

No. 35582-5-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**ALBERTO CARBONAL,**

**Appellant/Defendant.**

FILED  
COURT OF APPEALS  
DIVISION II  
07 MAY 30 AM 10:30  
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**PIERCE COUNTY SUPERIOR COURT**

**CAUSE NO. 06-1-02350-3**

**THE HONORABLE KATHERINE J. NELSON,  
and**

**THE HONORABLE BRIAN TOLLEFSON**

**Presiding at the Trial Court.**

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**APPELLANT'S OPENING BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court's "Findings as to Disputed Facts" in the Findings and Conclusions on Defendant's Motion to Dismiss, numbered 1-7 are not supported by substantial evidence.

2. Mr. Carbonal was denied the effective assistance of counsel where his trial attorney failed to object to erroneous "undisputed facts."

3. The trial court erred when it admitted Mr. Carbonal's statements because the state failed to establish the corpus delicti of the crime charged.

4. The trial court erred when it found that the State had proved the intent to deliver element beyond a reasonable doubt at the bench trial.

5. The trial court's "Findings of Fact," in the Findings of Fact and Conclusions of Law Re: Bench Trial, numbered VII and IX are not supported by substantial evidence.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Are "Findings as to Disputed Facts" numbered 1-7 supported by substantial evidence where the only evidence offered was

two photos and the testimony of two witnesses who were not questioned concerning the subject matter of the findings? (Assignment of Error Number One.)

2. Was Mr. Carbonal denied the effective assistance of counsel where his trial attorney neglected to object to the “Undisputed Facts” portion of the Findings and Conclusions on Defendant’s Motion to Dismiss? (Assignment of Error Number Two.)

3. Even if the findings had been supported by substantial evidence, was the corpus delicti of the crime established where the findings were based primarily on the speculations of a police officer who was not involved in the case and was not sworn as an expert for the hearing on Mr. Carbonal’s Motion to Dismiss? (Assignment of Error Number Three.)

4. Did the State prove beyond a reasonable doubt that Mr. Carbonal intended to deliver the cocaine found in the motel room? (Assignment of Error Number Four.)

5. Are “Findings of Fact” numbered VII and IX supported by substantial evidence? (Assignment of Error Number Five.)

### **III. STATEMENT OF THE CASE**

#### **1. Procedural History**

On May 26, 2006, the defendant/appellant, Alberto Carbonal, was charged by Information with one count of Unlawful Possession of a Controlled Substance With Intent to Deliver, to wit: cocaine, pursuant to RCW 69.50.401 (1)(2)(a).

On June 27, 2006, appellant's counsel filed a Motion to Dismiss. CP 4-17. The Motion to Dismiss was heard by the Honorable Kathryn J. Nelson on August 9, 2006 and August 10, 2006.<sup>1</sup> RP 8-09-06 1-23; RP 8-10-06 24-46. Mr. Carbonal's Motion to Dismiss was denied. RP 8-10-06 45-46. Findings of Fact and Conclusions of Law on Defendant's Motion to Dismiss were filed on August 18, 2006. CP 26-29.

On August 30, 2006, Mr. Carbonal entered a written waiver of jury trial. CP 31. The case proceeded to bench trial before the Honorable Brian Tollefson on the same date. The trial court found Mr. Carbonal guilty as charged. RP 8-31-06 96-102. Findings of Fact and

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The VRPs are not sequentially numbered, and contain volumes in which the numbers are repeated and/or unnumbered. For purposes of clarity of Appellant's Opening Brief the VRPs will, therefore, be referenced by date.

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Conclusions of Law Re: Bench Trial were filed on November 13, 2006. CP 37-42.

On November 9, 2006, Judge Tollefson imposed a sentence of one hundred (100) months in the Department of Corrections, based on an offender score of six (6) and a standard range of sixty to one hundred and twenty (60-120) months. CP 46-58. A timely Notice of Appeal was filed on November 13, 2006. CP 59.

**2. Motion to Dismiss**

Mr. Carbonal's Motion to Dismiss was predicated upon two separate legal theories. The first was that the evidence was insufficient to make a prima facie showing that Mr. Carbonal committed the crime charged under *State v. Knapstad*, 107 Wn.2d 346,356,729 P.2d 48 (1986).

Secondly, Mr. Carbonal's Motion to Dismiss argued that his statements were not supported by sufficient corroborating evidence to prima facie establish the corpus delicti for the crime charged under *State v. Cobelli*, 56 Wn. App. 921,788 P.2d 1081 (1989).

Notably, the *Knapstad* portion of the motion was not supported by the requisite sworn affidavit, nor did the State respond by filing a

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responsive affidavit.<sup>2</sup> Subsequently, substituted counsel for Mr. Carbonal also misunderstood the requirements of a *Knapstadt* motion, as did the State and the trial court, as evidenced by the lack of proper filings, the testimony taken in lieu of affidavits, and the nature of the findings and conclusions entered. 8-9-06 and 8-10-06 1-46; CP 26-29.

With regard to the corpus delicti motion, testimony was taken from two State's witnesses: Officer Sean Conlon and Officer Shirley McLamore. Based on the testimony, the trial court concluded that Mr. Carbonal's admissions were sufficiently corroborated to establish the corpus delicti to the crime of possession with intent to deliver cocaine. CP26-29. (The complete Findings and Conclusions on Defendant's Motion to Dismiss are attached as Exhibit A and incorporated by reference herein.)<sup>3</sup>

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*State v. Knapstad*, 107 Wn.2d 346,356, 729 P.2d 48 (1986), sets forth the proper procedures for this pretrial motion: "A Washington defendant should initiate the motion by sworn affidavit, alleging there are no material disputed facts and that the undisputed facts do not establish a prima facie case of guilt....The State can defeat the motion by filing an affidavit which specifically denies the material facts alleged in the defendant's affidavit....Since the court is not to rule on factual questions, no findings of fact should be entered."

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The section designated "Findings as to Disputed Facts" in the Findings and Conclusions on Defendant's Motion to Dismiss is actually a combination of

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### 3. Bench Trial

A stipulation between the parties was entered regarding the chain of custody for all State's exhibits admitted into evidence. An additional stipulation was entered concerning the accuracy of the drug testing performed by the Washington State Patrol Crime Laboratory's Forensic Unit on the cocaine (State's Exhibits 6 and 7). CP 32-33. Four witnesses testified on behalf of the State including Officer Jeff Johnson, Officer Shirley McLamore, Officer Figueroa, and Officer Sean Conlon. 8-31-06 8-75.

Officer Johnson testified that on the date of Mr. Carbonal's arrest, May 25, 2006, he was working with the "Lakewood Motel Sweep Team." 8-31-06 9. Officers McLamore and Figueroa are members of the Motel Sweep Team. 8-31-06 30, 39. The Motel Sweep Team works "in conjunction with the motel owners and managers." 8-31-06 30. Once a month the team conducts "checks of motels to search for criminal activity." Id. The checks include running the guests for warrants, checking fire codes, checking for abandoned vehicles, etc. 8-31-06 10.

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mixed factual findings and legal conclusions. CP 26-29; Appendix A.

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Officer Sean Conlon, who was not directly involved in the investigation of Mr. Carbonal's case, testified as to the nuances of street level drug sales. He was offered as an expert witness for purposes of the trial. 8-31-06. 58

For the defense case, Mr. Carbonal testified on his own behalf. 8-31-06 75-80.

Based on the evidence presented the trial court reached the following factual findings and conclusions of law which are accepted by Mr. Carbonal with the exception of findings VII and IX: <sup>4</sup>

### **FINDINGS OF FACT**

#### I.

That on May 26, 2006, an Information was filed charging the defendant with UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER.

#### II.

On May 25, 2006, officers from the Lakewood Police Department were involved in a motel sweep. During a motel sweep, officers go to

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The section designated "Conclusion of Law" in the Findings of Fact and Conclusions of Law Re: Bench Trial is actually a combination of mixed factual findings and legal conclusions. CP 37-42, Appendix B.

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certain motels that are cooperating with law enforcement and review registration records for persons who might have outstanding warrants. They also check the parking lot and perform other tasks as described in the testimony of Officer Johnson. In reviewing the registration records of the La Casa Motel, the records for Room 25 indicated that the person registered to that room, Sean Rogers, had an outstanding warrant for his arrest. The warrant was determined to be valid and the officers proceeded to Room 25 and knocked on the door. The defendant, Alberto Carbonal, answered the door. Carbonal was the only individual in the room.

### III.

During the initial contact, defendant began looking over his shoulder to the right, reaching behind him and acting in a suspicious manner. After observing this behavior, Officer Johnson changed his position at the door. In changing his position, Officer Johnson was able to observe in plain view rock cocaine on the table next to the bed. Based on those plain view observations, Officer Johnson enters the hotel room and defendant is arrested.

#### IV.

Officer Figueroa mirandized the defendant. There is no dispute about the fact that the defendant was advised of his *Miranda* warnings. Defendant made statements to Officer Figueroa regarding the cocaine. It is undisputed that defendant admitted that the cocaine in the room was his. The cocaine in the room that was photographed shows fourteen (14) what has been described during the expert testimony of Detective Conlon as \$20 rocks, three pieces described as \$40 rocks, some larger chunks and some smaller pieces that have been identified or described as crumbs.

#### V.

Exhibit 3 that was admitted into evidence is a black jacket that was found on the bed. Defendant admitted that the jacket was his. The jacket was searched and inside the jacket another bag of cocaine was found. That bag of cocaine was depicted in a photograph admitted as Exhibit 2.

#### VI.

The cocaine found in the jacket and the cocaine found on the table next to the bed were packaged and put into evidence. The substances were

sent to the Washington State Patrol Crime Lab where they were analyzed. The parties entered into a stipulation based on the crime laboratory report of Maureen Dudschus, a forensic scientist with the crime lab, that the substances are in fact cocaine.

#### VII.

During an interview between Officer Figueroa and defendant, there were some statements that are disputed. Officer Figueroa testified that defendant made statements to him to the effect that he was going to sell some of the cocaine and that he was looking to make \$400. Defendant testified and denied making any statements about selling cocaine or making \$400. Defendant testified that he was going to smoke the cocaine using cigarettes which he claims he purchased at a convenience store before he came back to the room.

#### VIII.

Detective Conlon who testified as an expert witness in cocaine sales testified about what you would expect to find if you were involved in the sales of rock cocaine and sales of powder cocaine. Conlon testified based on his training, experience and knowledge that the contents of Exhibit 1 (the photograph) are consistent with the sale of rock cocaine.

Detective Conlon testified that users of cocaine don't bother to cut up rocks of cocaine in the fashion that was demonstrated by the contents of the plate photographed in Exhibit 1.

IX.

There were no items of paraphernalia associated with ingesting rock cocaine found in the motel room.

X.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

**CONCLUSIONS OF LAW**

I.

The court finds most persuasive the expert testimony of Detective Conlon who indicated that users of cocaine do not bother to cut up rocks of cocaine before they use it. The manner in which the cocaine in Exhibit I was laid out shows evidence consistent with the sale of rock cocaine.

II.

In addition, what was missing from the motel room was anything that would show that the cocaine was intended for personal use. While

defendant testified that he did have cigarettes and was going to use the cigarettes to smoke the cocaine, the expert testimony of Detective Conlon was that you would typically use some other device such as a glass tube with brillo to hold the rock of cocaine or some other device to smoke rock cocaine.

### III.

The case law indicates that under certain circumstances the quantity of a controlled substance standing alone does not show an intent to deliver. None of the parties disputes that you have a little bit more than just quantity. However, there are circumstances here which go much further and do establish an intent by defendant to deliver the cocaine found in the room. First of all, there is Exhibit 1, the photograph of a carefully laid out plate of different sized rocks and chunks of cocaine. Secondly, there are the statement of defendant as to what he intended to do with the cocaine found in the room. The Court is persuaded that defendant did indeed make statements that he planned to sell a portion of the rock cocaine and that he was looking to make \$400.00.....

(The complete Findings of Fact and Conclusions of Law Re: Bench Trial are attached as Appendix B and incorporated by reference

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herein.) CP 37-42.

#### **IV. ARGUMENT**

##### **A. THE STATE FAILED TO ESTABLISH THE CORPUS DELICTI OF THE CRIME OF UNLAWFUL POSSESSION OF COCAINE WITH THE INTENT TO DELIVER.**

A trier of fact may not consider the confession of an accused unless independent proof prima facie establishes the corpus delicti. *State v. Ashurst*, 45 Wn.App. 48-50,723 P.2d 1189 (1986). While the independent proof necessary to corroborate a confession need not be sufficient to support a conviction, it must be “evidence of sufficient circumstances which would support a logical and reasonable inference that the charged crime occurred.” In other words, “Proof of the corpus delicti of any crime requires evidence that the crime charged has been committed by someone.” *State v. Cobelli*, 56 Wn.App. 921,924,788 P.2d 1081 (1989)(citations omitted).

Under the corpus delicti rule, a defendant’s extrajudicial statements may not be admitted into evidence absent independent proof of the existence of every element of the crime charged. *State v. Ashurst*, 45 Wn.App. 48,723 P.2d 1189 (1986). The “corpus delicti”

usually involves two elements: “1) an injury or loss (e.g. death or missing property) and 2) someone’s criminal act as the cause thereof.” Bremerton v. Corbett, 106 Wn.2d 569,573-74,723 P.2d 1135 (1986).

In State v. Cobelli, officers saw the defendant engaged in a series of short conversations with clusters of people in a known drug area. They arrested the defendant and found several baggies containing a total of 1.4 grams of marijuana on his person. The defendant admitted that he had earlier sold two baggies of marijuana for \$10. each. Division One held that the State had failed to establish the corpus delicti of intent to deliver, and that the defendant’s confession was therefore erroneously admitted. *Id.* at 925-26.

In State v. Whalen, 131 Wn.App. 58,126 P.3d 55 (2005), the defendant stole seven packages of pseudoephedrine tablets from a drugstore. Whalen confessed that he was taking the pills for a meth cook to satisfy a marijuana debt. He was charged with robbery in the second degree and possession of pseudoephedrine with intent to manufacture. The robbery charge was eventually dropped. Whalen, 131 Wn.App. at 60-62. The Court of Appeals reversed Whalen’s conviction because absent his confession the evidence did not support

a logical and reasonable inference of the charged criminal activity. Whalen, 131 Wn.App. at 66. The independent evidence established that Whalen shoplifted cold medicine and violated RCW 69.43.110, which limits the amount of pseudoephedrine a person can purchase in a 24 hour period. This evidence was not however sufficient to establish intent to manufacture. Whalen, 131 Wn.App. at 63-64, 66.

In State v. Bernal, 109 Wn.App. 150,33 P.3d 1106 (2001) review denied, 146 Wn.2d 1010,52 P.3d 518 (2002), the defendant was charged with, among other crimes, controlled substances homicide. Bernal, 109 Wn.App.at 153. The evidence established that the victim died of a heroin overdose, but did not sufficiently corroborate that the accused delivered the heroin. The accused confessed to the delivery, but there was no other extrinsic evidence to suggest a delivery other than the accused's statement. There were also other plausible ways in which the victim could have obtained the heroin, such as finding it or stealing it. Bernal, 109 Wn.App.at 154. For this reason, Division Two of the Court of Appeals reversed the conviction finding that the corpus delicti rule had not been satisfied. *Id.*

Washington law is settled that evidence that is just as consistent

with a non-criminal causal agent as it is with a criminal causal agent is not sufficient to constitute a corpus delicti. For example, in State v. Aten, 130 Wn.2d 640,927 P.2d 210 (1996), the defendant was convicted of the second degree manslaughter of a four-month-old child who had died while in her care. Although the original medical examination indicated that the child died of SIDS, the defendant later confessed on a number of occasions that she had placed her hands on the mouth and nose of the child to keep her from crying, thereby causing the child's death.

At trial, the state offered the testimony of the medical examiner, who opined that the child's death could have been caused by SIDS, and could have been caused by manual suffocation as described by the mother. Either cause was equally as likely. The trial court then admitted the defendant's confession, holding that the state had adduced the "some evidence" necessary to prove a corpus delicti and allow the admission of the defendant's statements.

On appeal the defendant argued that the court had erred in admitting her confessions because the state failed to prove the corpus delicti of the crime. After a careful and detailed review of the corpus

delicti rule and the evidence presented in the case, the Court of Appeals agreed and reversed, finding that the confession was improperly admitted, and that absent the confession, substantial evidence did not support the conviction. The court stated the following on this latter issue:

Evidence may lead to a reasonable inference of criminality, or it may lead to a reasonable inference of innocence. But evidence that simply fails to rule out criminality or innocence does not reasonably or logically support an inference of either. It would be speculative to conclude from the autopsy report that Aten was criminally negligent.

*State v. Aten*, 79 Wn.App. 79,91,900 P.2d 585 (1995).

The Washington Supreme Court ultimately agreed with the Court of Appeals and affirmed the decision to vacate the conviction and dismiss the charges. The Supreme Court asserted the following concerning the absence of substantial evidence:

Respondent argues the State did not present sufficient evidence at trial to sustain a conviction or to be presented to a trier of fact. In reviewing the sufficiency of evidence in a criminal case. The question is whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.”

Admitted at trial were Respondent's statements that she suffocated the infant. She had also indicated she was only trying to calm Sandra, but did not intend to kill her. Dr. Schiefelbein testified the autopsy revealed the infant died of SIDS. But he also hesitatingly he might possibly make a reasonable and logical inference the infant died from suffocation when considering the infant's history. Viewing that evidence in the light most favorable to the State, it still can not be concluded there was sufficient evidence at trial for a rational trier of fact to find beyond a reasonable doubt that Respondent caused the child's death through criminal negligence. The corpus delicti issue permeates any conclusion on sufficiency of the evidence. That is the critical issue in this case.

*State v. Aten*, 130 Wn.2d at 666-67 (footnotes omitted).

As both the Court of Appeals and the Supreme Court explain in *Aten*, evidence that is equally consistent with innocence as it is with guilt is not sufficient either to support a conviction, or to establish corpus delicti.

**1. There is not substantial evidence to support factual findings numbered 1, 2, 3, 4, 5, 6, or 7.**

The purpose of findings of fact and conclusions of law is to aid an appellate Court's review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trial court's findings "if the record contains evidence

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of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *State v. Ford*, 110 Wn.2d 827,755 P.3d 806 (1988).

In Mr. Carbonal’s case the trial court based its ruling that sufficient corroborating evidence established the corpus delicti of intent to deliver based on the following facts:

#### **THE UNDISPUTED FACTS**

1. On May 25, 2006, officers of the Lakewood Police Department conducted a motel sweep at the La Casa Motel, 12807 Pacific Highway S.W.
2. The officers learned that the registered guest to room # 25 had a confirmed warrant.
3. Officers went to room # 25 and contacted an individual, later identified as ALBERTO CARBONAL. CARBONAL was the only individual in the room.
4. Inside the motel room on a table was a tray. The tray contained 3 large pieces of crack cocaine. In addition to these larger pieces were three medium sized pieces of crack cocaine and 14 smaller “chips” of cocaine. A photo of the tray and cocaine was admitted at the hearing.
5. CARBONAL was advised of his Miranda warnings and told the officers that he had found the cocaine. When asked what he was going to do with the cocaine, defendant stated that he was going to use it for his personal use and sell the rest for money. When asked how much money he was looking at making, defendant said about \$400.

6. A black leather jacket was found on the bed within three feet of where CARBONAL was standing. CARBONAL told officers that the jacket was his. Inside the jacket was a beige plastic baggie containing pieces of crack cocaine.
7. No items were found in the hotel room which could be used to ingest the crack cocaine.
8. The lack of any paraphernalia in the room that could be used to ingest the cocaine is also indicative of street level dealing.

### **FINDINGS AS TO DISPUTED FACTS**

1. The layout of the cocaine on the tray along with the quantity of cocaine is indicative of an intent to deliver.
2. The defendant was in a hotel room with a phone which would serve as a means of communications with potential buyers.
3. The lack of any paraphernalia in the hotel room which could be used to ingest the cocaine is also indicative of an intent to deliver.
4. A separate quantity of cocaine was found in the pocket of a jacket belonging to defendant.
5. Taking all reasonable inferences in the light most favorable to the State, these facts constitute evidence of sufficient circumstances which would support a logical and reasonable inference of defendant's possession of the cocaine and of his intent to deliver the cocaine.
6. The State provided sufficient independent proof of the defendant's intent to deliver the cocaine to allow the court to consider the defendant's admissions regarding what he intended to do with the cocaine. The independent proof and defendant's admissions are sufficient to establish the corpus delicti of possession of the cocaine and defendant's intent to deliver the

cocaine found in the room.

7. The quantity of cocaine in addition to the other factors outlined above and defendant's admission regarding his intent to deliver the cocaine are sufficient to establish defendant's possession of the cocaine and his intent to deliver it.

The "Undisputed Facts" as well as the "Findings as to Disputed Facts" are, however, unsupported by the testimony offered at the Motion to Dismiss Hearing. At the hearing, Officer Sean Conlon, who did not investigate or work on Mr. Carbonal's case, testified solely on the basis of two photos provided to him to view at the hearing. Officer Shirley McLamore was then called to testify that she had taken the photos. The only exhibits entered into the record were two photos. CP 25. Although the State referred to police reports in its argument, no such reports were entered into evidence at the hearing.

Quite simply, no testimony or other evidence was offered as to "Undisputed Facts" numbered 2, 3, 5, 6, 7, and 8.<sup>5</sup> Undisputed fact number 4, which concerns the layout the cocaine found, is also in error. It states that the cocaine found inside the motel room on a tray

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"The Undisputed Facts" are misnumbered.; number 7 is repeated. To avoid confusion appellant has properly numbered "The Undisputed Facts" section. The complete document is attached as Appendix A.

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contained 3 large pieces, plus 3 medium sized pieces, plus 14 small pieces, and a pile of even smaller “chips” of cocaine. In fact, Officer Conlon testified that the tray “appeared” to hold a piece of a “cookie” of cocaine, which had been cut up into about 14 \$20. size rocks, plus 2 medium size pieces which “could be sold as \$40. rocks,” plus some “crumbs.” 8-9-06 13-14.

The trial court’s “Findings as to Disputed Facts” are all in error because insufficient testimony or no testimony was offered to support such findings. With respect to finding number 1, that the layout and quantity of cocaine is indicative of an intent to deliver, the only testimony offered to support such an inference was that of Officer Conlon. Officer Conlon’s testimony, however, was based solely on viewing two photographs from which he speculated as to what the photos “appeared” to represent. Notably, Office Conlon was not sworn as an expert witness for purposes of the hearing.

“Findings as to Disputed Facts” number 2, that Mr. Carbonal was in a hotel room with a phone, was simply not a fact in evidence. Neither witness was questioned about a phone in the hotel room at the hearing. Number 3, that the lack of drug paraphernalia is also

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indicative of an intent to deliver, is meaningless because no testimony was presented at the hearing that no drug paraphernalia was found. Number 4, that a separate quantity of cocaine was found in a jacket pocket is erroneous because, again, no testimony was presented at the hearing to support this. The remaining “Finding as to Disputed Facts”, numbers 5-7 are actually legal conclusions. The conclusions are in error because they are not supported by the evidence.

The State may argue that the trial court considered the police reports attached to defendant’s hybrid *Knapstadt* and *corpus delicti* motion to dismiss. The record, however, fails to show this. Moreover, such consideration would be improper under *State v. Knapstadt*, because the motion was not properly supported by an affidavit. See *Knapstadt*, 107 Wn.2d at 356. Likewise, had the trial court considered a police report that was not admitted as evidence for purposes of the corpus delicti evidentiary hearing, such consideration would have been improper. In any event, the records fails to show which, if any, information in addition to the testimony the trial court in fact considered. Based on the testimony presented the Findings and Conclusions on Defendant’s Motion to Dismiss cannot stand.

2. **Counsel for Mr. Carbonal was ineffective because she failed to object to “The Undisputed Facts” portion of the findings and conclusions where the “Undisputed Facts” were not supported by the evidence.**

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9<sup>th</sup> Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”). To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *cert. denied*, 126 S.Ct. 2294, 164 L.Ed. 820 (2006) (*citing State v. Rosborough*, 62 Wn.App. 341, 348, 814 P.2d 679 (1991)). To establish ineffective representation, the defendant must show that counsel’s performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing*

Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. McNeal, 145 Wn.2d at 362, 37 P.3d 280 (citing State v. Early, 70 Wn.App. 452, 460, 853 P.2d 964 (1993)).

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. McNeal, 145 Wn.2d at 362, 37 P.3d 280 (citing Strickland, 466 U.S. at 689). If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. McNeal, 145 Wn.2d at 362, 37 P.3d 280 (citing State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

It was not objectively reasonable nor was it legitimate strategy for Mr. Carbonal's trial counsel to fail to object to "The Undisputed Facts" portion of the Findings and Conclusions on Defendant's Motion to Dismiss. As noted above, no testimony was offered to support numbers 2, 3, 5, 6, 7, and 8. Nor were any police reports admitted into evidence to support these facts. As also discussed above, "undisputed

fact” number 4, which concerned the quantity and layout of the alleged cocaine, was inaccurate.

Mr. Carbonal was prejudiced by his trial counsel’s deficient performance because the trial court considered and relied upon “The Undisputed Facts” in reaching its decision to deny Mr. Carbonal’s Motion to Dismiss.

**3. Even if the factual findings had been supported by substantial evidence, the corpus delicti of the crime was not established.**

Under *Cobelli*, *Whalen*, *Bernal*, and *Aten*, reversal is required in the instant case. Mr. Carbonal was not seen engaging in drug transactions. He was not in a high crime area. On the contrary, Mr. Carbonal was inside his room at a hotel designated as part of a “crime free” housing program by the city. 8-31-06 10. No scales or packaging materials were found. No cash was found on Mr. Carbonal’s person or inside his room. He had no cell phone, no pager, or any other accouterment typically related to drug sales.

The trial court’s findings and conclusions relied heavily on the testimony of Officer Sean Conlon that the layout and quantity of cocaine plus the lack of drug paraphernalia by which to ingest crack

cocaine was indicative of drug sales rather than personal use. Such reliance by the trial court was misplaced. Officer Conlon was not involved in the case as an investigating or arresting officer. Nor was he sworn as an expert witness. He provided no testimony that the substance found was ever weighed or even tested. His entire testimony was based on viewing two photographs in court. Under *Brown*, the trial court's over-reliance on Officer Conlon's testimony provided an insufficient basis to establish corpus delicti.

Furthermore, the findings in this case are equally as consistent with innocence as with guilt. Being present in a motel room with a phone does not support a logical and reasonable inference that one intends to sell drugs rather than use them. Possessing a small quantity of drugs in one's pocket does not support a logical and reasonable inference that one intends to sell rather than simply use the drugs. In sum, even if substantial evidence supported the trial court's findings, the findings were insufficient to establish the corpus delicti of the crime of possession with the intent to deliver cocaine.

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**B. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. CARBONAL INTENDED TO DELIVER COCAINE.**

Due process requires the State to prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed 2d 368 (1970); *State v. Baeza*, 100 Wn. 2d 487, 490, 670 P.2d 646 (1983) (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979)). Evidence is sufficient to support a conviction where, after considering the evidence in the light most favorable to the State, the appellate court finds that a rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. See *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *affd.*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

To prove Mr. Carbonal's guilt of possession with intent to deliver under RCW 69.50.401 (1)(2)(a), the State was required to

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prove three elements: 1) unlawful possession; 2) the intent to deliver; and 3) a controlled substance, here, cocaine. Here the State failed to prove the element of intent to deliver beyond a reasonable doubt. Naked possession of a controlled substance is generally insufficient to establish an inference of an intent to deliver. State v. Darden, 145 Wn.2d 612, 625, 41 P.3d 1189 (2002).

The courts must be careful to preserve the distinction and not to turn every possession of a minimal amount of a controlled substance into a possession with intent to deliver without substantial evidence as to the possessor's intent above and beyond the possession itself.

Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession.

State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993).

Thus, a finding of an intent to deliver a controlled substance must be supported by "substantial corroborating evidence." Mere possession is not enough. *Id.* Washington appellate courts have repeatedly cautioned that, standing alone, police opinions regarding quantity or packaging of a controlled substance are insufficient to show an intent to deliver. A conviction cannot be based solely on an "officers opinion as to what what a person would carry for normal

use.” *Id.* at 485. See also *State v. Davis*, 79 Wn. App. 591, 904 P.2d 306 (1995); *State v. Hutchins*, 73 Wn. App. 211, 868 P.2d 196 (1994).

In *State v. Brown*, police observed a juvenile drinking beer on a public sidewalk with a friend in a “high narcotics area.” *Brown*, 68 Wn. App. at 481. After a brief police pursuit, Brown dropped \$400 worth of crack cocaine to the ground. *Id.* at 482. He was later charged with possession of cocaine with intent to deliver. *Id.* Although police had not observed any activity consistent with a drug sale, one officer testified that the amount of cocaine recovered was too much for personal use and that “this [was] definitely possessed with the intent to deliver.” *Id.* The *Brown* Court found the evidence insufficient to support a finding of intent to deliver beyond a reasonable doubt and remanded the case for entry of a conviction for simple possession. *Id.* at 485.

In *State v. Davis*, the defendant was found with a total of nineteen (19) grams of marijuana in individually wrapped baggies, two baggies of marijuana seeds, a box of sandwich baggies, a marijuana pipe, and a number of knives. 79 Wn. App. at 593-96. An officer testified that a marijuana user was unlikely to have the amount of

marijuana with the type of packaging found on the defendant. *Id.* at 593. The appellate court disagreed, finding the amount of marijuana and packaging to be consistent with personal use. *Id.* at 596. The Court found the evidence insufficient to suggest an intent to deliver absent other indicia of such an intent, for example, a large amount of money or scales. *Id.* at 596.

In *State v. Hutchins*, the defendant was found with three hundred and ninety-three (393) grams of wet marijuana. 73 Wn. App. at 213. One officer testified about the street price for the amount of marijuana found on the defendant and explained that the marijuana could be repackaged and sold for approximately twice the purported purchase price. *Id.* at 214. The Court stated:

When...testimony of a profit motive is presented with no evidence other than bare possession of a quantity of marijuana, its admission is little more than an attempt to bootstrap a simple possession charge into the more serious offense of possession with intent to distribute.

*Id.* at 215. Finding no corroborating evidence of an intent to deliver other than the officer's opinions about potential profits, the Court reversed the conviction. *Id.* at 215, 218.

Other Washington cases have upheld convictions for possession

with intent to deliver only where substantial corroborating factors supported a finding of an intent to deliver. In State v. Hagler, 74 Wn. App. 232,233,872 P.2d 85 (1994), police stopped a speeding car driven by Hagler, a juvenile, who made furtive gestures as the police approached and then gave the officers a false name. *Id.* When police removed him from the car, they observed suspected rock cocaine inside the car and some falling from Hagler's lap. *Id.* Police recovered 24 rocks of suspected cocaine, weighing 2.8 grams, from the scene. *Id.* Police also observed \$342. In an open pocket of Hagler's clothing. *Id.* At trial, an officer testified that in his opinion, 24 rocks of cocaine was inconsistent with personal use. *Id.* at 234. Given the amount of cocaine plus the amount of cash possessed by a juvenile, the Court affirmed Hagler's conviction for possession with the intent to deliver. *Id.* at 236. See also State v. Lane, 56 Wn. App.286,297,786 P.2d 277 (1989) (informant's tip, \$850. in cash, scales, one ounce of cocaine, and officer testimony indicating one ounce enough for eight typical sales sufficient to support finding of intent to deliver); State v. Lopez, 79 Wn.App. 755, 758-59, 768-69, 904 P.2d 1179 (1995) (large amount of cocaine, some broken into small bindles, \$826. in cash immediately

following a controlled buy of \$1000. of cocaine, and officer testimony about packaging and typical sales amounts sufficient to support intent to deliver conviction).

In Mr. Carbonal's case, the parties stipulated that the substance found was determined "beyond a reasonable doubt to be cocaine after being tested by the Washington State Patrol Crime Lab." CP 32-33. The sole issue at the bench trial was whether the evidence presented proved beyond a reasonable doubt that Mr. Carbonal intended to deliver the cocaine. Mr. Carbonal does not challenge the trial judge's finding of facts with the exception of factual findings numbered IX and VII.,<sup>6</sup> but urges this court to reject the conclusion that such findings are sufficient to establish guilt beyond a reasonable doubt as to the element of intent to deliver.

The legal analysis for insufficiency of evidence for a finding of guilt is substantially the same as that for insufficiency to establish the corpus delicti of the crime, with the obvious difference in the standard

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Finding of Fact number IX states: There were no items of paraphernalia associated with ingesting rock cocaine found in the motel room. Finding of Fact number VII states that Mr. Carbonal confessed he intended to sell the cocaine. See Appendix B.

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of proof. Here, the standard of proof is higher; it is proof beyond a reasonable doubt.

The trial judge, as the motion judge had, found “most persuasive” the testimony of Officer Conlon, who was sworn as an expert for the trial. See Appendix B at p.4. Officer Conlon’s testimony regarding the layout and quantity of cocaine plus the lack of drug paraphernalia from which to ingest the cocaine, combined with Mr. Carbonal’s admission are the two reasons given for the trial court’s conclusion of guilt. The quantity of cocaine, in terms of weight, however, was not specifically found by the trial court. Officer Conlon testified that the street value of the cocaine was about \$700. including both the cocaine found on the tray and that found in Mr. Carbonal’s jacket pocket. 8-31-06 71.

Factual findings numbered VII and IX are not supported by substantial evidence to the extent they state that Mr. Carbonal confessed to the intent to deliver, and that nothing in the motel room could be used as a smoking device.

With respect to the lack of a smoking device, again the trial court relied exclusively on Officer Conlon’s testimony to conclude that

nothing was present in the motel room that would provide a means by which Mr. Carbonal could have ingested the cocaine. The court's conclusion was in error, however. Mr. Carbonal testified that in fact he uses cigarettes to smoke cocaine, and he had two packages of cigarettes in the motel room. This testimony was never disproved or rebutted. Officer Conlon testified that anything that one can keep a flame going on to melt crack cocaine is usable as a smoking device. 8-31-06 69. Officer Figueroa could not remember if cigarettes were found . *Id.* at 52.

Officer Figueroa testified that Mr. Carbonal admitted to Officer Johnson via Spanish translation, that he was hoping to sell some of the cocaine, and was planning to use the rest. 8-31-06 44. Mr. Carbonal denied that he would be "ignorant" enough to make such an incriminating statement. 8-31-06 77. Mr. Carbonal's denial is credible in light of the fact that he plainly had experience with law enforcement and the criminal justice system, and in view of the contradictions presented by Officer Figueroa's testimony. Officer Figueroa claimed that he served only as a Spanish interpreter for Officer Johnson, and

that Officer Johnson conducted the interrogation of Mr. Carbonal. *Id.* at 24,40. Officer Johnson, however, testified that Officer Figueroa questioned Mr. Carbonal directly.

Here, as in *Brown*, there was “no weapon, no substantial sum of money, no scales or other drug paraphernalia indicative of sales or delivery, the rocks of cocaine were not separately packaged nor were separate packages in his possession.” *Brown*, 68 Wn.App. at 484. As in *Brown*, the trial court over-relied on the subjective testimony of a police officer in lieu of actual evidence that would connect Mr. Carbonal with an intent to sell the drugs found.

The facts in this case are not comparable to cases such as *State v. Goodman*, 150 Wn.2d 777, 83 P.3d 410 (2004) (six baggies weighing 2.8 grams, scales, additional baggies, and a controlled buy sufficient to establish intent to deliver), *State v. Llamas-Villa*, 67 Wn.App. 448,836 P.2d 239 (1992) (where the defendant possessed cocaine, heroin and \$3,200., combined with the officer’s observations of drug deals); *State v. Mejia*, 111 Wn.2d 892,766 P.2d 454 (1989)

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(one and a-half pounds of cocaine and a controlled buy); State v. Simpson 22 Wn.App.572,590 P.2d 1276 (1979) (cocaine, uncut heroin, lactose for cutting balloons for packaging).

In this case, there was no substantial corroborating evidence to support the charge that Mr. Carbonal possessed cocaine with the intent to deliver it. Unlike cases such as Hagler, Lane, and Lopez, no prior delivery was witnessed, no accounting books were discovered, no huge amount of cash was discovered, and no prepackaged narcotics ready to sell were discovered. In fact no money was found at all on Mr. Carbonal's person or in the motel room.

Mr. Carbonal's remedy is for this Court to reverse his conviction for Unlawful Possession with Intent to Deliver. In the event this Court determines the evidence was sufficient to establish possession of cocaine this Court should remand for entry of such judgment and for resentencing.

## **V. CONCLUSION**

For all of the foregoing reasons and conclusions, Mr. Carbonal

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respectfully requests that this Court vacate his Judgment and Sentence for Unlawful Possession of a Controlled Substance With Intent to Deliver. Should this Court determine that the corpus delicti was established for the crime of simple possession, and that the evidence presented at Mr. Carbonal's bench trial was sufficient to prove possession of a controlled substance, this Court should remand for entry of a judgment and sentence on the lesser charge.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of May, 2007.



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Sheri L. Arnold  
WSBA # 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on May 30, 2007, she hand delivered this Opening Brief to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and delivered by U.S. mail to appellant, A;bertp Cabbonal,, DOC # 300364 McNeil Island Corrections Center, Post Office Box 881000, Steilacoom, Washington 98388, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on May 30, 2007.

  
Norma Kinter

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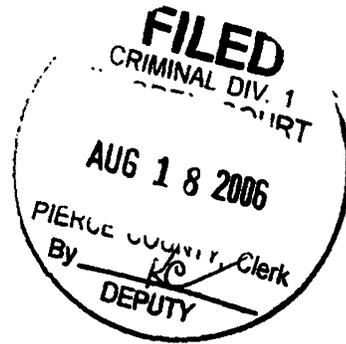
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**APPENDIX A**

**FINDINGS AND CONCLUSIONS ON DEFENDANT'S MOTION TO DISMISS**



06-1-02350-3 26001745 FNFL 08-21-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-02350-3

vs.

ALBERTO CARBONAL,

Defendant.

FINDINGS AND CONCLUSIONS ON  
DEFENDANT'S MOTION TO DISMISS

THIS MATTER having come on before the Honorable K. Nelson on the 9<sup>th</sup> and 10<sup>th</sup> day of August, 2006, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 8.2 and CrR 3.6.

THE UNDISPUTED FACTS

1. On May 25, 2006, officers of the Lakewood Police Department conducted a motel sweep at the La Casa Motel, 12807 Pacific Highway SW.
2. The officers learned that the registered guest to room #25 had a confirmed warrant.
3. Officers went to room #25 and contacted an individual, later identified as ALBERTO CARBONAL. CARBONAL was the only individual in the room.
4. Inside the motel room on a table was a tray. The tray contained 3 large pieces of crack cocaine. In addition to these larger pieces were three medium sized pieces of crack cocaine and 14 small pieces of crack cocaine. The tray also contained a razor blade and a pile of smaller "chips" of cocaine. A photo of the tray and cocaine was admitted at the hearing.
5. CARBONAL was advised of his Miranda warnings and told the officers that he had found the cocaine. When asked what he was going to do with the cocaine, defendant stated that he was going to use it for his personal use and sell the rest

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1 for money. When asked how much money he was looking at making, defendant  
2 said about \$400.

- 3 6. A black leather jacket was found on the bed within three feet of where  
4 CARBONAL was standing. CARBONAL told officers that the jacket was his.  
5 Inside the jacket was a beige plastic baggie containing pieces of crack cocaine.
- 6 7. No items were found in the hotel room which could be used to ingest the crack  
7 cocaine.

#### 8 THE DISPUTED FACTS

- 9 1. Sean Conlon, a detective with the Lakewood Police Department, testified  
10 regarding the differences between street level sales of powder cocaine and rock  
11 cocaine or "crack". Detective Conlon has participated in over 500 undercover  
12 narcotics investigations with both the Seattle Police Department and Lakewood  
13 Police Department.
- 14 2. Crack cocaine is sold by the rock, not weight.
- 15 3. When dealing with powder cocaine, a seller needs some unit to weigh out the  
16 narcotics. A seller would also need packaging material to contain the substance.  
17 These items would not necessarily be needed for sales of rock cocaine as the  
18 cocaine is sold in individual rocks that do not need to be weighed and sellers will  
19 often transfer the rock of cocaine directly to the buyer without putting it into a  
20 container or baggie.
- 21 4. Street level dealers of rock cocaine or crack will typically obtain a "cookie" of  
22 cocaine weighing from a couple of grams to one ounce and sell individual rocks  
23 off of the larger "cookie". A \$20 rock of cocaine typically weighs between 1/10  
24 to 2/10 of a gram. A seller will typically buy a one ounce "cookie" for \$600. The  
25 seller will typically be able to obtain 5 - \$20 rocks from each gram of cocaine.  
Those 5 \$20 rocks translate to \$100 per gram. A one ounce cookie (28 grams)  
would give the seller a potential yield of \$2800.
5. The layout of the cocaine on the tray is more indicative of street level dealing than  
personal use. The 14 smaller pieces of cocaine are consistent in size with a \$20  
rock of cocaine. The 3 medium sized pieces are consistent in size with a \$40 rock  
of cocaine but could be cut into 2- \$20 rocks. The smaller pieces appear to be cut  
off of the 3 large pieces.
6. The "chips" of cocaine found on the tray are consistent with personal use. Users  
will not smoke an entire \$20 rock of cocaine at one time. Rather they will smoke  
a smaller piece consistent with the size of the chips found on the tray.

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- 7. The lack of any paraphernalia in the room that could be used to ingest the cocaine is also indicative of street level dealing.

FINDINGS AS TO DISPUTED FACTS

- 1. The layout of the cocaine on the tray along with the quantity of cocaine is indicative of an intent to deliver.
- 2. The defendant was in a hotel room with a phone which would serve as a means of communication with potential buyers.
- 3. The lack of any paraphernalia in the hotel room which could be used to ingest the cocaine is also indicative of an intent to deliver.
- 4. A separate quantity of cocaine was found in the pocket of a jacket belonging to defendant.
- 5. Taking all reasonable inferences in the light most favorable to the State, these factors constitute evidence of sufficient circumstances which would support a logical and reasonable inference of defendant's possession of the cocaine and of his intent to deliver the cocaine
- 6. The State provided sufficient independent proof of the defendant's intent to deliver the cocaine to allow the court to consider the defendant's admissions regarding what he intended to do with the cocaine. The independent proof and defendant's admissions are sufficient to establish the corpus delicti of possession of the cocaine and defendant's intent to deliver the cocaine found in the room.
- 7. The quantity of cocaine in addition to the other factors outlined above and defendant's admissions regarding his intent to deliver the cocaine are sufficient to establish defendant's possession of the cocaine and his intent to deliver it.

Defendant's Motion to Dismiss is DENIED.

DONE IN OPEN COURT this 18<sup>th</sup> day of August, 2006.

Presented by:

*Dione Joy Ludlow*

DIONE JOY LUDLOW  
Deputy Prosecuting Attorney  
WSB # 25104

*[Signature]*  
 JUDGE  
**KATHRYN J. NELSON**

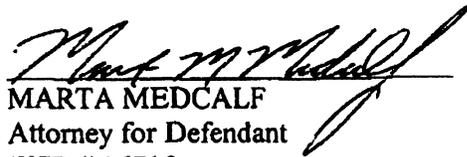
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**AUG 18 2006**

PIERCE COUNTY, Clerk  
 By *[Signature]*  
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06-1-02350-3

1 Approved as to Form:

2   
 3 MARTA MEDCALF  
 4 Attorney for Defendant  
 5 WSB # 16710

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**APPENDIX B**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: BENCH TRIAL**



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-02350-3

vs.

ALBERTO CARBONAL,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: BENCH TRIAL

NOV 13 2006

THIS MATTER having come on before the Honorable B. Tollefson, Judge of the above entitled court, for bench trial on the 31<sup>st</sup> day of August, 2006, the defendant having been present and represented by attorney MARTA MEDCALF, and the State being represented by Deputy Prosecuting Attorney DIONE JOY LUDLOW, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

That on May 26, 2006, an Information was filed charging the defendant with UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER

II.

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1 On May 25, 2006, officers from the Lakewood Police Department were involved in a motel  
2 sweep. During a motel sweep, officers go to certain motels that are cooperating with law  
3 enforcement and review registration records for persons who might have outstanding warrants.  
4 They also check the parking lot and perform other tasks as described in the testimony of Officer  
5 Johnson. In reviewing the registration records of the La Casa Motel, the records for Room 25  
6 indicated that the person registered to that room, Sean Rogers, had an outstanding warrant for his  
7 arrest. The warrant was determined to be valid and the officers proceeded to Room 25 and  
8 knocked on the door. The defendant, Alberto Carbonal, answered the door. Carbonal was the  
9 only individual in the room.

10 III.

11 During the initial contact, defendant began looking over his shoulder to the right, reaching  
12 behind him and acting in a suspicious manner. After observing this behavior, Officer Johnson  
13 changed his position at the door. In changing his position, Officer Johnson was able to observe  
14 in plain view rock cocaine on the table next to the bed. Based on those plain view observations,  
15 Officer Johnson enters the hotel room and defendant is arrested.

16 IV.

17 Officer Figueroa mirandized defendant. There is no dispute about the fact that defendant was  
18 advised of his *Miranda* warnings. Defendant made statements to Officer Figueroa regarding the  
19 cocaine. It is undisputed that defendant admitted that the cocaine in the room was his. The  
20 cocaine in the room that was photographed shows fourteen (14) what has been described during  
21 the expert testimony of Detective Conlon as \$20 rocks, three pieces described as \$40 rocks, some  
22 larger chunks and some smaller pieces that have been identified or described as crumbs.

23 V.

1 Exhibit 3 that was admitted into evidence is a black jacket that was found on the bed. Defendant  
2 admitted that the jacket was his. The jacket was searched and inside the jacket another bag of  
3 cocaine was found. That bag of cocaine was depicted in a photograph admitted as Exhibit 2.

#### 4 VI.

5 The cocaine found in the jacket and the cocaine found on the table next to the bed were packaged  
6 and put into evidence. The substances were sent to the Washington State Patrol Crime Lab  
7 where they were analyzed. The parties entered into a stipulation based on the crime laboratory  
8 report of Maureen Dudschus, a forensic scientist with the crime lab, that the substances are in  
9 fact cocaine.

#### 10 VII.

11 During an interview between Officer Figueroa and defendant, there were some statements that  
12 are disputed. Officer Figueroa testified that defendant made statements to him to the effect that  
13 he was going to sell some of the cocaine and that he was looking to make \$400. Defendant  
14 testified and denied making any statements about selling cocaine or making \$400. Defendant  
15 testified that he was going to smoke the cocaine using cigarettes which he claims he purchased at  
16 a convenience store before he came back to the room.

#### 18 VIII.

19 Detective Conlon who testified as an expert witness in cocaine sales testified about what you  
20 would expect to find if you were involved in the sales of rock cocaine and sales of powder  
21 cocaine. Conlon testified based on his training, experience and knowledge that the contents of  
22 Exhibit 1 (the photograph) are consistent with the sale of rock cocaine. Detective Conlon  
23 testified that users of cocaine don't bother to cut up rocks of cocaine in the fashion that was  
24 demonstrated by the contents of the plate photographed in Exhibit 1.  
25

## IX.

1 There were no items of paraphernalia associated with ingesting rock cocaine found in the motel  
2 room.  
3

## X.

4  
5 From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.  
6

CONCLUSIONS OF LAW

## I.

7  
8  
9 The court finds most persuasive the expert testimony of Detective Conlon who indicated that  
10 users of cocaine do not bother to cut up rocks of cocaine before they use it. The manner in  
11 which the cocaine in Exhibit 1 was laid out shows evidence consistent with the sale of rock  
12 cocaine.  
13

## II.

14 In addition, what was missing from the motel room was anything that would show that the  
15 cocaine was intended for personal use. While defendant testified that he did have cigarettes and  
16 was going to use the cigarettes to smoke the cocaine, the expert testimony of Detective Conlon  
17 was that you would typically use some other device such as a glass tube with brillo to hold the  
18 rock of cocaine or some other device to smoke rock cocaine.  
19

## III.

20  
21 The case law indicates that under certain circumstances the quantity of a controlled substance  
22 standing alone does not show an intent to deliver. None of the parties disputes that you have to  
23 have a little bit more than just quantity. However, there are circumstances here which go much  
24 further and do establish an intent by defendant to deliver the cocaine found in the room. First of  
25

1 all, there is Exhibit 1, the photograph of a carefully laid out plate of different sized rocks and  
2 chunks of cocaine. Secondly, there are the statements of defendant as to what he intended to do  
3 with the cocaine found in the room. The Court is persuaded that defendant did indeed make  
4 statements that he planned to sell a portion of the rock cocaine and that he was looking to make  
5 \$400.00.

6 IV.

7 That the Court has jurisdiction of the parties and subject matter.

8 V.

9 That all relevant events or at least one element of the crime occurred in Pierce County.

10 III.

11 That ALBERTO CARBONAL is guilty beyond a reasonable doubt of the crime of  
12 UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO  
13 DELIVER, in that, on May 25, 2006, ALBERTO CARBONAL:

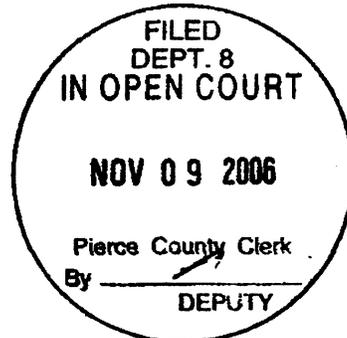
- 14 1. Did possess a controlled substance, to wit: cocaine in rock form; and
- 15 2. That defendant possessed the cocaine with the intent to deliver the cocaine; and
- 16 3. That the acts occurred in the State of Washington.

17 DONE IN OPEN COURT this 9<sup>th</sup> day of NOV ~~October~~, 2006.

18  
19   
20 JUDGE

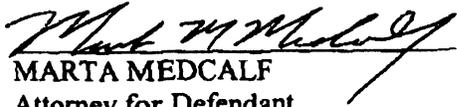
21 Presented by:

22 Dione J. Ludlow  
23 DIONE JOY LUDLOW  
24 Deputy Prosecuting Attorney  
25 WSB # 25104



Approved as to Form:

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 MARTA MEDCALF  
 Attorney for Defendant  
 WSB # 16710