

NO. 36559-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER LEE ARMENDARIZ,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it refused to suppress evidence a police officer obtained through the use of a pretext detention and through an illegal order that the defendant identify himself in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment. RPS 2-12; SCP 1-3.¹

2. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it repeatedly allowed the state to elicit irrelevant, prejudicial evidence. RP 20-23.

3. The state's comment on the credibility of a key witness denied the defendant his right under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment to have a fair and impartial jury be the sole judge of the facts. RP 63-66.

¹"RPS" refers to the single volume verbatim report of the suppression motion held on June 13, 2007. "RP" refers to the continuously numbered, two volume verbatim reports of the trial held on June 26, 2007, and June 27, 2007. "SCP" refers to supplemental clerk's papers.

4. Trial counsel's failure to waive the requirement that the jury find beyond a reasonable doubt that the defendant had a prior conviction for a serious offense violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. RP 3.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it refuses to suppress evidence a police officer obtained through the use of a pretext detention and through an illegal order to provide identification in violation of a defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment?

2. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it repeatedly allows the state to elicit irrelevant, prejudicial evidence when the erroneous admission of that evidence causes prejudice to the defendant's case?

3. Does a prosecutor's comment on the credibility of a key witness deny a defendant the right under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment to have a fair and impartial jury be the sole judge of the facts when but for that improper comment the jury would have returned a verdict of acquittal?

4. For a defendant charged with first degree unlawful possession of a firearm, does a trial counsel's failure to waive the requirement that the jury find beyond a reasonable doubt that the defendant had a prior conviction for a serious offense violate the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when the defense did not dispute the fact that the defendant had a prior conviction for a serious offense. RP 3.

STATEMENT OF THE CASE

Factual History

At about 12:10 am on the morning of March 18, 2007, Centralia Police Officer Michael Lowrey was on routine patrol when he observed a vehicle make a lane change without signaling. RPS 3-4. Officer Lowrey does not stop vehicles for improper lane changes. RPS 10. Rather, when he sees a driver make a lane change without signaling, he runs the plates on the vehicle to determine whether or not the registered owner has a valid driver's license. *Id.* If the vehicle owner does not have a valid license, then he stops the vehicle to determine whether or not the registered owner is the driver. *Id.*

Consistent with this practice, Officer Lowrey ran the plates on the vehicle he saw make the improper lane change. RPS 4-5; RP 14-17. The inquiry revealed that the registered owner was a woman by the name of Marissa Grab, whose license was suspended. *Id.* Based upon this information, Officer Lowrey turned his overhead lights on to make a traffic stop. *Id.* The vehicle eventually pulled into the driveway of a house and stopped. RPS 5-6; SCP 1-3. At the time, Officer Lowrey could not see who was in the vehicle. *Id.* However, as he approached, he could see that there were three people in the car: a male driver, a female in the front passenger seat, and another male in the back. RPS 7; RP 19-20. In spite of the fact that Officer Lowrey then knew that the registered owner of the vehicle was not the

driver, he ordered the driver to produce his license. *Id.* As he did this, he put his flashlight on the two passengers to see if they were wearing seatbelts. RP 7-8. The backseat passenger was not. *Id.* Upon seeing this, he also ordered the backseat passenger to also identify himself. *Id.* The back seat passenger complied. *Id.*

In fact, Greg Shroeder was the driver, his long-time girlfriend Marissa Grab was the front seat passenger, and the defendant Christopher Armendariz was the backseat passenger. RPS 7; RP 19-20. After obtaining everyone's identification, Officer Lowrey returned to his police vehicle to run their names for warrants. RPS 8-9; RP 20-23. Dispatch responded that there were confirmed warrants for both Mr. Shroeder as well as the defendant, and that both were convicted felons. RPS 8-9; RP 20-23, 25-26. Upon hearing this information, Officer Lowrey called for another officer, who arrived in a few minutes. RPS 8-9; RP 24-25. When the other officer arrived, they took all three people out of the vehicle, placed the defendant and Mr. Shroeder under arrest, and put handcuffs on them. *Id.* Up to this point, Officer Lowrey had not seen any furtive movements from anyone within the vehicle. RP 40.

With all three out of the vehicle, the officers began a search. RP 24-25. This search uncovered a baggie of methamphetamine on the driver's floorboard, and a loaded .40 pistol leaning against the transmission hump on the front passenger's side. RP 24-27. At this point, the officers also placed

Marissa Grab under arrest. *Id.* A search of her person incident to that arrest uncovered a drug pipe with methamphetamine residue in it. RP 26. Later, at the jail, Mr. Schroeder and Ms Grab claimed that after Officer Lowrey went back to his vehicle to run their names for warrants, the defendant threw the pistol into Mr. Shroeder's lap and that Mr. Shroeder then took the pistol and dropped it on the floor on the front passenger's side of the vehicle. RP 28-29, 63-64, 73, 93.

Procedural History

By information filed March 19, 2007, the Lewis County Prosecutor charged the defendant with one count of first degree unlawful possession of a firearm. CP 1-2. Prior to trial, the defense moved to suppress the gun, arguing that Officer Lowery had detained the vehicle on a pretext and that he had illegally ordered the defendant to identify himself. CP 6-7, 14-17. The court later held a hearing at which the state called Officer Lowrey as its sole witness. CP 22. After argument, the court denied the motion and later entered the following findings of fact and conclusions of law:

FINDINGS OF FACT

1.1 On March 18, 2007, at approximately 12:10 AM, Officer Lowery was on patrol, traveling northbound on Tower Avenue, Centralia, when he observed a vehicle change lanes without signaling.

1.2 After observing the infraction, Lowery ran the vehicle's license plate and discovered the driver's license of the registered owner, identified as Marissa Grab, was suspended.

1.3 Due to the time of day, Lowrey could not readily determine if the particulars of the person operating the vehicle matched those of the registered owner.

1.4 Lowrey activated his emergency lights and stopped the vehicle in the driveway of a residence situated on Washington Avenue.

1.5 Lowrey contacted the occupants of the vehicle and immediately recognized the driver, Gregory Shroeder, from previous contacts.

1.6 Using his flashlight, Lowrey targeted the lap area of each passenger to determine whether they were wearing their safety belts.

1.7 The defendant, who was seated behind the front passenger, was not searing his safety belt.

1.8 Lowrey asked the defendant to identify himself based upon the regulatory violation.

1.9 The defendant identified himself as Christopher Lee Armendariz.

1.10 Lowrey checked the defendant's name through dispatch and discovered he was wanted on an outstanding warrant through the Department of Corrections.

1.11 After confirming the status of the warrant, Lowrey placed the defendant under arrest.

CONCLUSIONS OF LAW

2.1 The reason a traffic stop was initiated was based upon both a moving violation and the fact that the driver's license of the registered owner was suspended.

2.2 The stop of the vehicle was lawful based upon both the observations of Officer Lowrey and his inability to readily ascertain the driver was not the registered owner.

2.3 Officer Lowrey's inquiry of the defendant as to his identity was proper based upon a clearly observable violation of the traffic code.

2.4 The arrest of the defendant was lawful.

SCP 1-2.

This case later came on for trial with the state calling Officer Lowrey, Marissa Grab, and Greg Schroeder as witnesses. RP 14, 54, 87. They testified to the facts contained in the preceding *Factual History*. RP 14-109. The state also called Eileen Slavin, a fingerprint technician for the Washington State Patrol. RP 45. She testified that she tested the pistol taken out of Marissa Grab's vehicle, but was unable to get any usable prints. RP 45-53. The defense stipulated that the defendant had a prior conviction for a serious offense and that the firearm in question was operable at the time the police seized it. RP 3; Exhibit 6 & 7.

During the direct examination of Officer Lowrey, the state elicited the fact that the officer had obtained the defendant's name, ran it for warrants, and that dispatch informed him that the defendant had an outstanding felony warrant. RP 20-22. The defense made three relevance objections to this evidence and court overruled all three. *Id.* These objections went as follows:

Q. Was that information [the defendant's name] provided to you?

A. Yes, it was, by Mr. Armendariz.

Q. What did you do after receiving that:

MR. MEYER: Objection. Relevance.

THE COURT: Overruled.

A. I walked back to my vehicle, and I ran Mr. Schroeder for driving status, and I ran Mr. Armendariz through the system, through dispatch.

Q. Why did you run Mr. Armendariz through the system or dispatch?

A. Any –

MR. MEYER: Same Objection.

THE COURT: Overruled.

A. Any body we stop for any traffic infraction we run them through for driver's and wants to make sure they have no outstanding warrants or anything else, they're not suspended, whatever.

Q. What were the results of your check?

MR. MEYER: Same Objection.

THE COURT: Overruled.

A. Greg Schroeder came back that he was suspended third. That means he didn't have a driver's license. Mr. Armendariz came back with a felony warrant.

RP 20-21.

During the testimony of both Mr. Schroeder as well as Ms Grab, both sides elicited the fact that they were providing evidence for the state in return for either the dismissal or reduction of their charges. RP 65-66, 101.

Specifically, the state had agreed to reduce Mr. Schroeder's charges such that he would only be looking at 6 months in jail as opposed to five years in prison, and the state had agreed to dismiss all charges against Ms Grab. *Id.* On direct examination by the state, and over defense objection, the court allowed Ms Grab to testify that she would only get a dismissal of all charges if she was "truthful" in her testimony. RP 65-67.

Following the close of the state's case the defense also closed without calling any witnesses. RP 109-111. The court then instructed the jury without any exceptions or objections by the defense. RP 114. The parties then presented closing argument, with the state reminding the jury that at the time Officer Lowrey pulled the vehicle over the defendant had an outstanding "felony warrant." RP 116. After argument, the jury retired for deliberation, and later returned a verdict of guilty. CP 68. Following sentencing within the standard range, the defendant filed timely notice of appeal. CP 72-81, 84.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT REFUSED TO SUPPRESS EVIDENCE A POLICE OFFICER OBTAINED IN VIOLATION OF THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). These exceptions "fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops." *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996) (footnote omitted). Under these exceptions to the Fourth Amendment warrant requirement, a police officer may stop a vehicle for any number of minor, civilly enforced, traffic infractions. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

A traffic stop made upon an observation of an infraction committed by the driver or a passenger violates a defendant's privacy rights under

Washington Constitution, Article 1, § 7, if it is used as a pretext to investigate a police officer's suspicion of other criminal activity. *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962). For example, in *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999), a police officer saw the defendant riding with a person suspected of gang and drug activity. In order to speak with the defendant and the driver about his suspicions, the officer followed the vehicle and eventually pulled it over for having license tabs that had expired five days previous. He then determined that the driver had a suspended license and arrested him. During a search of the vehicle incident to the arrest of the driver, the officers found a gun, several baggies of marijuana, and \$600.00 cash in the defendant's jacket. The officer then arrested the defendant.

After being charged, the defendant moved to suppress all of the evidence seized on the basis that the police obtained it following a pretext stop of the vehicle in which he was riding. Following a hearing, the court granted the defendant's motion. The state appealed, and the Court of Appeals reversed. The defendant then obtained review from the Washington Supreme Court, arguing that his initial detention was pretextual, and as such violated his right to privacy under Washington Constitution, Article 1, § 7. The Supreme Court stated the following as to whether or not pretext stops violate the state constitution:

We conclude the citizens of Washington have held, and are entitled

to hold, a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement. We therefore hold pretextual traffic stops violate Article I, Section 7, because they are seizures absent the “authority of law” which a warrant would bring.

State v. Ladson, 138 Wn.2d at 842.

The court then went on to state the following concerning what constitutes a pretextual stop and what standard should be used in determining what constitutes a pretextual stop.

When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior. *Cf. State v. Angelos*, 86 Wn.App. 253, 256, 936 P.2d 52 (1997) (“When the use of the emergency exception is challenged on appeal, the reviewing court must satisfy itself that the claimed emergency was not simply a pretext for conducting an evidentiary search. To satisfy the exception, the State must show that the officer, both subjectively and objectively, ‘is actually motivated by a perceived need to render aid or assistance.’”) (citations omitted) (quoting *State v. Loewen*, 97 Wn.2d 562, 568, 647 P.2d 489 (1982)). We recognize the Court of Appeals has held that the test for pretext is objective only. *See State v. Chapin*, 75 Wn.App. 460, 464, 879 P.2d 300 (1994). But an objective test may not fully answer the critical inquiry: Was the officer conducting a pretextual traffic stop or not? (FN11) We cannot agree with *Chapin* and disapprove it to the extent it limits the query to objective factors alone.

(FN11) “Pretext is, by definition, a false reason used to disguise a real motive. Thus, what is needed is a test that tests real motives. Motives are, by definition, subjective.” Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment’s Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 Temp.L.Rev. 1007, 1038 (1996).

State v. Ladson, 138 Wn.2d at 843.

Following its statement on the standard to apply for determining pretextual stops, the court reversed the Court of Appeals and reinstated the trial court's suppression order, holding as follows: "Here, the initial stop, which is a seizure for constitutional purposes, was without authority of law because the reason for the stop (investigation) was not exempt from the warrant requirement." *State v. Ladson*, 138 Wn.2d at 843.

In the case at bar, the totality of the circumstances, looking at both the objective and subjective intent of the officer clearly indicate that the fact of the illegal lane change was a pretext the state used in an attempt to justify the officer's actions. In fact, the officer himself did not even claim that he made the stop for this reason. Rather, the officer candidly admitted that, as per his standard practice, he simply used the fact of the illegal lane change as a trigger to initiate a review of the licensing status of the registered owner of the vehicle. Had the registered owner been legally licensed there would have been no traffic stop. Thus, the officer's actions cannot be justified by the fact of the infraction because the fact of the infraction was a pretext.

However, as was just mentioned, the officer did not really attempt to justify the stop based upon the infraction. Rather, he justified his actions based upon the fact that the registered owner of the vehicle was suspended. There was not pretext in this justification, and as the following explains, the

defense does not challenge the legality of the initial stop because the fact that the registered owner was suspended does provide a legal basis for the officer's initial stop of the vehicle.

Under RCW 46.20.349, a police officer who verifies that the registered owner of a motor vehicle traveling on the public streets may stop that vehicle and verify the identity of the driver. This statute states:

Any police officer who has received notice of the suspension or revocation of a driver's license from the department of licensing, may, during the reported period of such suspension or revocation, stop any motor vehicle identified by its vehicle license number as being registered to the person whose driver's license has been suspended or revoked. The driver of such vehicle shall display his driver's license upon request of the police officer.

RCW 46.20.349.

Although this statute appears to be all inclusive, it must still be interpreted in a constitutional manner. The decision in *State v. Penfield*, 106 Wn.App. 157, 22 P.3d 293 (2001) illustrates this point. In this case, a police officer stopped the vehicle the defendant was driving based upon the fact that the registered owner, a woman, had a suspended driver's license. At the time of the stop, the officer could not see who was driving. However, as he approached the vehicle, he could see that the defendant, a male, was driving. At this point, the officer knew that the driver was not the registered owner. In spite of this fact, the officer ordered the defendant to produce his license, which the officer then ran and determined was suspended. The officer then

arrested the defendant and found methamphetamine in the vehicle.

The state later charged the defendant with possession of the methamphetamine found in the car and the defendant moved to suppress the evidence on the basis that the officer violated the defendant's right to privacy when he continued to detain him after determining that he was not the registered owner. The trial court denied the motion, agreeing with the state's argument that under RCW 46.20.349, the officer was legally justified in detaining the driver and demanding his license even if the officer did know he was not the registered owner. Following conviction, the defendant appealed, arguing that his continued detention after the officer determined that he was not the registered owner violated his right to privacy under the Fourth Amendment. The Court of Appeals agreed and reversed, holding as follows:

Here, Officer Vaughn's only articulable suspicion of criminal activity was information that the driver's license of the vehicle's owner was suspended. He had no other reason to ask Mr. Penfield for his driver's license after he realized Mr. Penfield was not the registered owner. Other facts may exist to create a suspicion that the driver may not have the owner's permission to use the automobile or that the driver is engaged in some other criminal activity. Officer Vaughn had none to offer here. Officer Vaughn violated Mr. Penfield's Fourth Amendment right to be free of unreasonable searches and seizures when he asked Mr. Penfield to produce his driver's license.

State v. Penfield, 106 Wn.App. at 162-163.

The facts in the case at bar are identical to the facts in *Penfield*. In

Penfield, an officer was following a motor vehicle on the public streets and ran the license plate to determine the identity of the registered owner. In the case at bar, Officer Lowery was following a motor vehicle on the public streets and ran the license plate to determine the identity of the registered owner. In *Penfield*, the officer determined that the registered owner was a female and that her license was suspended. In the case at bar, Officer Lowrey determined that the registered owner was a female and that her license was suspended. In *Penfield*, the officer could not see who was driving the vehicle and could not verify if the driver appeared to be the registered owner. In the case at bar, Officer Lowery could not see who was driving the vehicle and could not verify if the driver appeared to be the registered owner. In *Penfield*, the officer then stopped the vehicle, and as he approached, he saw that the driver was a male and not the registered owner. In the case at bar, Officer Lowrey then stopped the vehicle, and as he approached, he saw that the driver was a male and not the registered owner. Finally, in *Penfield*, the officer ordered the driver to produce his driver's license, thereby illegally detaining him. In the case at bar, Officer Lowrey also ordered the driver to produce his driver's license, thereby illegally detaining him and everyone else in the car.

In this case, Officer Lowrey did not start flashing his light inside the interior of the vehicle until after he had illegally ordered the driver to produce his driver's license. Thus, the officer's subsequent determination that the

defendant was not wearing his seatbelt, his subsequent determination that the driver was suspended, and his subsequent determination that there was a warrant for the defendant, all flowed from his illegal detention of everyone in the vehicle. Consequently, the trial court erred when it denied the defendant's motion to suppress.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT REPEATEDLY ALLOWED THE STATE TO ELICIT IRRELEVANT, PREJUDICIAL EVIDENCE.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative

evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise

of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal justice that “propensity” evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed.

1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there

was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta

appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995). As the court stated in *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982), "[a] careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative

value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.”

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similar crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: “This is not the problem. Alberto [the defendant] already has a record and had stabbed someone.” *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have

influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." See *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." See *State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, review denied, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on

this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, “[e]ach case must rest upon its own facts,” [*State v.*] *Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917))], the seriousness of the irregularity here, combined with the weakness of the State’s case and the logical relevance of the statement, leads to the conclusion that the court’s instruction could not cure the prejudicial effect of [the alleged victim’s] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona’s motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed a crime, particularly one similar to the crime charged. The admission of this evidence is such a strong inducement to the jury to simply find the defendant guilty based upon his propensity to criminal conduct that its admission denies the defendant a fair trial.

In the case at bar, the jury was also induced to find the defendant guilty based upon his propensity to criminal conduct when it heard the evidence from Officer Lowrey that the defendant had an outstanding “felony warrant” for his arrest. This evidence was not relevant to the jury determination of the facts at issue at trial, and it left the jury to speculate as

to what felony the defendant had committed. At a minimum, the jury would be left to believe the defendant was guilty, in spite of the extremely weak evidence, simply because he was the type of person, a criminal, who would commit such an offense. Thus, by overruling the defendant's objection to this evidence, the trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

In the case at bar, the state's case turned solely upon the credibility of Marissa Grab and Greg Shroeder. The physical evidence did not support their self-serving claims of the defendant's guilt. Actually, the physical evidence in the form of the location of the methamphetamine and firearm supported the conclusion that Marissa Grab and Greg Shroeder were guilty of the crime, not the defendant. In addition, the fact that Officer Lowrey failed to see any furtive movements in the vehicle was inconsistent with Marissa Grab and Greg Shroeder's version of the events. Finally, both of the state's witnesses had a very strong motive to lie to protect each other. In such a case, as opposed to those with moderate or strong evidence of guilt, the improper admission of even relatively minor evidence can and does make the difference between a verdict of acquittal and a verdict of conviction. In this case, the court's decision to allow the state, over defense objection, to elicit irrelevant, prejudicial evidence was not a relatively minor error. Since it was

more than sufficient to turn a verdict of acquittal to conviction, the defendant is entitled to a new trial.

III. THE STATE'S COMMENT ON THE CREDIBILITY OF A KEY WITNESS DENIED THE DEFENDANT HIS RIGHT UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT TO HAVE A FAIR AND IMPARTIAL JURY BE THE SOLE JUDGE OF THE FACTS.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial both defense counsel and the prosecutor, as well as the witnesses, must refrain from any statements or conduct that express their personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a "substantial likelihood" that any such conduct, comment, or questioning has affected the jury's verdict, then the defendant's right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When this Walker was called to testify he admitted

to previously beating the defendant, but he denied having threatened to have the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

However, when Livingston was examined outside the presence of the jury he refused to testify concerning his conversation with Walker as he didn't want to be labeled a "snitch." Although the court gave Livingston an 11 month sentence for contempt it refused to allow defense counsel to cross-examine Walker concerning his admissions to Livingston. Following verdicts of guilty the defendant appealed arguing that the trial court erred when it refused to allow the offered cross-examination of Walker.

In rejecting the defendant's claim, the Court of Appeals stated the following.

Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence. *See State v. Yoakum*, 37 Wash.2d 137, 222 P.2d 181 (1950).

State v. Denton, 58 Wn.App. at 257 (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Similarly in *State v. Yoakum, supra*, the defendant was charged with Second Degree Assault out of an incident in which the defendant knifed another person during a fight outside a bar. At the trial the defendant testified and claimed self defense. During cross-examination the prosecutor repeatedly impeached the defendant with a transcript of a taped conversation the defendant made to the police. However, the prosecutor never did offer either the transcript into evidence or call the officer to testify concerning the statement.

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-examination to evidence within the personal knowledge of the prosecutor never made part of the record. In setting out the law on this issue, the Washington Supreme Court relied upon and quoted extensively from the Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936).

In *Hash* the defendant appealed his conviction for statutory rape, arguing that the trial court had erred when it allowed the prosecutor to cross-examine a witness concerning inconsistent statements the witness had previously made to the prosecutor in his office in front of another deputy prosecuting attorney. The Arizona Supreme Court stated the following concerning the state's impeachment of the witness.

It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in the question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate him Ed Frazier, deputy county attorney, a lawyer of high standing for integrity and ability. These questions were not put, as the court assumed as a basis for impeachment. Their certain effect was to discredit the witness J. A. Edgar. The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he may possess under the guise of cross-examination, as in this case.

* * *

To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Edgar would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone the case should be retried.

State v. Yoakum, 37 Wn.2d 142-143 (quoting *Hash v. Arizona*, 59 P.2d at 311).

In *Yoakum* the Washington Supreme Court went on the reverse the defendant's conviction, stating as follows.

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity was prejudicial to the rights of appellant.

State v. Yoakum, 37 Wn.2d at 144.

In the case at bar, the court, over defense objection, allowed the state to present its opinion to the jury that Marissa Grab and Gregory Shroeder were telling the truth when they testified that the defendant was the one in possession of the firearm. Although not stated directly to the jury, it was none the less very effectively communicated when the state elicited the fact that (1) all charges had been dropped against Marissa Grab because, (2) she had agreed to only give “truthful” testimony against the defendant. By eliciting this second fact, the state was giving its opinion to the jury that Marissa Grab’s testimony was, in fact truthful. In allowing the state to elicit this evidence, the court allowed the state to give even more direct evidence of its opinion as to the credibility of a witness than the state did in *Yoakum*. This evidence violated the defendant’s right to have a fair and impartial jury decide the facts upon the evidence at trial, rather than upon the opinion of the prosecutor.

As was mentioned in the prior argument, the facts in this case turn solely upon the credibility of Marissa Grab and Greg Shroeder. The physical evidence actually supported the conclusion that they were guilty of the crime, not the defendant. In addition, the fact that Officer Lowrey failed to see any furtive movements in the vehicle seriously questioned their version of the events. Finally, both of the state’s witnesses had a very strong motive to lie and put the blame on the defendant. In such a case, as opposed to those with

strong evidence of guilt, the improper admission of even relatively minor evidence can make the difference between a verdict of acquittal and a verdict of conviction. In addition, in this case, the state's vouching for the credibility of Marissa Grab was far from a relatively minor error. Since it was more than sufficient to turn a verdict of acquittal to conviction, the defendant is entitled to a new trial.

IV. TRIAL COUNSEL'S FAILURE TO WAIVE THE REQUIREMENT THAT THE JURY FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD A PRIOR CONVICTION FOR A SERIOUS OFFENSE VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's

performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to waive the requirement that the jury find one of the elements of the offense beyond a reasonable doubt. The following presents this argument.

One of the fundamental principles of our constitutional jurisprudence is that the state bears the burden of proving every element of the crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25

L.Ed.2d 368 (1970). However, there is nothing within our law or the constitution that prevents a defendant from waiving this constitutional right. *State v. Korum*, 157 Wn.2d 614, 141 P.3d 14 (2006). In essence, this is precisely what a guilty plea is: a waiver of the right to force the state to prove every element of crime charge beyond a reasonable doubt. *State v. Wilson*, 102 Wn.2d 161, 6 P.3d 637 (2000). In addition, in Washington, a defendant has the right by court rule to waive this constitutional right and plead guilty. See CrR 4.2 and *State v. Bowerman*, 115 Wn.2d 794, 802 P.2 116 (1990).

In the case at bar, the state charged the defendant with first degree unlawful possession of a firearm under RCW 9.41.040(1). This statutes states:

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

RCW 9.41.040(1).

Under this statute, one of the elements of the crime is that the defendant has a prior conviction for a “serious offense.” This crime, along with the offense of failure to register as a sex offender, presents any competent defense attorney with a dilemma and the state with an unfair

advantage. As the decisions in *Pogue*, *Acosta* and *Escalona* illustrate, the admission of evidence that a defendant has a prior criminal conviction, particularly one similar to the crime charged, invites the jury to convict the defendant based upon its perception that the defendant has a propensity to commit criminal acts. Thus, when the existence of a prior conviction is an element of the offense charged, a defendant begins the case with a significant disadvantage.

In the context of allowing the state to impeach a defendant's testimony with the fact of prior convictions, our criminal jurisprudence attempts to overcome this unfair prejudice by instructing the jury that the fact of a prior conviction may only be used for the purpose of impeachment and no other purpose. However, this instruction does not apply when the evidence of the prior conviction is admitted substantively to prove an element of the offense charged. In addition, the irony for the defense in cases such as the one at bar is that the defense rarely if ever disputes the fact of the prior conviction at trial. This is precisely what happened in the case at bar as evidenced by the fact that the defense signed a stipulation that the defendant did have a prior conviction for a serious offense.

Given the unfair prejudice that arises when the jury discovers that the defendant has a prior felony conviction, particularly one described as a conviction for a "serious offense," no reasonable defense attorney would fail

to take any available action to prevent the jury from hearing about the conviction. Put another way, there is no tactical reason to allow a jury to hear that the defendant has a prior conviction for a "serious offense." In the case at bar, the defense attorney had an available means to prevent the jury from hearing out the defendant's prior conviction. This step was simply to waive the defendant's constitutional right to have the state prove this element of the crime beyond a reasonable doubt. Thus, counsel's failure to take this step fell below the standard of a reasonable prudent attorney.

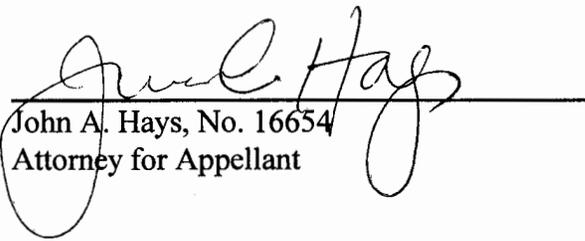
As has previously been argued in this brief, the evidence against the defendant was very weak. Certainly it was sufficient to sustain a conviction, but it was far from compelling. In such a circumstance, the unfair prejudice that arose from the jury learning that the defendant had a prior conviction for a "serious offense" was sufficient to change a verdict of acquittal to a verdict of conviction. Thus, but for trial counsel's failure to waive the defendant's right to have the state prove the element of the prior conviction, the jury would more likely than not have returned a verdict of acquittal. Consequently, the defendant was denied effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment and is entitled to a new trial.

CONCLUSION

This trial court erred when it denied the defendant's motion to suppress. As a result, this court should vacate the defendant's convictions and remand with instructions to dismiss. In the alternative, this court should vacate the defendant's conviction and remand for a new trial.

DATED this 29th day of January, 2008.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9.41.040(1)-(2)

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.320, 71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in > RCW 9.41.010.

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

RCW 46.20.349

Any police officer who has received notice of the suspension or revocation of a driver's license from the department of licensing, may, during the reported period of such suspension or revocation, stop any motor vehicle identified by its vehicle license number as being registered to the person whose driver's license has been suspended or revoked. The driver of such vehicle shall display his driver's license upon request of the police officer.

