Sieler, supra* at 47.

In the absence of any underlying information made known to the officer regarding the reliability of the source of this tip and the underlying factual basis for this tip, the

officer lacked a lawful basis to stop the defendant's vehicle.

III.

IDENTIFICATION EVIDENCE HAS BEEN TAINTED BY THE ILLEGAL SEIZURE OF THE DEFENDANT

It is well established that evidence obtained as the result of an illegal search or seizure must be suppressed as "fruit of the poisonous tree". *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), *State v. White,* 97 Wash.3d 92, 101, 640 P.2d 1061 (1982).

All evidence derived from a violation of a defendant's constitutional rights must be excluded unless the State can prove that it is not tainted by the illegality. *State v. Tan Le,* 103 Wn.App. 354, 12 P.3d 653 (2000):

> To prove that the evidence was purged of taint, the State must show either that: (1) intervening circumstances have attenuated the link between the illegality and the evidence; (2) the evidence was discovered through a source independent from the legality; or (3) the evidence would inevitably have been discovered through legitimate means. *Tan Le* at 657.

In *Tan Le,* the court considered the admissibility of post-arrest identification. The court adopted the analytical framework proposed by Professor LaFave:

> Professor LaFave urges that an identification following an illegal arrest should be excluded as direct evidence, unless the identification is sufficiently attenuated the from the primary illegality. Courts following this approach have applied essentially the same attenuation analysis used in *Brown v. Illinois* to determine the connection between an illegal arrest and a confession. These factors include: (1) temporal proximity; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy

of the official misconduct. *Tan Le* at 362.

In *Tan Le*, a police officer responded to a burglary in progress and saw the defendant fleeing the scene. The defendant was later located hiding in a house by other officers. The first officer was called to the scene and identified the defendant. However, the court ruled that the warrantless search of the house was illegal.

The court found that the post-arrest identification was not attenuated from the initial arrest as it occurred almost immediately after the arrest, and the taint was not purged by intervening circumstances. The court also declined an invitation to apply the so-called the independent source doctrine to post-arrest identification issues, rejecting the argument because the officer had made a pre-arrest observation of the defendant. The court said that to do so would eviscerate the very purpose of the exclusionary rule. *Tan Le* at 365, 366.

In the instant case, Officer Gann viewed the security video almost immediately after the illegal seizure and arrest of the defendant. He made no pre-illegality observation of the defendant. His subsequent identification of the defendant as the individual in the video is thus irrevocably tainted by the illegal seizure of the defendant.

Darin Jorgensen's identification of the defendant is similar to that of the officer in *Tan Le.* Like that officer, Jorgensen made a pre-illegality observation of suspects at the scene of the alleged theft. He was then transported to the scene of the illegal seizure of the defendant where he made an on-scene identification of the defendant. But just as in

Tan Le, this identification is a direct result of the illegal seizure and must therefore be suppressed.

A related issue is whether subsequent in-court identifications of a defendant are admissible. The first decision in the state of Washington addressing this issue is *State v. Mathe,* 102 Wn.2d 537, 688 P.2d 859 (1984). In *Mathe,* the defendant was charged with two robberies. A month after the robbery, the defendant was arrested. The defendant was photographed and subsequently identified from a photo montage by the clerk from one store. The arrest was ruled illegal, and it was conceded that the photographic identification and a lineup identification were suppressible.

However, the court declined to suppress in-court identifications by witnesses, reasoning that these identifications were based on observations made prior to the illegal arrest. The court relied on *United States v. Crews,* 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980) for the proposition that the illegal arrest had no effect on the subsequent in-court identifications.

> In an opinion written by Justice Brennan, the United States Supreme Court affirmed. It reasoned that a victim's in-court identification of an accused has three elements:
>
> First, the victim is present at trial to testify as to what transpired between her and the offender, and to identify the defendant as the culprit. Second, the victim possesses knowledge of and the ability to reconstruct the prior criminal occurrence and to identify the defendant from her observations of him at the time of the crime. And third, the defendant is also physically present in the courtroom, so that the victim can observe him and compare his appearance to that of the offender.

IN THE COURT OF APPEALS OF THE

STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON /DSHS	
Respondent	
v.	COA 68725- 5-I
JAMES E. BALLOU 2nd.	
Appellant	

DECLARATION OF SERVICE

I ,JACQUELINE BALLOU ,DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STSTE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT.

THAT ON THE__13___ DAY OF DECEMBER 2012 ,I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT (SAG) TO BE SERVED ON THE PARTY/PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

(X) SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKERFELLER AVENUE
EVERETT ,WASHINGTON 98201

(X) COURT OF APPEALS
600 UNIVERSITY AVE.

SEATTLE ,WASHINGTON 98101

(X)

SIGNED IN SEATTLE,WASHINGTON ,THIS 13th DAY OF DECEMBER 2012.

x Jacqueline Ballou