

NO. 36796-3-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

DAVID LAMAR SMITH,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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ON APPEAL FROM THE  
SUPERIOR COURT OF CLARK COUNTY

Before The Honorable John F. Nichols, Judge  
and Before The Honorable John Wulle, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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**A. ASSIGNMENT OF ERROR**

*State v. Eaton* \_\_\_ Wn. App. \_\_\_, (No. 34911-6-II, February 12, 2008), available at 2008 Wash. App. LEXIS 343, holds that possession of drugs when a person is involuntarily arrested and brought into a jail or facility is not legally sufficient to find that the person voluntarily brought the contraband into the facility to support a sentencing enhancement under RCW 9.94A.533(5)(c). In this case, the trial court erred in imposing a sentence enhancement under RCW 9.94A.533(5) for possession of cocaine while in a county jail.

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

In *Eaton*, this Court held that the zone enhancement for possession of drugs while in a county jail or a state correctional facility under RCW 9.94A.533(5) may not be imposed if the possession in the jail or correctional facility was involuntary, such as when a defendant is arrested and brought into the jail or correctional facility, in which case a defendant's possession of contraband is not legally sufficient to find that the person voluntarily introduced the contraband into the facility. Where the appellant was arrested and taken into custody and searched at the county jail, and where officers discovered cocaine in a marking pen that was in appellant's pocket, and

where he did not voluntarily take the pen and cocaine into the jail, did the court err in imposing a zone enhancement?

**C. STATEMENT OF THE CASE**

The facts of this case are fully set forth in the Appellant's Brief.

**D. FACTS RELEVANT TO MOTION**

This court granted appellant Smith leave to file a supplemental brief in light of the Court's published opinion in *Eaton*. The appellant will rely upon the Statement of the Facts as presented in his opening brief.

**E. ARGUMENT**

**1. SMITH DID NOT VOLUNTARILY BRING  
COCAINE INTO THE CLARK COUNTY JAIL,  
A SENTENCE ENHANCEMENT ZONE.**

RCW 9.94A.533(5)(c) provides that where an offender or an accomplice commits the crime of possession of a controlled substance in a county jail or state correctional facility, an additional twelve months shall be added to the offender's standard range. Appendix A. In the case, Smith did not commit a volitional act when he was taken into the Clark County Jail, where crack cocaine was found hidden in a marking pen which was obtained from Smith's pants pocket when he was booked into the jail, and therefore the trial court should not have imposed a zone enhancement.

This Court recently addressed the question of whether a defendant can

be subjected to this enhancement in the situation where the person did not enter the jail voluntarily, but rather was taken there against his will while under arrest by a law enforcement officer. In *Eaton*, \_\_\_ Wn. App. \_\_\_, (No. 34911-6-II, filed February 12, 2008), 2008 Wash. App. LEXIS 343, the defendant was arrested for DUI and he was transported by the officer to the Clark County Jail, where another officer searched him. *Eaton*, 2008 Wash. App. 343 at \*2. During this search, the officer observed what appeared to be a plastic bag taped to the top of Eaton's sock. Inside the plastic bag, the officers discovered methamphetamine. *Id.*

In the case at bar, Smith was arrested after he was pulled over, allegedly for failure to signal while turning. 1RP at 9, 11. The initial stop is challenged in Smith's opening brief. Brief of App. at 10-16. After he was stopped, the officer determined that there were two district court warrants for Smith's arrest, and that his license was suspended in the third degree. 1RP at 11. The officer found suspected cocaine and suspected drug paraphernalia in the car. 1RP at 15. While searching Smith incident to arrest, the officer found a pen in his right front pants pocket. 1RP at 12, 14. He put the pen back into Smith's pocket and transported him to the Clark County Jail. 1RP at 18. At the jail, he was searched and the marking pen was found to contain

crack cocaine. IRP at18.

Here, as was the case in *Eaton*, there was no proof that Smith voluntarily possessed drugs in a county jail. Smith did not, for example, attempt to introduce cocaine into the Clark County Jail by smuggling it in while residing there, or attempt to transfer it to another who was residing there. He had no intention of going to the county jail on April 17, 2007; he was unexpectedly taken there after his arrest. Therefore, the act of taking the cocaine into the jail was not volitional.

Principles of criminal liability impose two requirements for culpability: *actus reus* and *mens rea*. *Carter v. United States*, 530 U.S. 255, 269, 120 S. Ct. 2159 (2000); *State v. Eaton*, \_\_\_ Wn. App. \_\_\_ (February 12, 2008) 2008 Wn. App. LEXIS 343; *State v. Lindberg*, 125 Wash. 51, 215 Pac. 41 (1923) (strict liability, or *mala prohibita*, crimes comport with due process so long as one acts voluntarily).

Crimes involving possession of controlled substances have no *mens rea* requirement. Therefore, the sentence enhancement under RCW 9.94A.533(5) has no *mens rea* requirement. *Eaton*, \_\_\_ Wn. App. \_\_\_, 2008 Wash. App. LEXIS 343 at \*6. As this Court held in *Eaton*, “even strict liability punishments, i.e., those crimes and sentence enhancements having no

*mens rea* requirement, require something of an element of volition.” *Eaton*, 2008 Wash. App. LEXIS 343 at \*6. This Court “presume[d] that when the legislature enacted RCW 9.94A.533(5), it did not intend the unlikely, absurd, or strained consequence of punishing a defendant for his *involuntary* act.” *Eaton*, 2008 Wash. App. LEXIS at \*13. Identically to *Eaton*’s case, once arrested, Smith no longer had control over his location or over any items in his possession. The control rested with the arresting officer and the corrections officers at the jail. The State should not be allowed to physically take a defendant into an enhancement zone, such as the Clark County Jail, and then be permitted to choose whether he will be penalized for possessing contraband in the enhancement zone or the non-enhancement zone in which his possession could also be established.

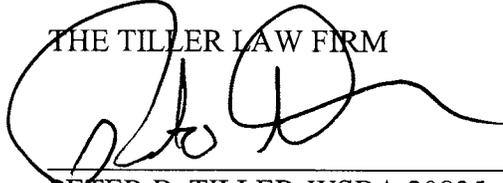
#### **F. CONCLUSION**

For the above-stated reasons, this Court should vacate the sentence enhancement imposed under RCW 9.94A.533(5)(c) and remand for resentencing within the standard range, or in the alternative, vacate the convictions in accordance with the arguments presented in the Opening Brief of Appellant filed February 1, 2008.

DATED: March 10, 2008.

Respectfully submitted,

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PETER B. TILLER-WSBA 20835  
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**CERTIFICATE**

I certify that I mailed a copy of the foregoing Supplemental Brief of Appellant, postage pre-paid on March 10, 2008, at the Centralia, Washington post office addressed as follows:

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Dated: March 10, 2008.



PETER B. TILLER, WSBA NO. 20835

A

## Appendix A

### RCW 9.94A.533

#### Adjustments to standard sentences.

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728 (4);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under RCW 9.94A.728 (4);

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401 (2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.