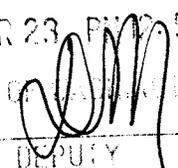


Court of Appeals No. 38479-5-II

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

CULLEN LYLE WICK,

Defendant/Appellant.

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 07-1-03618-2
The Honorable D. Gary Steiner, Presiding Judge**

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I. ASSIGNMENTS OF ERROR

1. Mr. Wick was unlawfully arrested because the arresting officers lacked knowledge of sufficient facts to support probable cause.
2. The State presented insufficient evidence to convict Mr. Wick of any crime besides bail jump where all evidence supporting the crimes was discovered pursuant to the unlawful arrest of Mr. Wick.
3. The State presented insufficient evidence to convict Mr. Wick of any count of identity theft where the State presented no evidence to support the inference that Mr. Wick possessed the identification information of another with the intent to commit, aid, or abet, another crime.
4. The State presented insufficient evidence to convict Mr. Wick of possession of a fictitious identification where the State presented no evidence which would support the inference that Mr. Wick possessed his own altered identification card with intent to use such identification card to commit theft, forgery, or identity theft.

II. ISSUES PRESENTED

1. Was Mr. Wick's arrest lawful where he was arrested prior to the officers learning sufficient facts to support an objectively reasonable belief that Mr. Wick was engaged in criminal activity? (Assignment of Error No. 1)
2. Did the State present sufficient evidence to convict Mr. Wick of any crime besides bail jump where all evidence supporting the crimes was discovered pursuant to the unlawful arrest of Mr. Wick? (Assignments of Error Nos. 1 & 2)
3. Did the State present sufficient evidence to convict Mr. Wick of identity theft where the State presented no evidence to support the inference that Mr. Wick possessed the identification information of another with the intent to commit, aid, or abet, another crime? (Assignment of Error

No. 2)

4. Did the State presented sufficient evidence to convict Mr. Wick of possession of a fictitious ID where the State presented no evidence which would support the inference that Mr. Wick possessed his own altered ID card with intent to use such identification card to commit theft, forgery, or identity theft? (Assignment of Error No. 3)

III. STATEMENT OF THE CASE

Factual and procedural background

On November 5, 2005, Mr. Afsheen Saatchi was working as the first assistant manager at the Proctor Safeway in Tacoma. RP 322-325. A man and a woman, later identified to be Mr. Cullen Wick and Ms. Linda Schock, came into the store and tried to return a bottle of truffle oil with a receipt .for the purchase of the oil. RP 216-217, 219-220, 333-334. The clerk who was helping Mr. Wick questioned the validity of Mr. Wick's receipt. The clerk brought Mr. Wick's receipt to Mr. Saatchi for Mr. Saatchi to examine. RP 333. Mr. Saatchi agreed that the receipt was a fake, so Mr. Saatchi called Mr. Justin Joyce, the supervisor of the Safeway, to examine the receipt. RP 258, RP 333. Mr. Joyce concurred with Mr. Saatchi and the clerk that the receipt was fake. Mr. Joyce stalled Mr. Wick and Ms. Schock while Mr. Saatchi went into the office and called 911. RP 333.

Mr. Saatchi and Mr. Joyce continued to stall Mr. Wick and Ms. Schock until the police arrived 15 minutes later. RP 333. Mr. Wick and Ms.

Schock remained at the customer service counter until the police arrived. RP 333. The officers contacted Mr. Wick and Ms. Schock as Mr. Wick and Ms. Schock were walking out the door of the Safeway. RP 349.

Tacoma Police Officers Robison, Mettler, Williams, and Lorberau were dispatched to the Safeway in response to the 911 call. RP 213-215. Dispatch had given the officers a description of Ms. Schock and Mr. Wick en route to the Safeway. RP 215-216. The officers saw individuals matching that description in the entryway of the Safeway. RP 389. Officers Mettler and Robison contacted the individuals and asked them to step outside of the store. RP 389. Officer Mettler informed Mr. Wick and Ms. Schock of their constitutional rights and Mr. Wick waived his rights. RP 220, 391-392.

Officer Robison contacted the woman who matched the description of the female who had been inside the store and the woman identified herself as Ms. Linda Schock. RP 215-217.

Officer Mettler spoke with Mr. Wick in order to get "his side of the story." RP 389-390. Mr. Wick told Officer Mettler that he was at the store returning a bottle of oil for his mother. RP 390. Mr. Wick told Officer Mettler that he had a receipt for the oil and he didn't understand why he was being contacted since he didn't think that there was any problem. RP 390.

Officer Mettler handcuffed Mr. Wick and put Mr. Wick in the back of his patrol car within a few minutes of the initial contact. RP 394, 405-406.

Officer Mettler then spoke with the Safeway employees. RP 393. Officer Mettler spoke with the Safeway employees inside the store at the cash register, then asked them to come outside of the store. RP 405-406.

While Officer Mettler was speaking to the Safeway employees, Officer Williams spoke with Mr. Wick in an effort to identify him. RP 628-629. Mr. Wick told Officer Williams that he did not have an identification card on his person, but verbally identified himself as Cullen Wick. RP 628-629.

The Safeway employees identified Mr. Wick and Ms. Schock as the individuals who had been trying to return the bottle of truffle oil. RP 218. Mr. Saatchi had confiscated the receipt and gave it to the officers. RP 225, 336. Mr. Saatchi explained to the police why the receipt was a fake. RP 350.

Officer Mettler recontacted Mr. Wick in the patrol car, again informed Mr. Wick of his constitutional rights. Mr. Wick acknowledged his rights and told Officer Mettler he would talk to him. RP 391-392, 394-395. Mr. Wick told Officer Mettler, "I don't want Linda getting arrested for this. It is my own doing." RP 221, 395.

Officer Mettler asked Ms. Schock which vehicle belonged to she and Mr. Wick. Ms. Schock identified a gold Nissan Pathfinder in the parking lot. RP 222. Mr. Wick refused to give consent for the officers to conduct a warrantless search of his vehicle. RP 397, 406. Officer Mettler looked into

the vehicle and observed a upside-down receipt on the passenger side of the dashboard. RP 396. The receipt had "Safeway" written across the top. RP 396. Officer Mettler also observed three or four receipts laying on the front passenger seat. RP 396.

The officers then asked Mr. Saatchi and Mr. Joyce to walk by Mr. Wick's car. RP 267, 343, 405. Inside the vehicle, both Mr. Saatchi and Mr. Joyce saw numerous receipts, including Safeway receipts, in the front passenger area. RP 267-268, 343-344. Mr. Joyce told the police that the receipts had suspicious characteristics and appeared to have been tampered with. RP 268, 275.

Officer Mettler asked Officer Williams to transport Mr. Wick to the jail. RP 629. Officer Williams then took Mr. Wick out of Officer Mettler's vehicle and over to Officer Williams' vehicle, and searched him. RP 629. Officer Williams removed Mr. Wick's wallet from Mr. Wick's person and searched through the wallet. RP 630. Inside Mr. Wick's wallet, Officer Williams located Mr. Wick's Washington State I.D. card. RP 630. On the I.D. card, Mr. Wick's last name had been altered with a pen to change the "c" to an "o" and the driver's license number on the card had been similarly altered. RP 630. Officer Williams asked Mr. Wick how the I.D. had come to be altered. Mr. Wick responded that some kids had stolen his wallet and he had just gotten it back. RP 630.

After Officer Williams searched Mr. Wick, Officer Lorberau also searched him, including the contents of his wallet. RP 630. In Mr. Wick's wallet, Officer Lorberau found another Washington I.D. card for Mr. Wick that was valid and had not been altered. RP 630. The officers also found a credit card for an individual with the last name of Eickhoff in Mr. Wick's wallet. RP 631-632. Officer Williams asked Mr. Wick about the credit card. Mr. Wick responded that he had no idea how it had gotten into his wallet. RP 632. The police then impounded Mr. Wick's vehicle in order to allow detectives to obtain a search warrant for the vehicle. RP 397.

Tacoma Police Detective Louise Nist was assigned to investigate Mr. Wick's case. RP 415, 419-420. When Detective Nist was assigned to the case, Mr. Wick was already in custody and Mr. Wick's vehicle had already been impounded. RP 420. Detective Nist obtained a search warrant for Mr. Wick's vehicle and Officer Quilio assisted Detective Nist in searching the vehicle on November 10, 2005. RP 286-287, 423-424.

In the back seat of Mr. Wick's vehicle, the officers found a large gray tote. RP 290, 428. Inside the tote, the officers found a zip lock bag holding numerous I.D.s, other cards and paperwork. RP 290. The ziplock bag also contained a small metal box. RP 441. Inside the metal box was a Washington driver's license for Jean Dougherty, a Washington driver's license in the name of Hilary Leonard, a King County library card in the

name of Linda Schock, a Pierce County library card belonging to Linda Schock, a Washington Quest card belonging to Linda Schock. RP 443-442. Also inside the tote were other cards, paperwork, two rolls of blank thermal paper, and receipts. RP 290, 438. The cards included a US Bank Visa debit card in the name of Jean Dougherty, an Alaska Airlines Visa card in the name of Lori Kelly, and a Visa card in the name of Hilary Leonard. RP 443.

In the back seat, behind the driver's seat, the officers found a multi-function scanner-printer-copier. RP 293, 445.

In an organizer velcroed to the visor over the passenger seat, the officers found a zip lock bag containing .2 grams of methamphetamine as well as glass smoking pipes. RP 294, 493-496. Officer Quilio and Detective Nist also found a temporary I.D. card in the name of Cathie Hillman-Wick in the passenger visor along with two gift cards to Walmart. RP 440. Tucked between the center console and the passenger seat, the officers found a length of rubber tubing. RP 299-300.

On the front passenger floorboard, Officer Quilio found lots of documents and receipts. RP 301. Also on the front passenger floorboard, Officer Quilio found a cardboard box containing 87 receipts from various stores. RP 301-302, 437. Some of the receipts in the box had been photocopied onto full sheets of paper. RP 301-302. All of the receipts were partial receipts in that the tops of the receipts had been cut off. RP 437. The

receipts were printed on a variety of different types of paper. RP 437.

Also in the cardboard box was a rotary cutting device and a personal trimmer that could be used to cut paper. RP 302. The cardboard box additionally contained two rulers, pens, a blue binder with papers in it, and thermal paper that had been cut into the appearance of a receipt. RP 302-303.

Inside the blue binder, Officer Quilio found numerous photocopies of paint, tags and packaging for items purchased at stores, various price tags from stores put into a bag, and photocopies of UPC codes from different items. RP 303. There were receipts in the binder from Albertsons, Ace Hardware, Value Village, and Super Center. RP 432. There were also photocopies of Mr. Wick's driver's license where the photocopy had been printed over something else. RP 303. The blue binder also contained a white envelope labeled, "Card, Cash & Carry" from Lowe's. RP 432. Inside the white envelope were numerous receipts. RP 432-433. Several of the receipts were from Albertsons and one of the Albertsons receipts had been glued to a blank piece of paper. RP 433.

Officer Quilio and Detective Nist found six receipts, one from Safeway, on the passenger side dashboard and on the front passenger seat. RP 440.

In the driver's sun visor, Officer Quilio and Detective Nist also discovered unopened pieces of mail, one addressed to Mr. Wick and one

addressed to Mr. Wick and Cathie Hillman. RP 436.

Officer Quilio also discovered a power inverter in the vehicle which could be used to convert the power from the cigarette lighter into AC wall power. RP 304. The inverter was wired in underneath the carpeting along the sides of the console. RP 304.

On July 11, 2007, Mr. Wick was charged with the following crimes: forgery for the Safeway receipt used to attempt to return the bottle of truffle oil; one count of possession of a controlled substance for the .2 grams of methamphetamine found in his vehicle; possession of stolen property in the second degree for the Alaska Visa credit card issued to Lori Kelly; possession of stolen property in the second degree for the US Bank Visa check card issued to Jean Dougherty; possession of another's identification for Jean Dougherty's driver's license; possession of another's property for Hilary Leonard's Washington driver's license; and unlawful possession of fictitious identification for Mr. Wick's Washington I.D. card that had been modified to have his last name spelled W-i-o-k. CP 1-5.

On September 24, 2007, the charges against Mr. Wick were amended. CP 6-10. On January 9, 2008, the State amended the charges against Mr. Wick again. CP 11-15.

On May 27, 2008, Mr. Wick filed a motion to dismiss the charges against him for violation of his right to due process of law. CP 16-29. Mr.

Wick argued that the prosecutor committed an unjustifiable delay in filing the charges against him, and that this violation prejudiced Mr. Wick's ability to defend himself, because two witnesses who would have given exculpatory testimony on Mr. Wick's behalf became unavailable. CP 16-29.

Also on May 27, 2008, Mr. Wick filed a motion to sever the bail jump charge from the other charges against him or, in the alternative, to disqualify Deputy Prosecuting Attorney Martinelli. CP 30-37. Mr. Wick argued that deputy prosecuting attorney Martinelli was likely to be a necessary witness on the bail jump charge requiring that charge to be severed from the other charges, or that Ms. Martinelli be disqualified as the prosecuting attorney. CP 30-37.

On June 2, 2008, a CrR 3.5 hearing was held to determine whether Mr. Wick's statement to Officer Mettler that he was returning the truffle oil for a friend was admissible. RP 35-104. The trial court denied the motion to suppress the statement. RP 103-104. Argument on the motion to sever the bail jump count and the motion to disqualify Ms. Martinelli was also heard on June 2, 2008. RP 106-121. The trial court denied the motions. RP 121.

On June 4, 2008, argument on the motion to dismiss all charges for prejudicial pre-accusatorial delay was argued. RP 132-149. In addition to the loss of the exculpatory testimony of two witnesses, Mr. Wick moved for a dismissal on grounds that the delay in charging resulted in the Safeway

employees losing their memory regarding the specifics of the viewing of Mr. Wick's vehicle, thus depriving Mr. Wick of the ability to challenge the warrant for his vehicle, since the warrant was based on what the Safeway employees told the police. RP 132-134. The trial court denied the motion. RP 149.

On June 5, 2008, Mr. Wick filed a Motion in Limine to exclude reference to various items of evidence. CP 168-169. Argument on this motion was also heard on June 5, 2008. RP 155-195. The prosecutor stipulated that no reference to Mr. Wick's misdemeanor warrants would be admitted. RP 155. The prosecutor further stipulated that the fire department clothing found in Mr. Wick's vehicle would not be referenced. RP 157. The prosecutor also stipulated that evidence of Mr. Wick's criminal history would be inadmissible unless Mr. Wick took the stand and opened the door. RP 158.

The prosecutor objected to items 2, 3, 5, and 7 in Mr. Wick's Motion in Limine. RP 156-158. The prosecutor argued that the presence of Mr. Eickhoff's credit card in Mr. Wick's wallet, Mr. Wick's statements about Mr. Eickhoff's credit card to the police, and evidence relating to the ID cards, driver's licenses, credit cards, library cards, Quest cards, and gift cards found in Mr. Wick's vehicle, but which were not the subject of any charged offense, were admissible. RP 155-158. The prosecutor argued that this evidence was

admissible for the following reasons: as “res gestae” of the charged crimes; as evidence of Mr. Wick’s intent to use the items for criminal purposes in relation to the identity theft charges; as evidence that Mr. Wick knew the property was stolen in relation to the forgery and possession of stolen property charges. RP 155-158, 166-167, 169-171. Mr. Wick argued that, since this evidence was not the subject of any charged crime, the evidence was irrelevant and more prejudicial to Mr. Wick than probative of any issue before the jury. RP 162-163.

The trial court ruled that the receipts, which were visible on the dashboard, were similar to the receipt presented at the Safeway store were admissible to rebut Mr. Wick’s assertions at the scene that he did not know anything about the receipt being fraudulent. RP 198. The trial court also ruled that the evidence relating to the charged crimes was admissible, but that documents not relating to the charged crimes were not admissible. RP 198-199. The trial court ruled that the ID which was found in the vehicle which was identical to the one Mr. Wick had on his person where his last name had been modified to “W-i-o-k” was admissible to rebut Mr. Wick’s statement at the scene that something had happened to that ID. RP 198-199. The trial court also ruled that evidence relating to identification cards and other documents with Ms. Schock’s name on them was admissible. RP 205. The trial court ruled that the credit card belonging to Eickhoff was admissible

because, "it is in relation to that stuff that was on [Mr. Wick] and therefore of some material importance in determining the relationship between stuff in the sack and the defendant." RP 206.

During argument on the motion to suppress, Mr. Wick made an oral motion to suppress all the receipts found in Mr. Wick's vehicle on the basis that the receipts were not the grounds for any of the charges, and admission of the receipts would be more prejudicial towards Mr. Wick than it would be probative of any issue before the jury. RP 206-207. The prosecutor argued that the receipts were admissible to prove Mr. Wick's knowledge that the receipt presented to the Safeway store was forged, and to prove Mr. Wick's intent to commit a crime as part of the identity theft charges. RP 207-208. The trial court agreed with the State and ruled that the receipts were admissible. RP 208.

At trial, Justin Joyce testified that the receipt presented to him by Mr. Wick was printed using the wrong font, and had been printed on the wrong paper to be a legitimate receipt. RP 262. Afsheen Saatchi also testified that the receipt presented by Mr. Wick was fake due to the receipt's incorrect paper width, paper thickness, print, ink, and lettering. RP 335.

Hilary Leonard testified that on September 14, 2004, her van was broken into and purse containing her credit cards and identification was stolen. RP 474. Ms. Leonard testified that she never got her driver's license

back and that exhibit 11A contained her old driver's license and her old Visa card. RP 475-477. Ms. Leonard testified that she does not know either Mr. Wick or Ms. Schock. RP 477-478.

Jean Dougherty testified that in September of 2005 her purse, containing her driver's license, was stolen out of her car. RP 480-482. Ms. Dougherty testified that exhibit 11A contained her driver's license, and her US Bank ATM card. RP 483. Ms. Dougherty testified that she doesn't know either Mr. Wick or Ms. Schock and that she did not give anyone permission to possess or use her US Bank card. RP 484.

Lori Kelly testified that her car was broken into in August or September of 2005 and her wallet, containing her ID, driver's license, debit card, Alaska Airlines Visa card, gift cards, store credit cards, and Home Depot card, were stolen. RP 544-547. Ms. Kelly testified that exhibit 11A contained her Alaska Airlines Visa card. RP 547. Ms. Kelly testified that she does not know Mr. Wick or Ms. Schock, and that she had not given her permission to anyone else to possess her Alaska Airlines Visa card. RP 548-549.

In his defense, Mr. Wick called Ms. Linda Schock. RP 638. Ms. Schock testified that she is Mr. Wick's girlfriend and has known Mr. Wick for five years. RP 638. Ms. Schock testified that the items found in the tote in Mr. Wick's vehicle belonged to a woman named Lori Silves who Mr.

Wick and Ms. Schock were helping move. RP 638-649.

Ms. Silves rented a room from Mr. Melendy, a friend of Ms. Schock. RP 638-639. In the last two weeks of October, 2005, Ms. Silves lived with Ms. Schock and Mr. Wick off-and-on because Mr. Melendy wanted Ms. Silves to move out of his home. RP 639-640

Ms. Schock testified that, on November 5, 2005, Mr. Melendy called Ms. Schock and told her to come pick up Ms. Silves' property. RP 646. Ms. Schock testified that when she and Mr. Wick arrived at Mr. Melendy's home, Mr. Melendy had put Ms. Silves' things on the driveway. RP 646. Mr. Melendy gave Ms. Schock a small bag that contained Mr. Wick's driver's license which had been taken from Ms. Schock's and Mr. Wick's home. RP 649. Ms. Schock testified that she put the small bag above the passenger visor of Mr. Wick's truck. RP 732.

Ms. Schock testified that she and Mr. Wick loaded Ms. Silves' belongings into Mr. Wick's vehicle, picked up Ms. Silves, and were driving Ms. Silves around in order for Ms. Silves to obtain money to pay Mr. Wick and Ms. Schock for helping Ms. Silves move. RP 646-652. Ms. Schock testified that the group ended up at the Safeway because Ms. Silves gave Mr. Wick the bottle of truffle oil and the receipt so Mr. Wick could return it and get money that way. RP 652-654. Ms. Schock also testified that the multifunction printer found in Mr. Wick's vehicle belonged to Ms. Silves.

RP 684.

Ms. Schock testified that Brian Eickhoff was a friend of Angela Clayton, who was a friend of Ms. Schock. RP 686. Ms. Schock testified that Mr. Wick possessed Mr. Eickhoff's credit card because Mr. Eickhoff had left it at Mr. Wick's house during a Halloween party. RP 687-688, 695. Ms. Schock testified that Mr. Eickhoff's credit card was in Mr. Wick's wallet because Mr. Wick was trying to set up a time to give it back to Mr. Eickhoff. RP 688.

After Mr. Wick had rested his case, the State called Mr. Eickhoff as a rebuttal witness. RP 744-745, 758. Prior to Mr. Eickhoff testifying, Mr. Wick moved the court to give a limiting instruction to the jury instructing them that Mr. Eickhoff's testimony could be considered only for the purposes of rebutting Ms. Schock's testimony and weighing her credibility. RP 755. The trial court refused to give the instruction prior to Mr. Eickhoff testifying. RP 756.

Mr. Eickhoff testified that he did not know Mr. Wick or Ms. Schock. RP 759. Mr. Eickhoff testified that in August of 2004, his vehicle was stolen. RP 759-760, 764. Mr. Eickhoff testified that his ID and debit card were in his vehicle when it was stolen. RP 760. Mr. Eickhoff testified that exhibit 5 contained Mr. Eickhoff's Bank of America credit/debit card that was stolen from his vehicle. RP 762-753.

After Mr. Eickhoff testified, the trial court heard argument and agreed to instruct the jury that the testimony of Mr. Eickhoff was to be considered only for the impeachment of Ms. Schock. RP 766-776, 779.

On June 24, 2008 the State amended the charges against Mr. Wick for the third and final time to the following charges: forgery for the Safeway receipt used to attempt to return the truffle oil; unlawful possession of a controlled substance for the .2 grams of methamphetamine found in Mr. Wick's vehicle; possessing stolen property in the second degree for Lori Kelly's credit card; possessing stolen property in the second degree for Jean Dougherty's credit card; unlawful possession of fictitious identification; identity theft in the second degree regarding Jean Dougherty; identity theft in the second degree regarding Lori Kelly; identity theft in the second degree regarding Hilary Leonard; and bail jumping. CP 187-190.

Also on June 24, 2008, the jury found Mr. Wick guilty of all charges. CP 234-242.

On October 24, 2008, Mr. Wick stipulated to his prior criminal record and offender score. CP 246-248. The trial court sentenced Mr. Wick to 60 months imprisonment. CP 249-261. The trial court imposed 12 to 24 months of community custody on Count II, 9 to 18 months community custody on Count VIII, 9 to 18 months community custody on Count IX, and 9 to 18 months community custody on Count X. CP 249-261.

Notice of appeal was timely filed on October 24, 2008. CP 263.

IV. ARGUMENT

1. **The State presented insufficient admissible evidence to convict Mr. Wick of any crime except bail jump where all evidence supporting the crimes was discovered pursuant to an unlawful arrest and was therefore inadmissible.**

“[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). We recently affirmed the following rule stemming from *Terry*: “A person is ‘seized’ within the meaning of the Fourth Amendment only when, by means of physical force or a show of authority, his freedom of movement is restrained.... There is a ‘seizure’ when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”

State v. Mendez, 137 Wn.2d 208, 222, 970 P.2d 722 (1999), citing *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998).

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. Whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person...and the Fourth Amendment requires that the seizure be reasonable.

State v. Larson, 93 Wn.2d 638, 641, 611 P.2d 771 (1980) (internal citations omitted).

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . [S]eizures must be supported by probable cause whether or not formal arrest or search by way of warrant has been

made. Although there are exceptions that authorize seizure on lesser cause, these are narrowly drawn and carefully circumscribed.

State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994) (internal citations omitted). A physical arrest is a seizure under the Fourth Amendment and must be preceded by a determination that there is probable cause to believe the person arrested has committed a crime. *Dunaway v. New York*, 442 U.S. 200, 213, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

Probable cause [to arrest] exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed...A bare suspicion of criminal activity, however, will not give an officer probable cause to arrest.

State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986), *cert. denied*, 499 U.S. 979, 111 S.Ct. 1631, 113 L.Ed.2d 726 (1991).

To justify a warrantless seizure under article I, section 7, of the Washington Constitution, the police must be able to point to "specific and articulable facts" giving rise to a reasonable suspicion that the person stopped is engaged in criminal activity. *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997).

- a. *Mr. Wick was arrested by police before the police had knowledge of sufficient facts to support an objectively reasonable suspicion that Mr. Wick was engaged in criminal activity.*

Mr. Wick was stopped by police as soon as the police arrived at the Proctor Safeway and saw Mr. Wick. RP 389. Officer Mettler questioned Mr. Wick about what was going on, sent officer Robison to contact the store security about what had happened, and then informed Mr. Wick of his constitutional rights. RP 390-391. Officer Mettler handcuffed Mr. Wick and put Mr. Wick in the back of his patrol car within a few minutes of the initial contact. RP 394, 403, 405-406. Officer Mettler then spoke with the Safeway employees. RP 393, 403.

Mr. Wick was detained by police and put into the back of Officer Mettler's patrol car prior to Officer Mettler speaking with the Safeway employees. A reasonable person who had been stopped by police, questioned, then placed into the back of a police car, would not feel that he was free to leave. Mr. Wick was, therefore, arrested by the officers prior to the officers speaking to the Safeway employees.

Because Mr. Wick was arrested prior to Officer Mettler speaking to the Safeway employees, the only facts known to Officer Mettler at the time he arrested Mr. Wick were the facts he learned through the police dispatcher and the facts learned from his questioning of Mr. Wick. Officer Mettler testified that dispatch had informed him that "somebody was at the store trying to return something that they believed was some sort of fraud taking place." RP 387. Mr. Wick told Officer Mettler that he had a receipt for the

for the item that he was returning and that he could not understand why he was being contacted by the police. RP 390. Mr. Wick told Officer Mettler that he didn't think there was any problem as far as he knew. RP 390.

Thus, at the time Officer Mettler arrested Mr. Wick and placed Mr. Wick in the back of his patrol car, Officer Mettler was aware only that Safeway employees had reported that Mr. Wick attempted to return an item using a suspicious receipt, and that Mr. Wick denied any knowledge of using a fraudulent receipt. At best, this provided the officers with a basis to conduct a *Terry* stop.¹ However, the officers did more than conduct a *Terry* stop of Mr. Wick; the officers placed Mr. Wick in full custodial arrest including reading Mr. Wick his constitutional rights and placing Mr. Wick in the back of a police patrol car. The actions of the officers went far beyond a *Terry* stop and constituted a full custodial arrest of Mr. Wick. However, at the time of Mr. Wick's arrest, the officers lacked knowledge of sufficient facts to support an objectively reasonable belief that Mr. Wick was engaged in criminal activity. Therefore, the arrest of Mr. Wick was unlawful.

b. Because the arrest of Mr. Wick was unlawful, all evidence discovered pursuant to the arrest of Mr. Wick was inadmissible at trial.

¹ A police officer may stop and detain a person for questioning if he reasonably suspects that the person is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984).

Evidence obtained directly or indirectly through exploitation of an unconstitutional police action must be suppressed, unless the secondary evidence is sufficiently attenuated from the illegality as to dissipate the taint. *Wong Sun v. United States*, 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Under article 1, section 7, suppression is constitutionally required. *State v. White*, 97 Wn.2d 92, 110-112, 640 P.2d 1061 (1982). This constitutionally mandated exclusionary rule “saves article 1, section 7 from becoming a meaningless promise.” *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by “not tainting our proceedings by illegally obtained evidence.” *Ladson*, 138 Wn.2d at 359-360, 979 P.2d 833.

Here, all incriminating evidence was discovered after Mr. Wick had been arrested by the police. The items found during the searches of Mr. Wick subsequent to his arrest and all the items found in Mr. Wick’s vehicle were tainted by the initial unlawful arrest of Mr. Wick. Thus, all evidence discovered on Mr. Wick’s person as well as all evidence discovered in Mr. Wick’s vehicle should have been suppressed and was inadmissible at trial.

- c. *The admissible evidence presented by the State at trial was insufficient to convict Mr. Wick of the crimes of forgery, unlawful possession of a controlled substance, possessing stolen property, unlawful possession of a fictitious identification, or identity theft since all evidence relating to these charges was found pursuant to Mr. Wick's unlawful arrest.*

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). If the reviewing court finds insufficient evidence to prove an element, reversal is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *Hickman*, 135 Wn.2d at 103, 954 P.2d 900.

As found by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the *Winship* doctrine² “requires more than a trial ritual;” it is an essential of the due process guarantees by the 14th Amendment that “no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof.” *Jackson*, 307 U.S. at 316-317.

² The Constitution prohibits a criminal conviction of any person except upon proof of guilt beyond a reasonable doubt of every element of the crime charged. *In re Winship*, 397 U.S. 358 (1970).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn.App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992), *abrogated on other grounds State v. Trujillo*, 75 Wn.App. 913, 883 P.2d 329 (1994).

i. Forgery.

Mr. Wick was charged with one count of forgery in violation of RCW 9A.60.020(1)(a)(b). Under RCW 9A.60.020(1)(a)(b), "A person is guilty of forgery if, with intent to injure or defraud: (a) He falsely makes, completes, or alters a written instrument or; (b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged."

The State, therefore, had the burden of establish either that Mr. Wick created the fraudulent Safeway receipt or that Mr. Wick knew the receipt was fraudulent. To meet this burden, the State relied on the evidence found in Mr. Wick's vehicle and on his person, specifically the numerous receipts, xeroxes of receipts, incomplete forged receipts, the multipurpose copier, the power inverter, the credit and debit cards belonging to other individuals, the identification cards belonging to other individuals, and the identification cards found on Mr. Wick's person. RP 155-158, 166-167, 169-171, 783-787. However, as discussed above, all this evidence was discovered pursuant to

Mr. Wick's unlawful arrest and was, therefore, inadmissible. Without the introduction of this evidence, the State had no evidence from which the jury could draw the inference that Mr. Wick either created the forged receipt himself or knew that the receipt was forged. Without evidence to support such an inference, the State would have had insufficient evidence to establish that Mr. Wick was guilty of any form of forgery.

ii. Unlawful Possession of a Controlled Substance.

Mr. Wick was charged with unlawful possession of a controlled substance based on the methamphetamine found inside his vehicle. CP 4-5, 187-190. As discussed above, all evidence discovered inside Mr. Wick's vehicle was discovered pursuant to his unlawful arrest. Therefore, none of the evidence discovered inside his vehicle was admissible at trial. Thus, all of the evidence regarding the methamphetamine was inadmissible. Without this evidence, the State had no admissible evidence to establish that Mr. Wick possessed any controlled substance. The State thus presented insufficient admissible evidence to establish that Mr. Wick committed the crime of possession of a controlled substance.

iii. Possession of Stolen Property.

Mr. Wick was charged with possessing stolen property in violation of RCW 9A.56.140(1) and RCW 9A.56.160(1)(c) based on the discovery of

Lori Kelly's credit card and Jean Dougherty's credit/debit card and driver's license inside of his vehicle. CP 4-5, 187-190.

Under RCW 9A.56.140(1), "Possessing stolen property' means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto."

Under RCW 9A.56.160(1)(c), "A person is guilty of possessing stolen property in the second degree if...He or she possesses a stolen access device."

Thus, to convict Mr. Wick of possession of stolen property based on Ms. Kelly's and Ms. Dougherty's credit or debit cards, the State had the burden of demonstrating that Mr. Wick knowingly possessed Ms. Kelly's and Ms. Dougherty's credit or debit cards while also knowing that the cards were stolen.

First, all evidence relating to the cards being in Mr. Wick's possession was obtained pursuant to Mr. Wick's unlawful arrest and was therefore inadmissible. Second, to establish that Mr. Wick knowingly possessed the card while knowing that the cards were stolen, the State relied on the presence of the receipts, the forged receipts the multi-function copier, the other items discovered inside Mr. Wick's vehicle, as well as Mr. Eickhoff's credit card found on Mr. Wick's person as a basis for the inference that Mr. Wick was engaged in fraudulent activities and therefore would have known

that the cards belonging to Ms. Kelly and Ms. Dougherty were stolen. RP 790-793.

As discussed above, all this evidence was improperly discovered pursuant to Mr. Wick's unlawful arrest and was inadmissible. Without this evidence, the State had insufficient admissible evidence to establish that Mr. Wick even possessed the cards, much less evidence which would support an inference that he knew the cards were stolen. The State presented insufficient admissible evidence to establish that Mr. Wick was guilty of possession of stolen property.

iv. Unlawful Possession of Fictitious Identification.

Mr. Wick was charged with unlawful possession of fictitious identification in violation of RCW 9A.56.320(4). CP 187-190. Under RCW 9A.56.320, "A person is guilty of unlawful possession of fictitious identification if the person possesses a personal identification card with a fictitious person's identification with intent to use such identification card to commit theft, forgery, or identity theft, when the possession does not amount to a violation of RCW 9.35.020." This charge is based on the Washington ID card issued to Mr. Wick that had been modified with a pen so Mr. Wick's last name read "W-i-o-k." CP 4-5, 793-795.

The ID with Mr. Wick's altered last name was found inside Mr.

Wick's wallet in one of the searches of him incident to his arrest. RP 630. As discussed above, Mr. Wick was unlawfully arrested. Consequently, all evidence discovered pursuant to his arrest was "tainted" and inadmissible. The "W-i-o-k" ID was found in Mr. Wick's wallet which was searched, twice, incident to his arrest. RP 630. The State, therefore, presented insufficient admissible evidence to establish that Mr. Wick committed the crime of unlawful possession of fictitious identification.

v. Identity Theft.

Mr. Wick was charged with three counts of identity theft: one based on Jean Daugherty's credit/debit card and driver's license; another based on Lori Kelly's credit/debit card; and one based on Hilary Leonard's driver's license and Visa card. CP 187-190; RP 795-797.

Again, all these items were discovered pursuant to the unlawful arrest of Mr. Wick. Consequently, none of these items were admissible at trial. Thus, the State presented insufficient admissible evidence to establish that Mr. Wick committed the crime of identity theft.

2. **The State presented insufficient evidence to convict Mr. Wick of any of the counts of identity theft where the State presented insufficient evidence to support the inference that Mr. Wick possessed the identification information of any other person with the intent to use that information to commit a crime.**

Mr. Wick was charged with three counts of identity theft in the second

degree in violation of RCW 9.35.020(3). CP 187-190. One based on Jean Daugherty's credit/debit card and driver's license; another based on Lori Kelly's credit/debit card; and one based on Hilary Leonard's driver's license and Visa card. CP 187-190; RP 795-797.

RCW 9.35.020(3) provides, "A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW."

RCW 9.35.020(1) provides, "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

Thus, in order to convict Mr. Wick of identity theft in the second degree, the State had the burden of proving that Mr. Wick knowingly possessed the means of identification or financial information of each woman with the intent to commit, aid, or abet any crime.

Even assuming that all the evidence found inside Mr. Wick's vehicle and on his person is admissible, the State still presented insufficient evidence to support an inference that Mr. Wick possessed the ID cards and debit/credit cards of the women with the intent to commit, aid, or abet any crime.

Here, the State presented sufficient evidence to permit the jury to infer that Mr. Wick possessed the IDs and credit/debit cards, but the State presented no evidence which would support the inference that Mr. Wick possessed those cards with the intent to commit, aid, or abet another crime. All the evidence recovered from Mr. Wick's vehicle would support the inference that Mr. Wick was engaged in generating and using fraudulent receipts, but these receipts had nothing to do with the credit cards or IDs found in the vehicle and on Mr. Wick's person. There was no evidence presented that Mr. Wick attempted to further any crime by use of a fraudulent ID, or that Mr. Wick was manufacturing false IDs.

“[T]he existence of a fact cannot rest upon guess, speculation, or conjecture.” *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 892 (2006). Here, no evidence was presented as to Mr. Wick's intent regarding the IDs and debit cards. Any inference by the jury that Mr. Wick possessed those cards with the intent to commit any crime would be pure guess, speculation, and conjecture.

The State presented insufficient evidence to support the conclusion that Mr. Wick possessed the IDs and credit/debit cards of Jean Dougherty, Lori Kelly, and Hilary Leonard with the intent to commit, aid, or abet any crime.

3. The State presented insufficient evidence to convict Mr. Wick of possession of a fictitious ID where the State presented no evidence to establish Mr. Wick's intent regarding his possession of his own altered ID.

Mr. Wick was charged with possession of a fictitious ID, contrary to RCW 9A.56.320(4) based on his possession of a valid Washington State ID card, issued to him, whereupon someone had altered Mr. Wick's last name to read "W-i-o-k." CP 4-5, 187-190; RP 247-248, 630, 633.

Under RCW 9A.56.320(4), "A person is guilty of unlawful possession of fictitious identification if the person possesses a personal identification card with a fictitious person's identification with intent to use such identification card to commit theft, forgery, or identity theft, when the possession does not amount to a violation of RCW 9.35.020."

Here, as with the identity theft charges, the State presented no evidence that Mr. Wick possessed his own altered ID card with the intent to use that card to commit any theft, forgery, or identity theft. The State presented ample evidence to establish that Mr. Wick had a mobile receipt forging operation in his vehicle, but presented no evidence that Mr. Wick possessed the IDs and credit/debit cards that form the basis of the identity theft and possession of a fictitious ID charges with the intent of using the IDs to commit any crimes. The only evidence which might suggest that Mr. Wick intended to use the IDs or credit/debits cards to commit any crime is the

testimony of Officer Quilio that she found xeroxes of a driver's license with Mr. Wick's photo on it. RP 303. Officer Quilio testified, however, that the xeroxes seemed to be experimental since the xerox of the license was printed over something else. RP 303.

Any inference by the jury that Mr. Wick possessed these IDs with the intent to use these IDs to commit any crime would be speculation and conjecture that lacked any factual basis in the evidence presented to the trial court. The State presented insufficient evidence to establish that Mr. Wick possessed the ID cards and debit/credit cards with the intent to use the cards to commit any other crime. Thus, the State therefore presented insufficient evidence to establish that Mr. Wick committed the crime of possession of a fictitious ID.

V. CONCLUSION

This court should vacate Mr. Wick's convictions and dismiss all charges against him, save the bail jump charge. Such dismissal will change Mr. Wick's offender score and require resentencing.

DATED this 23rd day of April, 2009.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sheri Arnold". The signature is written in black ink and is positioned above a horizontal line.

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

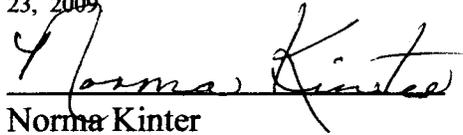
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STATE OF WASHINGTON
BY 
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CERTIFICATE OF SERVICE

The undersigned certifies that on April 23, 2009, I delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to appellant, Cullen L. Wick, DOC # 814689, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520, true and correct copies of the appellant's Opening 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 April 23, 2009.


Norma Kinter