

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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**NO. 38624-1-II**

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JASON RONALD SLIGHTE,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The defendant's conviction should be reversed and the case remanded with instructions to dismiss because the police obtained the evidence supporting the conviction in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. RP 1-60.

2. Trial counsel's failure to bring a motion to suppress evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. RP 1-60.

3. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment when it entered judgment against him for an offense unsupported by substantial evidence. RP 1-60.

*Issues Pertaining to Assignment of Error*

1. Should a defendant's conviction be reversed and the case remanded with instructions to dismiss if the record demonstrates that the police obtained the evidence supporting the conviction in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when no other evidence of guilt exists?

2. Does a trial counsel's failure to bring a motion to suppress evidence based upon a legal argument that was successful before another state's supreme court and which was pending on review before the United States Supreme Court deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment when the motion to suppress would have been successful?

3. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when it entered judgment against him for an offense unsupported by substantial evidence?

## STATEMENT OF THE CASE

### *Factual History*

At about 11:30 in the evening on July 11, 2008, Centralia police officer Michael Lowery (hereinafter “Officer ML”) was on patrol when he spotted a small, older model pickup truck on the road without a license plate light. RP 18-21.<sup>1</sup> Upon seeing this he pulled behind the vehicle, which the defendant was driving, and initiated a traffic stop. *Id.* The defendant immediately pulled over, and when Officer ML walked up to speak with the defendant, he noted the single male passenger acting in a somewhat furtive manner, appearing to secret something by his feet. RP 21-25. In addition, the passenger was sweating, even though it was a cool night. *Id.* At about this time, Officer ML’s brother Douglas Lowrey (hereinafter “Officer DL”), who is also a Centralia Police Officer, arrived to assist. *Id.* As Officer ML spoke with the defendant, Officer DL walked up to speak with the passenger, who appeared to be attempting to turn away to hide his identity as well as hide something between the seat and door. RP 41-43. Once Officer DL got up to the side of the vehicle, he recognized the passenger as Chris King, a person

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<sup>1</sup>The record in this case includes one volume of verbatim reports of the trial held on October 16, 2008, and one volume of verbatim reports of the combined motion for relief from judgment and sentencing held on November 21, 2008. The former is referred to herein as “RP [Page #],” while the latter is referred to herein as “RP 11/21/08 [Page #].”

the officer believed had an outstanding warrant. *Id.* As a result, he ordered the passenger out of the vehicle and told him to wait on the sidewalk. *Id.*

Within a couple of minutes, Officer DL was able to confirm a valid warrant outstanding on the passenger. RP 42-43. Upon receiving this information, he put handcuffs on the passenger, told him he was under arrest, and placed him in the back of one of the patrol vehicles. *Id.* By this time, Officer ML had already ordered the defendant to get out of the truck. RP 21-25. As the defendant got out, he told Officer ML that there was a black bag in the truck that was not his. *Id.* Following Officer DL's arrest of the passenger, Officer ML searched the vehicle incident to the arrest of the passenger and found the following items: (1) a bunch of empty baggies and a knife on the passenger side of the floor, (2) a metal box underneath some clothing behind the seats, and (3) a large bag full of new ziplock baggies. Inside the metal box, Officer ML found a set of digital scales, a "snort" straw, and a number of small baggies, some with minute amounts of crystal residue in them. RP 25-37. Officer DL did not participate in the search of the vehicle. RP 43.

Based upon his discovery of these items in the truck, Officer ML arrested the defendant, searched his person, and found a black zipper bag in one of the defendant's pockets. RP 32-34. The black zipper bag had plastic baggies, spoons, and straws in it. RP 34-37. Officer ML later sent one of

these baggies to the Washington State Crime lab for analysis. *Id.*

### ***Procedural History***

By information filed July 14, 2008, and amended on October 9, 2008, the Lewis County Prosecutor charged the defendant Jason Ronald Slighte with one count of possession of methamphetamine with intent to deliver. CP 1-2, 9. The case later came on for trial before a jury, with the state calling Officers ML and DL as its first two witnesses. RP 18, 41. They testified to the facts set out in the preceding factual history. *See Factual History.* In addition, Officer ML identified Exhibit No. 4 as one of the baggies that he found in the black zippered bag from the defendant's pocket that he had sent to the crime lab for analysis. RP 34-37.

As it's last witness, the state called Sharon Herbelin, a forensic scientist with the Washington State Patrol. RP 45. She testified that she had examined Exhibit No. 4 in this case, and found a minute amount of crystal substance in it. RP 46-51. The amount was so small that she could not weigh it. RP 52-53. However, given the sophistication of her equipment, she was able to test the substance and determine that it contained methamphetamine. RP 46-51.

Following Ms Herbelin's testimony, the state rested its case. RP 59. The defense immediately rested its case without calling any witnesses. *Id.* The court then instructed the jury without objection, and the parties presented

closing argument. RP 60-71, 71-81. Following deliberation, the jury returned a verdict of guilty. CP 57.

Prior to sentencing in this case, the defendant moved for relief from judgment, arguing that under the decision in *State v. Todd*, 101 Wn.App. 945, 6 P.3d 86 (2000), the court should vacate the conviction for possession of methamphetamine with intent to deliver, and enter judgment against the defendant for the lesser included offense of possession. CP 58-59. The state conceded the argument and signed an agreed order granting the defendant's requested relief. CP 62-64. However, the court refused the defendant's motion, and sentenced the defendant within the standard range on the original verdict. CP 62-63, 65-76. The defendant thereafter filed timely notice of appeal. RP 78-90.

## ARGUMENT

### **I. THE DEFENDANT'S CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED WITH INSTRUCTIONS TO DISMISS BECAUSE THE POLICE OBTAINED THE EVIDENCE SUPPORTING THE CONVICTION IN VIOLATION OF THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.**

Under Article 1, § 7 of the Washington Constitution, as well as under the Fourth Amendment to the United States Constitution, 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). One of these exceptions allows the police to search a defendant and the area within the defendant’s immediate control incident to a valid custodial arrest. However, the arrest must be “custodial,” and the search may only follow the arrest, not precede it. *State v. Parker*, 139 Wash.2d 486, 496, 987 P.2d 73 (1999); *State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003).

In *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), the Washington Supreme Court examined the scope of searches incident to the

arrest of a driver or passenger in a motor vehicle. In this case, they adopted a “bright line rule” for determining when the police could make a warrantless search of the passenger compartment of a vehicle upon the arrest of the driver. The court held:

During the arrest process, including the time immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

*State v. Stroud*, 106 Wn.2d at 152.

Although any number of Washington cases have refined this rule, particularly in the context of what constituted the “passenger compartment” of a vehicle, what constituted a “locked container,” and what privacy interests a passenger in the vehicle had in his or her person and possessions, few if any cases addressed the question of when the right to search ended. This should not be surprising given the extreme simplicity in determining whether or not the person arrested was still at the scene or handcuffed in the back seat of a police vehicle. However, as the following points out, the validity of most searches under *Stroud* have now been called into question based upon a recent decision by the United States Supreme Court.

In *Arizona v. Gant*, No. 07–542, an opinion filed April 21, 2009, the United States Supreme Court addressed the parameters under which the

police may, consistent with the Fourth Amendment, make a warrantless search of a vehicle following the arrest of the driver or a passenger. In this case, an Arizona Police Officer arrested the defendant for operating a motor vehicle with a suspended license. Following this arrest, the officer handcuffed the defendant and placed in a nearby patrol vehicle. With the defendant still at the scene in the patrol car, the police then searched his vehicle incident to his arrest and found handguns and drugs in it. The defendant was later convicted of possessing these items. However, the Arizona Supreme Court reversed this conviction, holding that the search incident to arrest was not justifiable, since any concerns for officer safety or the possible destruction of evidence issue had ended when the defendant was arrested, handcuffed, and placed in a patrol car.

Following entry of the decision by the Arizona Supreme Court, the state filed a Petition for Writ of Certiorari, which the United States Supreme Court granted. Ultimately, the court affirmed the decision of the Arizona Supreme Court, finding that the warrantless search violated the Fourth Amendment. The court held:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. The Arizona Supreme

Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed.

*Gant v. Arizona*, page 18.

The effect of this decision is to invalidate the majority of warrantless searches in Washington State undertaken pursuant to the decision of the Washington Supreme Court in *Stroud*. As a review of the holdings in *Gant* and *Stroud* reveals, there are now many classes of searches taken under *Stroud* that are no longer valid under the Fourth Amendment. Indeed, the majority of searches considered valid under *Stroud* are now invalid under *Gant*. As the following argues, the search in the case at bar provides one clear example.

In this case, one of the officers arrested the passenger in the truck on an outstanding warrant. Upon making the arrest, he handcuffed the passenger and placed in a patrol vehicle. Once this was done, the other officer searched the vehicle incident to the arrest of the passenger, finding numerous items of drug paraphernalia, along with a minute amount of crystal residue in a baggie. Based upon this search, the officer then arrested the defendant, who was the driver, and found a baggie in his pocket with a minute amount of methamphetamine residue in it. When the second officer searched the truck, he was not looking for evidence of the crime for which the first officer had arrested the passenger. Indeed, the first officer had not even arrested the

passenger for the commission of a crime. Rather he had arrested the passenger for an outstanding warrant. Neither was the second officer looking for weapons. Thus, under the decision in *Gant*, the search violated the defendant's right to privacy under United States Constitution, Fourth Amendment, and necessarily under Washington Constitution, Article 1, § 7, and the evidence found during that search must be suppressed.

In addition, the only justification for the search of the defendant's person was the discovery of the items during the illegal search of the vehicle. Thus, the arrest of the defendant, and the search incident to that arrest, flowed directly as the fruit of the initial illegal search. Consequently, as the fruit of the poisonous tree, the evidence found during the search of the defendant's person must also be suppressed. *See State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982) (citing *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963)). Absent the evidence seized from the truck and from the defendant's person, there is no evidence with which to support a conviction. As a result, this court should vacate the defendant's conviction and remand with instructions to dismiss.

In this case, the state may argue that the court should not consider this argument because appellant cannot raise it for the first time on appeal. However, the decision in *State v. Busig*, 119 Wn.App. 381, 81 P.3d 143 (2003), indicates otherwise. In *Busig*, police officers entered the defendant's

house pursuant to a warrant that allowed them to enter to execute an arrest warrant. Although the officers did not find the person named in the arrest warrant, they did see contraband that formed the basis of a new warrant, issued this time to search the premises for evidence of methamphetamine manufacturing. Following the execution of this second warrant, the state charged the defendant with possession of methamphetamine and manufacture of methamphetamine. The defendant responded with a motion to suppress, arguing that the second warrant should fail because the information in it was obtained during the execution of the first warrant, which was based upon a pretext. The trial court denied the motion, and the defendant was later convicted.

On appeal, the defendant argued, among other things, that the affidavit given in support of the second warrant did not establish probable cause to search, and the argument was not made before the trial court. The state responded that the argument did not constitute a manifest error of constitutional magnitude and should not be considered for the first time on appeal. However, while the court agreed with the state's argument, it did so only because prejudice was not evident in the record on appeal. The court stated:

For the first time on appeal, Ms. Busig challenges the second search warrant, a telephonic warrant based on evidence seen by officers in plain view while they were executing the original warrant.

The probable cause basis for the second warrant was not called into question at the suppression hearing. Generally issues raised for the first time on appeal are not subject to review. An exception to the general rule exists for claims of manifest error affecting a constitutional right. The asserted error must be of true constitutional magnitude and must actually prejudice the defendant.

Under the Fourth Amendment, all searches and seizures must be based on probable cause. Ms. Busig's contention that her residence was searched on the basis of a telephonic warrant that was not supported by probable cause is an alleged error of constitutional magnitude. However, prejudice is not evident in the record. Because the sufficiency of the telephonic affidavit to support probable cause to search was not discussed or examined at the suppression hearing, we have no determination by the trial court to review. We also have no indication whether the trial court would have granted a motion to suppress on this basis. As a result, Ms. Busig cannot show actual prejudice, the error is not manifest, and this issue is not reviewable on appeal.

*State v. Busig*, 119 Wn.App. at 390-391 (citation omitted).

None of the problems of reviewability from *Busig* exist in the case at bar. First, unlike *Busig*, there is no question how the trial court would have ruled in this case had the defendant brought a suppression motion. Based upon the existing precedent from *Stroud*, the trial court would have denied the motion. However, given the United States Supreme Court's clear decision in *Gant*, there is no question that the search of the vehicle incident to the arrest of the passenger on a warrant while the passenger was handcuffed and in a patrol car was illegal. Thus, unlike *Busig*, the record in this case is clear and the defendant has demonstrated prejudice.

**II. TRIAL COUNSEL’S FAILURE TO MOVE TO SUPPRESS THE EVIDENCE SEIZED IN THIS CASE DENIED THE DEFENDANT 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 bring a suppression motion in this case. Specifically, defendant argues that trial counsel's failure to be aware of the decision of Arizona Supreme Court in *State v. Gant*, 216 Ariz. 1, 162 P.3r 640 (2007), fell below the standard of a reasonable prudent attorney and caused prejudice. The state may well argue that this failure does not fall below the standard of a reasonable attorney because (1) the decisions of other state courts have no precedential value in Washington, and (2) the sheer volume of the annual decision of our fifty states would make it impossible for any attorney to be aware of each decision of each state's Supreme Court. Defendant generally agrees with this argument. However, these arguments do justify trial counsel's failure in this case for one important reason: On February 25, 2008, the United States Supreme Court granted certiorari in *State v. Gant*. The Supreme Court's published issue statements, which are available over the internet on the web site maintained by the United States Supreme Court, noted that it was considering a legal issue that any

Washington Criminal attorney would recognize as a case that would decide the continued validity of *Stroud*. The following is the Supreme Court's published issue statement:

QUESTIONS PRESENTED:

In *New York v. Belton*, 453 U.S. 454 (1981), this Court held that the risks to officer safety and to the preservation of evidence inherent in the arrest of a vehicle's recent occupant justify a contemporaneous warrantless search of the automobile's passenger compartment incident to the arrest. The question presented is: Did the Arizona Supreme Court effectively "overrule" this Court's bright-line rule in *Belton* by requiring in each case that the State prove after-the-fact that those inherent dangers actually existed at the time of the search?

CERT. GRANTED 2/25/2008

THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED LIMITED TO THE FOLLOWING QUESTION: DOES THE FOURTH AMENDMENT REQUIRE LAW ENFORCEMENT OFFICERS TO DEMONSTRATE A THREAT TO THEIR SAFETY OR A NEED TO PRESERVE EVIDENCE RELATED TO THE CRIME OF ARREST IN ORDER TO JUSTIFY A WARRANTLESS VEHICULAR SEARCH INCIDENT TO ARREST CONDUCTED AFTER THE VEHICLE'S RECENT OCCUPANTS HAVE BEEN ARRESTED AND SECURED?

See <http://www.supremecourtus.gov/qp/07-00542qp.pdf>.

What defendant in this case specifically argues, is that trial counsel's failure to be aware of pending criminal cases before the United States Supreme Court does fall below the standard of a reasonably prudent attorney for the following reasons: (1) The decisions of the United States Supreme Court are the law of the land and overrule any contrary decision of the

Washington Supreme Court, such as the decision in *Stroud*, (2) the volume of pending criminal cases before the United States Supreme Court is relatively small, and (3) the issue statements on pending cases are single paragraphs and can be easily accessed by anyone with a computer, or anyone with access to a law library. Thus, in the case at bar, trial counsel's failure to be aware of the pending *Gant* case and its impact on the continued validity of *Stroud*, particularly under the facts of this case, fell below the standard of a reasonably prudent attorney.

In the case at bar, trial counsel's failure also caused prejudice. As was set out in detail in the first argument in this brief, the decision in *Gant* requires the suppression of all of the relevant evidence in this case. The only thing lacking was the filing of a suppression motion before the trial court. It is true that this motion would undoubtedly have been denied by the Superior Court in this case based upon *Stroud*. However for the purpose of claiming ineffective assistance of counsel, the issue is not how the trial court would have ruled. Rather, the issue is the preservation of the argument for appeal. Had trial counsel brought the motion, there would be no question of its preservation as an argument on appeal.

In the preceding argument in this brief, defendant has presented law indicating that he can argue the validity of the search of his truck for the first time on appeal. To the extent this court rejects this claim, and refuses to

address the validity of that stop because the issue was not properly preserved on appeal, then trial counsel's failure to bring the suppression motion has caused prejudice. Thus, if this court rejects Argument I in this brief, it should find that trial counsel's failure to bring a suppression motion denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. Consequently, the defendant is entitled to a new trial.

**III. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CHARGE**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a 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). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence 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.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the state charged the defendant with possession of

methamphetamine with intent to deliver. Specifically, the state alleged that the defendant intended to deliver the methamphetamine residue the state forensic scientist found in the baggie taken from the defendant's pocket. The problem with this argument was that no reasonable juror could conclude that the defendant intended to deliver an amount of methamphetamine so small that the state's forensic scientist could not even weigh it. The decision in *State v. Robbins*, 68 Wn.App. 873, 846 P.2d 585 (1993), supports this conclusion.

In *Robbins, supra*, police officers executed a search warrant at the defendant's house looking for controlled substances and found three small plastic baggies and a spoon, as well as sales ledgers, cutting agents and paraphernalia tending to show that the defendant was a cocaine dealer. A state toxicologist used infrared spectrography to find small amounts of cocaine in the three baggies and on the spoon. Neither the cocaine in the baggies nor the cocaine on the spoon was in sufficient quantity to effect a sale. Following execution of the warrant, the state charged and convicted the defendant with possession of cocaine with intent to deliver. However, they vacated the verdict and entered judgment on the lesser included offense of possession upon its holding that there was no evidence that the defendant intended to deliver the minute quantities of cocaine in the baggies. The state then appealed. However, this court affirmed the decision of the trial court,

holding as follows:

The State argues that there was an “overwhelming amount of evidence that the defendant was buying and selling drugs.” Assuming that to be true, such evidence warrants only an inference that the defendant intended to deliver cocaine not yet possessed, and such an inference will not support a conviction for possession with intent to deliver.

The State argues that Robbins did not discard the three baggies because he intended to put new amounts of cocaine into them, then deliver the baggies and their contents – including the trace amounts present in the baggies on March 15, 1990 – to other persons. This argument fails because there is absolutely nothing to indicate that Robbins intended to use the three baggies to deliver cocaine in the future.

*State v. Robbins*, 68 Wn.App. at 876-877.

In the case at bar, as in *Robbins*, the police found a minute amount of a controlled substance in a baggie in the defendant’s possession. In fact, the amount in the case at bar was so small that the state forensic scientist could not even weigh it. In addition, in the case at bar, as in *Robbins*, there was no evidence that the defendant intended to use the baggie to deliver methamphetamine in the future. Thus, in the same manner that the evidence in *Robbins* was insufficient to support a finding that the defendant intended to deliver the cocaine in the baggies, so in the case at bar there is insufficient evidence to support a finding that the defendant intended to deliver the methamphetamine in the baggie from his pocket. As a result, this court should vacate the defendant’s conviction and remand with instructions to

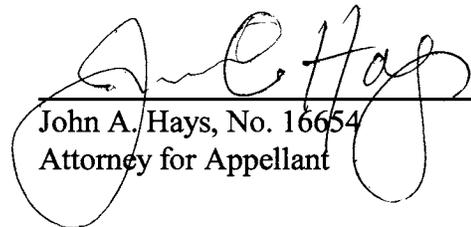
enter judgment on the lesser included offense of possession.

## CONCLUSION

The police illegally searched the defendant's vehicle, and thereby uncovered all of the evidence the state used at trial to support a conviction. As a result, this court should vacate the conviction and remand with instructions to dismiss. In the alternative, this court should vacate the conviction for possession with intent, and remand with instructions to enter judgment on the lesser included offense of possession of methamphetamine.

DATED this \_\_\_\_\_ day of June, 2009.

Respectfully submitted,



John A. Hays, No. 16654  
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, § 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 unreasonable 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.

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

**STATE OF WASHINGTON,**  
Respondent,

vs.

**SLIGHTE, Jason R.**  
Appellant.

**LEWIS CO. NO. 08-1-00468-1  
APPEAL NO: 38624-1-II**

**AFFIRMATION OF SERVICE**

**STATE OF WASHINGTON        )**  
  **) vs.**  
**COUNTY OF LEWIS            )**

**CATHY RUSSELL**, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **JUNE 22, 2009** , I personally placed in the mail the following documents

- 1. BRIEF OF APPELLANT
- 2.. AFFIDAVIT OF MAILING

to the following:

**MICHAEL GOLDEN  
LEWIS COUNTY PROS. ATTY  
345 W. MAIN ST.  
CHEHALIS, WA 98532**

**JASON R. SLIGHTE, DOC #951163  
OLYMPIA CORRECTIONS CTR.  
HC 80 BOX 2500  
FORKS, WA 98331**

Dated this 22<sup>ND</sup> day of JUNE, 2009 at LONGVIEW, Washington.

          Cathy Russell            
**CATHY RUSSELL**  
**LEGAL ASSISTANT TO JOHN A. HAYS**

