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No. 65967-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CRAIG LEE,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

Police encountered Anthony Lee as he was sitting in the driver's seat of his parked car at around 4 a.m. Although Mr. Lee was not engaged in criminal activity, the officers were suspicious due to the time and place. After a computer check revealed Mr. Lee's license plate was cancelled, the officers decided to stop him for driving with a cancelled license plate. They saw him some minutes later standing in a doorway alcove of a nearby motel and stopped and frisked him.

The officers found a glass tube on the ground next to where Mr. Lee was standing. They arrested him for possession of drug paraphernalia and searched him incident to arrest, finding cocaine.

The officers' stop and frisk of Mr. Lee was unconstitutional where (1) the officers' true purpose in stopping Mr. Lee was to investigate possible criminal activity, not enforce the traffic code; (2) the justification for conducting a traffic stop did not apply where Mr. Lee had already exited and parked his car some distance away; and (3) there was no evidence Mr. Lee was armed or dangerous. The subsequent arrest of Mr. Lee for possession of drug paraphernalia and the search incident to arrest were also unconstitutional, where (1) possession of drug paraphernalia is not

a crime; and (2) there was no evidence that Mr. Lee possessed the glass tube other than his mere proximity to it.

**B. ASSIGNMENTS OF ERROR**

1. The stop and frisk were unconstitutional in violation of the Fourth Amendment and article I, section 7.

2. In the absence of substantial evidence in the record, the trial court erred in finding "the officers observed the defendant drop what he believed, based upon his training and experience, a crack pipe."<sup>1</sup> 2/09/10RP 38.

3. The trial court erred in concluding the officers had "probable cause to arrest Mr. Lee for possession of the drug paraphernalia." 2/09/10RP 38.

4. The search incident to arrest was unconstitutional in violation of the Fourth Amendment and article I, section 7.

5. The trial court erred in denying the motion to suppress the cocaine.

6. The trial court erred in including two washed-out prior convictions in Mr. Lee's offender score.

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<sup>1</sup> The trial court did not file written findings of fact and conclusions of law following the suppression hearing. The citations in the brief to the trial court's findings are to the court's oral findings made at the end of the hearing.

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To be constitutional, a Terry stop and frisk must be justified at its inception and reasonably related in scope to the original justification. Was the stop and frisk of Mr. Lee unconstitutional where (1) the totality of the circumstances show the officers' purpose in conducting the stop was to investigate possible criminal activity and not to enforce the traffic code; (2) the justification for conducting a full traffic stop did not apply where Mr. Lee had already exited and parked his vehicle some distance away; and (3) there was no evidence that he was armed or dangerous?

2. Police officers may search an individual incident to arrest only if the arrest itself is lawful. Officers may not arrest a person for merely possessing drug paraphernalia because that is not a crime. Did the officers have authority of law to search Mr. Lee incident to his arrest for possessing drug paraphernalia?

3. Officers may not arrest a person for possession of contraband unless they have probable cause to believe he possessed the item. Mere proximity to an item is not sufficient to establish probable cause. Did the officers have probable cause to arrest Mr. Lee for possessing a glass tube, where the evidence

showed only that the tube was found on the ground next to Mr. Lee and not in his actual possession?

4. A sentencing court may not include a prior Class C felony in a person's offender score if, since being released from confinement pursuant to a felony conviction, the person spent five consecutive years in the community without committing any crime. Did the court err in including two prior Class C felonies in Mr. Lee's offender score, where he spent five consecutive years in the community after being released from confinement pursuant to a felony conviction without committing any crime?

D. STATEMENT OF THE CASE

The State charged Anthony Lee with one count of possession of cocaine, RCW 69.50.4013. CP 1. Prior to trial, a CrR 3.6 hearing was held to determine whether the cocaine should be suppressed.

At the hearing, Seattle Police Officer Bryan Bright testified he was on patrol at around 4 a.m. on February 19, 2009. 2/09/10RP 3, 6. He was in uniform in a marked police car with his partner, Officer Eugene Schubeck.<sup>2</sup> 2/09/10RP 5. As the officers were driving north in the 4400 block of Winslow Place, near Aurora

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<sup>2</sup> Officer Schubeck did not testify at the suppression hearing.

Avenue North, they saw Mr. Lee sitting in the driver's seat of a parked car. 2/09/10RP 6. The door was open and Mr. Lee was "reaching out for something on the street that we saw was a flashlight." Id. Officer Bright testified "[t]he reaching for the flashlight was unusual. The time and the location and the nature of the area makes it suspicion [sic]." 2/09/10RP 22. Officer Bright was "suspicious of anybody in that location in that time of day, especially siting [sic] in a car." 2/09/10RP 22-23. Officer Bright had never encountered Mr. Lee before. 2/09/10RP 14. Mr. Lee was not involved in any apparent criminal activity. 2/09/10RP 16.

Officer Bright drove up alongside Mr. Lee and engaged him in brief conversation. 2/09/10RP 7. Apparently Mr. Lee was having mechanical trouble with his car, which was soon resolved, and he drove away. Id. Meanwhile, the officers had entered Mr. Lee's front license plate number into the computer. 2/09/10RP 8. After Mr. Lee drove away, the officers learned the license plate was cancelled. Id. This caused Officer Bright to suspect Mr. Lee might be driving a stolen car. Id. Officer Bright testified:

Well, frequently -- or certainly not uncommonly, we have found stolen cars on that particular block on that particular street. It is not uncommon for people to use cancelled license plates on stolen cars.

So we thought that -- or I thought that, one, we would either talk to him about the now-moving

violation of driving with the cancelled license plate, and, the potential of those [sic] stolen car.

Id.

So, the officers turned around and searched for Mr. Lee.

2/09/10RP 8. As they were driving southbound on Winslow Place, they saw Mr. Lee running westbound on North Allen Place.

2/09/10RP 9. They did not see his car. Id. Officer Bright thought it was suspicious that Mr. Lee was running, given that he had just been contacted by police, and given that this was a "Stay Out of Drug Area" (SODA) and a "Stay Out of Areas of Prostitution" (SOAP) zone. 2/09/10RP 20-21.

The officers stopped and exited their car and then separated so they could more effectively look for Mr. Lee. 2/09/10RP 10. As Officer Bright was searching in one direction, he heard his partner yelling from behind him. Id. He turned around and approached and saw Mr. Lee standing in a doorway alcove of the Wallingford Inn. Id. Officer Schubeck ordered Mr. Lee out to the sidewalk. Id. Officer Schubeck then conducted a "weapons frisk" of Mr. Lee. 2/09/10RP 10-11.

As Officer Bright continued to watch, he observed Officer Schubeck "go back into the alcove and recover a glass tube with burnt residue." 2/09/10RP 11. Officer Bright did not see Mr. Lee in

possession of the glass tube. He also did not testify that *Officer Schubeck* saw Mr. Lee in possession of the tube.

The officers arrested Mr. Lee and placed him in handcuffs. *Id.* Officer Bright then left to look for Mr. Lee's car. *Id.* He found it about one-half block away in a parking lot behind an apartment building. 2/09/10RP 12. Officer Bright returned to Officer Schubeck, who showed him a folded up piece of paper towel that appeared to hold a small quantity of cocaine. *Id.* Officer Schubeck said he had found the cocaine on Mr. Lee. *Id.*

The trial court concluded the officers' stop of Mr. Lee was not pretextual, because they had not followed him waiting for him to commit a traffic infraction. 2/09/10RP 36. The court also concluded once the officers learned Mr. Lee's license plate was cancelled, they had the right to stop and detain him for the traffic infraction.<sup>3</sup> 2/09/10RP 38. Once they found the glass tube, the officers had probable cause to arrest him for possession of drug paraphernalia. *Id.* Thus, the court concluded, the search incident to arrest was lawful and the cocaine recovered was admissible. *Id.*

Following a jury trial, Mr. Lee was convicted of possession of cocaine as charged. CP 39.

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<sup>3</sup> The court did not address the "weapons frisk."

E. ARGUMENT

1. THE OFFICERS' STOP AND FRISK OF MR. LEE VIOLATED THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7, BECAUSE IT WAS NOT JUSTIFIED AT ITS INCEPTION AND EXCEEDED THE BOUNDS OF A REASONABLE TRAFFIC STOP

Officer Schubeck stopped Mr. Lee as he was standing in a doorway alcove of the Wallingford Inn. 2/09/10RP 10. The officer ordered Mr. Lee out to the sidewalk and conducted a "weapons frisk." 2/09/10RP 10-11. The trial court found the officer was justified in stopping and detaining Mr. Lee for committing the traffic infraction of driving with a cancelled license plate. 2/09/10RP 38.

To the contrary, the stop and frisk was not constitutionally permissible, because the officers' true purpose in stopping Mr. Lee was to investigate their suspicions that he was involved in possible criminal activity. Also, the stop exceeded the permissible scope of a reasonable traffic stop, because Mr. Lee had already exited and parked his car some distance away. Finally, the officer was not permitted to frisk Mr. Lee, where there was no evidence he was armed or presently dangerous. The fruits of the stop must be suppressed.

a. To be constitutionally permissible, a Terry stop and frisk must be justified at its inception and reasonably related in scope to the initial justification. An investigatory stop on the street is a "seizure" for purposes of the Fourth Amendment, even if the purpose of the stop is limited and the resulting detention is brief. Brown v. Texas, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) ("whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person").

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Our state constitution goes further and requires actual authority of law before the State may disturb an individual's private affairs. State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007); Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

Warrantless seizures are presumed unreasonable in violation of both the Fourth Amendment and article I, section 7. Day, 161 Wn.2d at 893; State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). There are, however, a few "jealously and

carefully drawn" exceptions to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant outweigh the reasons for prior recourse to a neutral magistrate. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the burden to show the particular search or seizure falls within one of these exceptions. Id.

One exception to the constitutional ban on warrantless searches and seizures is the "Terry" investigative stop. Duncan, 146 Wn.2d at 171-72; Day, 161 Wn.2d at 895; Terry, 392 U.S. at 21-22. A Terry investigative stop authorizes police officers to detain a person briefly for questioning without grounds for arrest "if they reasonably suspect, based on 'specific, objective facts' that the person detained is engaged in criminal activity or a traffic violation." Day, 161 Wn.2d at 896; Duncan, 146 Wn.2d at 172-74 (citing Terry, 392 U.S. at 21). To justify a Terry stop, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. Under the Fourth Amendment, whether the officer had grounds for a Terry stop and search is tested against an objective standard. Day, 161 Wn.2d at 896. By contrast, under article I, section 7, the Court considers the totality of

the circumstances, including the officer's subjective belief. Id. at 896-97. Our constitution does not tolerate pretextual stops. Id. (citing State v. Ladson, 138 Wn.2d 343, 352, 979 P.2d 833 (1999)).

A Terry stop must be justified at its inception and reasonably related in scope to the circumstances that justified the interference in the first place. Ladson, 138 Wn.2d at 351; Terry, 392 U.S. at 20. The constitutionality of a stop is a question of law reviewed *de novo*. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

b. The traffic stop violated article I, section 7, because the officers' true purpose in conducting the stop was to investigate their suspicions that Mr. Lee was involved in possible criminal activity. Unlike the Fourth Amendment, article I, section 7 precludes "pretextual" traffic stops. Ladson, 138 Wn.2d at 353, 358. A pretextual traffic stop is one where police stop an individual not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Id. at 349; State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). Pretext stops "generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations—violations for which the officer does not have probable cause." State v. Myers, 117 Wn. App. 93,

94-95, 69 P.3d 367 (2003), rev. denied, 82 P.3d 242 (2004). The reasonable articulable suspicion that a traffic infraction has occurred, which justifies an ordinary warrantless traffic stop, does not justify a stop for criminal investigation. Ladson, 138 Wn.2d at 349.

To determine whether a traffic stop was pretextual, the court considers the totality of the circumstances, including the objective reasonableness of the officer's behavior as well as his subjective intent. Ladson, 138 Wn.2d at 358-59. The ultimate question is whether the traffic violation was the real reason for the stop. State v. Meckelson, 133 Wn. App. 431, 437, 135 P.3d 991 (2006), rev. denied, 154 P.3d 919 (2007) (citing Ladson, 138 Wn.2d at 358-59).

"[A]n officer's candid admission to pretextual conduct is more probative than the denial of the conduct." State v. Montes-Malindas, 144 Wn. App. 254, 261, 182 P.3d 999 (2008) (citing Ladson, 138 Wn.2d at 359). An officer's admissions that he was suspicious of criminal activity are highly probative. Montes-Malindas, 144 Wn. App. at 261. In Montes-Malindas, the officer stated the reason he stopped a van was to cite the driver for failing to engage his headlights. Id. But the officer also admitted he became suspicious while observing the people in the van in the

parking lot, even before the headlight infraction occurred. Id. at 257. The Court concluded the officer's subjective intent, combined with the objective circumstances, rendered the stop pretextual. Id. at 262.

Here, Officer Bright admitted he was suspicious of Mr. Lee even before he learned Mr. Lee was driving a car with a cancelled license plate. Officer Bright testified Mr. Lee's reaching for a flashlight while sitting in a parked car at that time and in that place aroused his suspicions. 2/09/10RP 22-23. When the officers learned the license plate on Mr. Lee's car was cancelled, Officer Bright became even more suspicious. He candidly admitted one of the reasons the officers decided to detain Mr. Lee was to investigate whether he was driving a stolen car. 2/09/10RP 8. Finally, when Officer Bright saw Mr. Lee running, this further aroused his suspicions. 2/09/10RP 20-21. The extent and timing of the officer's suspicions indicate he stopped Mr. Lee to investigate his vague suspicions of criminal activity and not to enforce the traffic code.

The objective unreasonableness of the officers' actions also shows their true purpose in conducting the stop was to investigate their suspicions. When the officers stopped Mr. Lee, he had

already exited and parked his car some distance away; the officers did not even know where the car was. 2/09/10RP 9-10. This suggests the officers were not really concerned about whether Mr. Lee was driving safely on the streets in a properly-registered automobile. The officers also did not issue a citation for the underlying infraction. The failure to issue a citation is one of the factors to consider when assessing objective reasonableness. Montes-Malindas, 144 Wn. App. at 262.

Thus, the officer was suspicious of Mr. Lee even before he learned his license plate was cancelled; the officer candidly admitted that one of the reasons he decided to stop Mr. Lee was to investigate whether he was driving a stolen car; the stop occurred after Mr. Lee had exited and parked his car; and the officers did not issue a citation. The totality of these circumstances indicate the true purpose of the stop was to investigate possible criminal behavior and not to enforce the traffic code. The stop was pretextual in violation of article I, section 7.

c. The stop exceeded the proper scope of a reasonable traffic stop. As stated, a Terry stop must be justified at its inception and reasonably related in scope to the circumstances that justified the interference in the first place. Ladson, 138 Wn.2d

at 351; Terry, 392 U.S. at 20. Here, the officers purportedly stopped Mr. Lee because he had committed the traffic infraction of driving with a cancelled license plate. But the stop and frisk of Mr. Lee were not reasonably related to that purpose, because at the time of the stop Mr. Lee had already exited and parked his car. The officers did not cite Mr. Lee for the traffic infraction. This Court should hold the Terry stop was not reasonably related in scope to its purported justification.

Ordinarily, a Terry stop based on less than probable cause is permitted only if officers have a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a *crime*. State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002) (citing Terry, 392 U.S. at 21). "Essentially the only circumstance where, absent a reasonable articulable suspicion of criminal activity, Terry has been applied is to stops incident to traffic violations." Duncan, 146 Wn.2d at 173-74 (citing United States v. Hensley, 469 U.S. 221, 229, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985); Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); Ladson, 138 Wn.2d at 350-51). Terry has been extended to traffic infractions only because of "the law enforcement exigency created by the ready

mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation." Day, 161 Wn.2d at 897 (quoting State v. Johnson, 128 Wn.2d 431, 454, 909 P.2d 293 (1996) (footnote omitted) (citing United States v. Ross, 456 U.S. 798, 806-07, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982))).

Traffic stops must be reasonably related in scope to the original justification for the intrusion. When the driver of an automobile commits a traffic offense, the Constitution permits a police officer to stop the automobile and detain the driver to check his or her driver's license and automobile registration and to issue a citation. State v. Larson, 93 Wn.2d 638, 641, 611 P.2d 771 (1980) (citing Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979)); RCW 46.61.021(2) (when police officer stops person for traffic infraction, "the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.").

The Washington Supreme Court has refused to extend the Terry exception to include stops for other kinds of infractions. In

Day, the court held the Terry exception did not apply to parking infractions, because "[t]he reasons underlying extending Terry to traffic violations simply lose force in the parking context." Day, 161 Wn.2d at 897. Similarly, in Duncan, the court held Terry does not apply to civil infractions, because "[t]raffic violations create a unique set of circumstances that may justify this extension of Terry, but which may not be appropriate for other civil infractions." Duncan, 146 Wn.2d at 173-74. The diminishment of privacy interests due to "the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel" does not apply in the context of civil infractions. Id. at 174.

In light of these principles, it is apparent that the justifications for extending Terry to traffic infractions also do not apply to the present case. Mr. Lee was not driving his vehicle at the time of the stop—the car was parked in a separate location away from the scene. The government's interest in ensuring safe travel had dissipated. Because he was not in a car, Mr. Lee's privacy interests were the same as any citizen on the street. The officers did not have a reasonable, articulable suspicion that he was engaged in criminal activity. Terry therefore did not apply and the officers' stop and frisk of Mr. Lee was unreasonable.

d. The weapons frisk was unconstitutional because there was no evidence Mr. Lee was armed or presently dangerous. Under both the Fourth Amendment and article I, section 7, when an officer stops a person, he or she may, under certain circumstances, frisk the person as a matter of self protection. Kennedy, 107 Wn.2d at 11; Terry, 392 U.S. at 24. A "frisk" or pat-down search for weapons is "a serious intrusion upon the sanctity of the person"; the Constitution therefore requires that a frisk not be undertaken lightly. Terry, 392 U.S. at 17.

The justification for a frisk, under both the Fourth Amendment and article I, section 7, is possible danger to the officer. Kennedy, 107 Wn.2d at 10. The scope of a search incident to a stop of a vehicle is "constitutionally limited to that 'sufficient to assure the officer's safety.'" State v. Larson, 88 Wn. App. 849, 855, 946 P.2d 1212 (1997) (quoting Kennedy, 107 Wn.2d at 12); see also Terry, 392 U.S. at 20.

To justify a frisk without probable cause to arrest, the officer must have a reasonable belief, based on objective facts, that the suspect is armed and presently dangerous. State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008); Terry, 392 U.S. at 21-24. If the officer does not articulate a concern for his safety, the

search is unreasonable. State v. Feller, 60 Wn. App. 678, 681-82, 806 P.2d 776, rev. denied, 815 P.2d 265 (1991).

Here, the officer did not articulate any concern for his safety. Officer Bright testified he observed Officer Schubeck order Mr. Lee out of the doorway alcove and onto the sidewalk. 2/09/10RP 10. He then observed Officer Schubeck conduct a "weapons frisk" of Mr. Lee. 2/09/10RP 10-11. But Officer Bright did not testify that either he or Officer Schubeck thought Mr. Lee might be armed or dangerous. There was no evidence presented that Mr. Lee might be armed. There was no evidence that he behaved in a threatening or dangerous manner. Therefore, the "weapons frisk" of Mr. Lee was unconstitutional. Setterstrom, 163 Wn.2d at 626; Terry, 392 U.S. at 21-24.

e. The cocaine must be suppressed. All evidence obtained, either directly or indirectly, as the result of an unlawful seizure must be suppressed. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). When a Terry stop is unlawful, the subsequent search and fruits of that search are inadmissible. Ladson, 138 Wn.2d at 359-60.

Here, the Terry stop of Mr. Lee was unlawful. The cocaine seized from him was obtained directly as a result of that stop.

Therefore, the cocaine must be suppressed.

2. THE SEARCH INCIDENT TO ARREST WAS UNLAWFUL, BECAUSE THE UNDERLYING ARREST FOR POSSESSION OF DRUG PARAPHERNALIA WAS UNLAWFUL

The trial court concluded that, once the officers found the glass tube on the ground next to where Mr. Lee had been standing, they had probable cause to arrest him for possession of drug paraphernalia. 2/09/10RP 38. Therefore, the court concluded, the search incident to arrest was lawful. Id. But mere possession of drug paraphernalia is not an arrestable offense because it is not a crime. In addition, there was no evidence that Mr. Lee actually possessed the tube other than his mere proximity to it, which is insufficient to establish probable cause. Therefore, the arrest for possession of drug paraphernalia was unlawful and the fruits of the search incident to arrest must be suppressed.

a. A search incident to arrest is unconstitutional unless the underlying arrest is based upon probable cause. Warrantless searches are presumptively unreasonable, and will be deemed improper absent a valid exception based upon an emergency. Chimel v. California, 395 U.S. 752, 764-65, 89 S.Ct.

2034, 23 L.Ed.2d 685 (1969); State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); Ladson, 138 Wn.2d at 349; U.S. Const. amend. 4; Const. art. I, § 7.

A lawful custodial arrest creates a situation justifying the contemporaneous warrantless search of the arrestee and of the immediately surrounding area. Chimel, 395 U.S. at 763. But an arrest is unlawful, and hence unreasonable for purposes of the Fourth Amendment, if it is not based upon probable cause. Wong Sun, 371 U.S. at 479.

Under article I, section 7, police searches conducted without a warrant are per se unreasonable subject only to a few specific established and well-delineated exceptions, which are limited and narrowly drawn. Parker, 139 Wn.2d at 496. One such exception is a search incident to a lawful arrest. Id. at 496-97. "It is the fact of arrest itself that provides the 'authority of law' to search, therefore making the search permissible under article 1, section 7." Id.

"A lawful arrest is a prerequisite to a lawful search" incident to arrest. State v. Grande, 164 Wn.2d 135, 139-40, 187 P.3d 248 (2008) (citing State v. Johnson, 71 Wn.2d 239, 242, 427 P.2d 705 (1967)). "[W]hile the search incident to arrest exception functions to secure officer safety and preserve evidence of the crime for

which the suspect is arrested, in the absence of a lawful custodial arrest a full blown search, regardless of the exigencies, may not validly be made." State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003). An arrest is unlawful, and hence a search incident to arrest is unlawful, if the arrest is not based upon probable cause. Grande, 164 Wn.2d at 142-43.

Probable cause to arrest exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing an offense. Parker, 79 Wn.2d at 328-29; Wong Sun, 371 U.S. at 479. The question whether probable cause exists is an objective inquiry. State v. Rodriguez-Torres, 77 Wn. App. 687, 693, 893 P.2d 650 (1995).

Probable cause for arrest is measured by the particular facts known to the arresting officer at the time of the arrest. Information or evidence obtained after the arrest cannot be considered in evaluating the existence of probable cause. Johnson v. United States, 333 U.S. 10, 16-17, 68 S. Ct. 367, 92 L. Ed. 436 (1948).

The burden is on the State to show that a police officer had probable cause to arrest. Grande, 164 Wn.2d at 141. This Court

reviews the constitutional question of whether probable cause existed *de novo*. Id. at 140.

b. The officers did not have probable cause to arrest Mr. Lee for mere possession of drug paraphernalia because that is not a crime. "[N]o Washington statute criminalizes 'possession of drug paraphernalia.'" State v. George, 146 Wn. App. 906, 918, 193 P.3d 693 (2008) (citing State v. Neeley, 113 Wn. App. 100, 107, 52 P.3d 539 (2002) ("bare possession of drug paraphernalia is not a crime"); State v. McKenna, 91 Wn. App. 554, 563, 958 P.2d 1017 (1998) ("mere possession of drug paraphernalia is not a crime"); State v. Lowrimore, 67 Wn. App. 949, 959, 841 P.2d 779 (1992) ("RCW 69.50.412 does not, ipso facto, make possession of drug paraphernalia a crime")); see also O'Neill, 148 Wn.2d at 584 n.8 ("Possession of drug paraphernalia is not a crime . . . ."). For possession of drug paraphernalia to be a crime, a defendant must either "use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance," RCW 69.50.412(1), or "deliver, possess with intent to deliver, or manufacture with intent to deliver drug

paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance." RCW 69.50.412(2).

Thus, to prove possession of drug paraphernalia, the State must prove not only that the defendant possessed the paraphernalia, but also that he used it in a drug-related activity. George, 146 Wn. App. at 919. In addition, because use of drug paraphernalia is a misdemeanor, an officer may not arrest a person for the crime unless it was committed in his presence. O'Neill, 148 Wn.2d at 584 n.8. Thus, for instance, in Neeley, the Court held the officer had probable cause to arrest Neeley for possession of drug paraphernalia, where the officer found items of paraphernalia in Neeley's possession and observed her act in a manner that was consistent with drug ingestion. Neeley, 113 Wn. App. at 108-09.

In this case, by contrast, there was no evidence that Mr. Lee used the glass tube in any drug-related activity in the officers' presence. Officer Bright did not testify that he observed Mr. Lee use the device for any purpose or that he observed Mr. Lee act in

any manner consistent with drug ingestion. He did not testify that *Officer Schubeck* observed Mr. Lee use the object in his presence. In addition, there was no evidence that Mr. Lee appeared to be under the influence of any drug. Therefore, the officers did not have probable cause to arrest Mr. Lee for possession of drug paraphernalia and the arrest was unlawful. Wong Sun, 371 U.S. at 479; Grande, 164 Wn.2d at 142-43.

c. The officers did not have probable cause to arrest Mr. Lee for possessing the glass tube, because there was no evidence that he actually possessed it other than his mere proximity to it.

i. The trial court's finding that the officers observed Mr. Lee drop the glass tube is not supported by substantial evidence and must be stricken. The trial court found "the officers observed the defendant drop what he believed, based upon his training and experience, a crack pipe." 2/09/10RP 38. But the court's finding is not supported by substantial evidence and therefore this Court may not rely upon it.

When reviewing the denial of a suppression motion, the question for the appellate court is whether substantial evidence supports the challenged findings of fact and whether the findings

support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (citing State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). Substantial evidence exists to support a challenged finding where there is a sufficient quantity of evidence in the record to persuade a fair-minded rational person of the truth of the finding. Hill, 123 Wn.2d at 644. A trial court's erroneous determination of facts, not supported by substantial evidence, are not binding on appeal. Id. at 647.

In determining whether a trial court's findings of fact following a suppression hearing are supported by substantial evidence, the appellate court reviews only the evidence presented at the suppression hearing. See State v. Jessup, 31 Wn. App. 304, 317, 641 P.2d 1185 (1982) (in reviewing court's order on motion to suppress evidence on grounds of illegal search, held, "only that evidence presented at the suppression hearing will have bearing on the defendant's expectation of privacy"); see also Hill, 123 Wn.2d at 644 ("Under the facts of this case, *as established by the trial court at the suppression hearing*, we hold that the sweatpants were not an extension of defendant's person, but part of the premises to be searched.") (emphasis added); cf. State v. Jackson, 82 Wn. App. 594, 609, 918 P.2d 945 (1996) (claim of insufficient evidence is

analyzed using the most complete factual basis available at the time the claim is made).

There is no evidence in the record that the officers observed Mr. Lee drop the glass tube. Officer Bright testified he observed Mr. Lee standing in the doorway alcove of the Wallingford Inn and saw Officer Schubeck order him out to the sidewalk. 2/09/10RP 10. He then observed Officer Schubeck frisk Mr. Lee. Id. at 10-11. After that, he saw Officer Schubeck "go back into the alcove and recover a glass tube with burnt residue." Id. at 11. Officer Bright never testified he observed Mr. Lee drop the device. He did not testify he ever saw Mr. Lee in possession of the item. He did not testify *Officer Schubeck* ever said he saw Mr. Lee in possession of it. Therefore, the trial court's finding that Mr. Lee dropped the tube is not supported by substantial evidence and this Court may not rely upon it.

ii. The officers did not have probable cause to believe Mr. Lee possessed the glass tube because mere proximity to an item is not sufficient to establish possession of it.

"[P]ossession may be actual or constructive to support a criminal charge." State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002) (citing State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969)).

"Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." Callahan, 77 Wn.2d at 29.

Dominion and control means that the object may be reduced to actual possession immediately. Jones, 146 Wn.2d at 333. But "mere proximity is not enough to establish possession." Id. Generally, the State must prove the defendant had dominion and control over the premises where the drugs were located. State v. Spruell, 57 Wn. App. 383, 388, 788 P.2d 21 (1990) ("where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession.").

Where there is no evidence of dominion and control other than the suspect's presence and proximity to an item, the evidence is insufficient to establish probable cause of possession. State v. Galbert, 70 Wn. App. 721, 728-29, 855 P.2d 310 (1993).

Here, at most, the evidence showed only that at the time of his arrest, Mr. Lee was standing next to a glass tube that was on the ground. There was no other evidence to establish Mr. Lee's dominion and control over the item. Thus, the evidence was insufficient to establish probable cause that he possessed it.

d. The evidence seized in the search incident to arrest must be suppressed. The exclusionary rule requires suppression of all evidence directly obtained as the result of an arrest made without probable cause. Wong Sun, 371 U.S. at 485; Grande, 164 Wn.2d at 147. Because the officers did not have probable cause to arrest Mr. Lee for possession of drug paraphernalia, the fruits of the search incident to arrest must be suppressed.

3. THE TRIAL COURT ERRED IN INCLUDING TWO WASHED-OUT PRIOR CLASS C FELONY CONVICTIONS IN MR. LEE'S OFFENDER SCORE

a. A sentencing court may not include a prior class C felony conviction in a person's offender score if he spent five consecutive years in the community since his release from confinement pursuant to a felony conviction without committing any crime. A sentencing court's calculation of the standard sentence range is determined by the "seriousness" level of the present

offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which is a list of his prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525. Constitutional due process<sup>4</sup> requires the State prove the existence of prior convictions by a preponderance of the evidence. State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719 (1986); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999); RCW 9.94A.530(2). The State also bears the burden of proving any facts necessary to determine whether the prior conviction should be included in the offender score. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); Ford, 137 Wn.2d at 480.

Prior convictions may be included in the offender score only if the court determines the convictions have not "washed out." RCW 9.94A.525(2). Determining whether a prior conviction has washed out requires a determination of the "class" of the prior offense. Id. The court must also determine whether the defendant spent a particular number of consecutive years in the community following his release from confinement pursuant to a felony conviction without committing any crimes. Id.

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<sup>4</sup> The Fourteenth Amendment provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Generally, apart from certain exceptions not relevant here,

**Class C prior felony convictions**

shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c). A Class C felony conviction is not to be included in the defendant's offender score if the defendant had five consecutive crime-free years at any time following release from confinement pursuant to a felony conviction. State v. Hall, 45 Wn. App. 766, 769, 728 P.2d 616 (1986).

Where a trial court erroneously includes a washed-out prior conviction in the offender score, the defendant may challenge the sentence for the first time on appeal. State v. Mendoza, 165 Wn.2d 913, 927, 205 P.3d 113 (2009); Ford, 137 Wn.2d at 485.

b. The court erred in including two prior class C felonies in Mr. Lee's offender score, because the prior offenses had washed out. On the judgment and sentence, the court found Mr. Lee had two felony convictions from 1998: one for "VUCSA BURN" and one for "VUCSA POSSESS COCAINE." CP 40. Mr. Lee was sentenced for both crimes on August 21, 1998. CP 45.

In its statement of its understanding of Mr. Lee's criminal history, the State alleged Mr. Lee received a sentence of 22 months for one of the 1998 convictions and 14 months for the other, to be served concurrently. Sub #48 at 7.<sup>5</sup> Thus, if Mr. Lee started serving his sentence on the date he was sentenced, and served the full 22 months, he would have been released in June 2000, triggering the five-year washout period. According to the State, Mr. Lee did not commit another crime until February 12, 2006. Id. He was not confined pursuant to a felony conviction during that interim period. Thus, Mr. Lee spent five consecutive years in the community after being released from confinement pursuant to a felony conviction without committing any crime.

The two felony convictions, "VUCSA BURN" and "VUCSA POSSESS COCAINE" are class C felonies. At the time of Mr. Lee's prior offenses, the "burn" statute was RCW 69.50.401(c). State v. Lauterbach, 33 Wn. App. 161, 162, 653 P.2d 1320 (1982).

That statute provided:

It is unlawful, except as authorized in this chapter and chapter 69.41 RCW, for any person to offer, arrange, or negotiate for the sale, gift, delivery, dispensing distribution, or administration of a controlled substance to any person and then sell, give, deliver, dispense, distribute, or administer to that

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<sup>5</sup> A supplemental designation of clerk's papers has been filed for this document.

person any other liquid, substance, or material in lieu of such controlled substance. Any person who violates this subsection is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

Former RCW 69.50.401(c) (1997) (emphasis added).

The "possess cocaine" statute provided:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (e) of this section.

Former RCW 69.50.401(d) (1997) (emphasis added).

For felonies defined by statute that are not contained in Title 9A RCW, the class of the crime is determined by the maximum sentence authorized. "If the maximum sentence of imprisonment authorized by law upon a first conviction of such felony is less than eight years, such felony shall be treated as a class C felony for purposes of this chapter." RCW 9.94A.035(3).

As stated, at the time of Mr. Lee's prior offenses, the maximum sentence authorized for a conviction of "VUCSA BURN" and "VUCSA POSSESS COCAINE" was five years. Former RCW

69.50.401(c), (d) (1997). Therefore, they are class C felonies for purposes of the Sentencing Reform Act. Because following his release from confinement for those crimes, Mr. Lee spent five consecutive years in the community without being confined pursuant to a felony and without committing any crime, those two class C offenses washed out. The trial court erred in including them in Mr. Lee's offender score.

F. CONCLUSION

The stop and frisk of Mr. Lee was unconstitutional because it was pretextual and not reasonably related to the officer's purported reason for stopping Mr. Lee. In addition, the search incident to arrest was unconstitutional because the arrest was made without probable cause. Therefore, the evidence seized from Mr. Lee must be suppressed. Finally, the trial court erred in including two prior class C felonies in Mr. Lee's offender score.

Respectfully submitted this 31st day of May 2011.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65967-7-I
v.	)	
	)	
ANTHONY LEE,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF MAY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
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<input checked="" type="checkbox"/> ANTHONY LEE 633527 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF MAY, 2011.

X \_\_\_\_\_ *[Signature]*

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STATE OF WASHINGTON  
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