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COURT OF APPEALS  
DIVISION II

No. 38580-5-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
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STATE OF WASHINGTON,  
Appellant,

vs.

**THOMAS S. COPLAND**

Respondent.

Grays Harbor Superior Court

Cause No. 08-1-00270-8

The Honorable Judge David Edwards

APPELLANT'S BRIEF

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**A.**

**ASSIGNMENTS OF ERROR**

1. The trial court erred by granting respondent's motion to suppress evidence resulting from a constitutional search of a black bag handed to Officer Steve Loyer by fireman David Cartwright.
2. The trial court erred by entering Finding of Fact No. 8 because the record supports a finding that the black plastic bag was not opened as a result of state action or police involvement.
3. The trial court erred by entering Finding of Fact No. 9 because the record supports a finding that the black plastic bag was not opened or obtained as a result of state action or police involvement.
4. The trial court erred by entering Conclusion of Law No. 1 which states that "[t]he State failed to establish whether or not the black bag obtained by the police involved State Action and did not involve the police;" the record does not support this conclusion.
5. The trial court erred by entering Conclusion of Law No. 2 which states that "[t]he State failed to establish that the black bag was opened by someone other than the police so as to render the contents of the black bag lawfully in plain view as an exception to the warrant requirement for this search;" the record does not support this conclusion.

**B.**

**ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred in granting the CrR 3.6 motion to suppress evidence obtained as a result of the search of the black bag, when the record indicates that the black bag was not obtained or opened as the result of State Action and did not involve the police? Assignments of Error 1, 2, 3 and 4.

**C.**

**STATEMENT OF THE CASE**

**1. Procedural facts:**

On May 19, 2008, Respondent Thomas S. Copland was charged by information filed in Grays Harbor County Superior Court with one count of possession of with intent to deliver oxycodone, contrary to RCW 69.50.401(2). Clerk's Papers [CP] at 1.

Pursuant to CrR 3.5 and 3.6 Copland filed a motion to suppress the evidence seized. CP at 6-7. Following a hearing on October 9, 2008, the Honorable Judge David Edwards granted the motion to suppress. RP (Oct. 9, 2008) at 19.

On October 13, 2008 an order dismissing this case was filed. CP at 17-18. On October 20, 2008, the court entered Findings of Fact and

Conclusions of Law. CP at 19-21. Notice of appeal was filed on November 10, 2008. CP at 22-28.

**2. Facts relating to motion to suppress**

Copland's counsel moved to suppress Oxycodone found in a black plastic bag that had been taken from Copland by hospital staff upon arriving at Grays Harbor Community Hospital. Copland had arrived in the emergency room by ambulance to receive medical attention for a head injury. The black plastic bag found on Copland was given to Officer Steve Loyer of the Aberdeen Police Department by Aberdeen Firefighter David Cartwright. RP (October 9, 2008) at 1-12, CP at 6-7.

Counsel filed a motion and memorandum for suppression on August 18, 2008. CP at 6-7. Officer Steve Loyer and Officer David Parkinson testified at the suppression hearing on October 9, 2008. Prior to the taking of any testimony, Copland's counsel stipulated that the removal of the black plastic bag from Mr. Copland's pants by hospital staff was not state action. RP (October 9, 2008) at 2. Copland's counsel also stipulated that emergency room personnel would not have needed a warrant to open the bag prior to turning it over to police. RP (October 9, 2008) at 2.

On October 19, 2008, Officer Steve Loyer of the Aberdeen Police Department was on duty in full uniform working as a security officer at the Grays Harbor Community Hospital, Grays Harbor County,

Washington. RP (October 9, 2008) at 4, 7. That evening Aberdeen firefighter David Cartwright handed him a black plastic bag. RP (October 9, 2008) at 5. Officer Loyer was able to view the contents of the bag only because it had been opened prior to his receiving it. RP (October 9, 2008) at 5. Officer Loyer did not know who opened the black bag prior to his receiving it. RP (October 9, 2008) at 8. Officer Loyer observed several bundles of clear plastic that contained blue pills inside the black bag. RP (October 9, 2008) at 5. Officer Loyer did not immediately know to whom the bag belonged but was later informed that the black bag had come from the pants of Thomas Copland while Copland was receiving treatment in one of the examination rooms. RP (October 9, 2008) at 5-6. Based on Officer Loyer's training and experience, the contents of the bag appeared to be controlled substances packaged for delivery or sale. RP (October 9, 2008) at 6. Based on these observations, Officer Loyer contacted dispatch to have an officer assist in the investigation. RP (October 9, 2008) at 6.

Officer David Parkinson of the Aberdeen Police Department responded to the request to assist in the investigation. RP (October 9, 2008) at 9-10. Officer Parkinson contacted Officer Loyer and was informed of the situation. RP (October 9, 2008) at 9-10. Officer Parkinson indicated that no other law enforcement agencies were involved in this investigation, because the black bag and the suspected illegal drugs

were given to him directly by Officer Loyer. RP (October 9, 2008) at 11. Officer Parkinson spoke with the nurses and firefighters involved, secured the evidence, and spoke with Thomas Copland. RP (October 9, 2008) at 11.

Judge Edwards found that no evidence had been presented to establish who opened the bag or how it had been obtained. RP (October 9, 2008) at 17. Based on this finding, Judge Edwards suppressed the contents of the black bag. RP (October 9, 2008) at 19.

The court entered the following Findings of Fact and Conclusions of Law on October 20, 2008:

#### UNDISPUTED FACTS

- (1) On October 19, 2007, Officer Steve Loyer of the Aberdeen Police Department was working as a security officer at the Grays Harbor Community Hospital in Grays Harbor County, Washington. Officer Loyer was wearing his Aberdeen Police Officer Uniform.
- (2) Aberdeen Firefighter David Cartwright handed Officer Loyer an open black plastic bag. It appeared to be a corner of a larger bag. Office Loyer did not open the bag and did not know who did. Officer Loyer could not see through the black plastic bag. If the bag had been closed Officer Loyer could not see what was in it. Inside the black bag Officer Loyer saw several bundles of clear plastic that had been tied up and contained blue colored pills which appeared to be controlled substances.
- (3) Officer Loyer found out later that the bag had come from one of the exam rooms in which the defendant Thomas Copland was located. Officer Loyer also found out later the Mr. Copland was in the same room and the black bag had come from his pants pocket.

- (4) Officer Loyer observed the pills appeared to be packaged up for delivery or sale.
- (5) Officer Loyer handed the black bag to Aberdeen Police Officer David Parkinson. Officer David Parkinson did not know who opened the bag. The black bag looked like it previously had been tied at the top. Mr. Copland denied knowledge of the black bag and its contents
- (6) No other witnesses testified.
- (7) The State did not subpoena Aberdeen Firefighter David Cartwright or any of the nurses involved.
- (8) The State presented no evidence as to whom or how the black plastic bag was opened.
- (9) The State presented no evidence as to whether or not there was State action involved in obtaining the black bag and getting it open.

#### CONCLUSIONS OF LAW

- (1) The State failed to establish whether or not the black bag obtained by the police involved State Action and did not involve the police.
- (2) The State failed to establish that the black bag was opened by someone other than the police so as to render the contents of the black bag lawfully in plain view as an exception to the warrant requirement for this search.
- (3) The police immediately recognized that the contents of the black bag as evidence.

CP at 19-21.

Based on these Findings of Fact, Conclusions of Law, and the concomitant order issued by Judge Edwards, the State could not proceed and the case was dismissed. CP at 17-18.

#### D.

#### ARGUMENT

- 1. Judge Edwards ignored the facts and stipulations entered during the CrR 3.6 hearing and instead improperly substituted**

**his own opinions in reaching his decision to suppress the evidence in this case.**

**a. Standard of Review**

On a motion to suppress, an appellate court reviews factual findings for substantial evidence and examines conclusions of law de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006); *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

**b. Applicable Law**

The Fourth Amendment's protection against illegal searches and seizures, as embodied in the exclusionary rule, protects against governmental actions only and does not sweep so broadly as to cover the actions of private citizens. *State v. McWatters*, 63 Wn.App. 911 822 P.2d 787 (1992). There is no prohibition against the State's use of evidence of information obtained by a private citizen, even though by unlawful means, unless the actions of the private citizen were in some way instigated, encouraged, counseled, or controlled by the State or its officers. *State v. Bishop*, 43 Wn.App. 17, 714 P.2d 1199 (1986); *State v. Agee*, 15 Wn.App. 709, 552 P.2d 1084 (1976). A desire by a private citizen to aid such officials does not transform the search into a government search unless

done with the official knowledge or at official instigation. *State v. Sweet*, 23 Wn.App. 97, 596 P.2d 1080 (1979); *State v. Smith*, 110 Wn.2d 658, 756 P.2d 722 (1988).

Two Washington cases deal directly with hospitals/private citizens and the exclusionary rule. In *State v. Bishop, supra*, the court held that there was no Fourth Amendment violation when a private security guard gave packets of white powdery substance to a police officer who opened the packets without a warrant and sent them to a laboratory for analysis. In *State v. McWatters, supra*, the defendant was injured in a motorcycle accident and a paramedic found \$11, 000.00 in cash and heroin which was given to police. The court held that the medic was not acting on behalf of police when he seized items.

The circumstantial evidence in the present case indicates that the initial search of the defendant was conducted by emergency room personnel whose actions were not encouraged nor instigated by the police. The undisputed facts in this case indicate that initially law enforcement did not know from where the black bag had come. RP (October 9, 2008) at 4. The initial seizure of the black bag could not have been at the behest of law enforcement when they were not even aware of its existence in the first place. Additionally, defense counsel stipulated at the hearing that the seizure of the black bag did not involve state action. RP (October 9, 2008)

at 2. The only reasonable inference is that the impetus for the search was to provide medical care to the defendant. While a person may believe turning over evidence may be helpful to the police, such unilateral conduct does not convert that person into an agent of the police. *State v. Clark*, 48 Wn. App. 850, 857, 743 P.2d 822 (1987). Therefore, the transfer of the black plastic bag from a firefighter to the police cannot be a basis to suppress evidence.

When the Aberdeen police took control of the black plastic bag, the suspected controlled substance was in plain view. RP (October 9, 2008) at 5. According to *State v. Hoggatt*:

Plain view really involves three stages: viewing, reaching and seizing: (1) The officer must view the item to be seized without intruding unlawfully on the defendants' privacy; (2) the officer must reach the item without intruding unlawfully on the defendant's privacy; and (3) the officer must seize the item (a) without intruding unlawfully on the defendant's privacy (as opposed to the defendant's possession), and (b) with probable cause to believe the item is contraband or evidence of a crime.

108 Wn. App. 257, 270, 30 P.3d 488 (2001).

The first requirement is met here. An Aberdeen firefighter handed the black plastic bag to the officer. The second requirement is also met here. Again, the officer received an open bag and he did not adversely affect privacy rights of the defendant. The third requirement is also met here. The officer seized the item after it was given to him by an Aberdeen

firefighter, and there was probable cause to believe the item constituted contraband or evidence of a crime. No violation of the third criterion occurred because the officer was able to see the suspected contraband without disturbing the bag.

Contrary to the Finding of Fact No. 8, the State did present circumstantial evidence concerning who opened the plastic bag and how it was opened. Again, Officer Loyer received an open black plastic bag from an Aberdeen Firefighter. RP (October 9, 2008) at 4. Officer Loyer did not know who opened the black bag prior to his receiving it. RP (October 9, 2008) at 8. Therefore, by implication either the bag was opened by hospital staff or the bag was already opened by the defendant. Under any set of circumstances, there is no evidence which shows that agents of the State or their surrogates opened the bag. Moreover, nothing in the record indicates that the black plastic bag was closed when it was discovered in Copland's pants pocket. Judge Edwards appears to have assumed that it was closed at that time.

Contrary to Finding of Fact No. 9, the State presented substantial evidence that there was no State action in obtaining the black bag or opening it. The undisputed facts in this case indicate that initially law enforcement did not know from where the black bag had come or to whom it belonged. RP (October 9, 2008) at 4. Additionally, defense counsel

stipulated at the hearing that the seizure of the black bag by hospital personnel does not involve State action. RP (October 9, 2008) at 2. Finally, there is no evidence to support the implied assertion that the black plastic bag must have been closed when it was discovered in Copland's pants pocket.

Conclusions of Law Nos. 1 and 2 are also untenable based on the record and for the same reasons that Findings of Fact Nos. 8 and 9 are untenable. From the record it is clear that the actions of the police did not cause the black plastic bag to be opened. The black plastic bag was delivered to the police by a firefighter who came from a hospital examination room. Nothing in the record indicates that the police were in the examination room. Therefore, Judge Edwards did not have substantial evidence to conclude that the State failed to meet its burden of proof in establishing that the open black plastic bag was not the result of State action.

Conclusions of Law Nos. 1 and 2 are all the more egregious because the defense admitted at the beginning of the CrR 3.6 hearing that hospital staff are not State agents. In short, the position taken by Judge Edwards is only tenable if one were to assume that there was a "phantom" police officer who opened the black plastic bag in the examination room or that this "phantom" police officer told medical personnel to open the

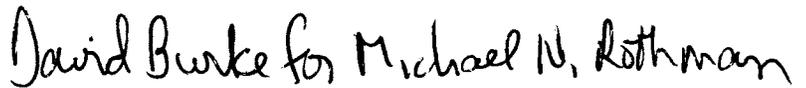
bag. Since these assumptions are not credible, Judge Edward's decision is not supported by substantial evidence and should be overturned.

E.

### CONCLUSION

For the reasons listed above, the relief sought by the Appellant should be granted. This case should be returned to the *status quo ante*. The orders of the Grays Harbor Superior Court suppressing the evidence seized in this case and dismissing this case should be vacated. This matter should be remanded to the Grays Harbor Superior Court (1) for entry of amended Findings of Fact and Conclusions of Law and (2) for setting a new trial date.

RESPECTFULLY SUBMITTED:



MICHAEL N. ROTHMAN  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,	)	
	)	NO 38580-5-II
Appellant.	)	
	)	AFFIDAVIT OF MAILING
vs.	)	
	)	
THOMAS STANLEY COPLAND,	)	
	)	
Respondent.	)	
_____	)	

STATE OF WASHINGTON	)	
	)	ss.
COUNTY OF PACIFIC	)	

DAVID J. BURKE, being first duly sworn on oath, deposes and says:

I am the Prosecuting Attorney for Pacific County, Washington.

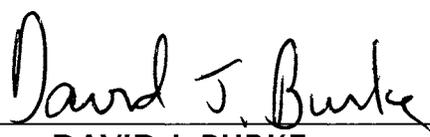
That on June 9, 2009, I mailed <sup>one copy</sup> ~~two copies~~ of the State's Brief of Appellant to Thomas Stanley Copland, Appellant at the following addresses:

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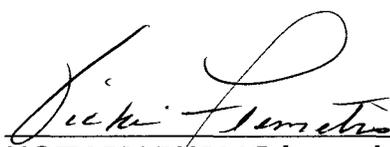
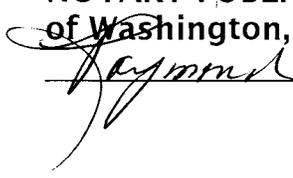
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DAVID J. BURKE

SUBSCRIBED & SWORN to before me this 9<sup>th</sup> day of  
June, 2009.

  
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