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ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Woods's constitutional right to privacy under Wash. Const. Article I, Section 7 by admitting evidence seized without a warrant.
2. The trial court erred in entering Finding of Fact No. 1.7. CP 22.
3. The trial court erred in entering the following Conclusions of Law: 2.1, 2.2, 2.3, 2.4, and 2.5. CP 22.
4. Mr. Woods's conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A warrantless arrest is valid only if based on probable cause. In this case, Mr. Woods was arrested without probable cause. Did the warrantless arrest without probable cause violate Mr. Woods's constitutional right to privacy under Wash. Const. Article I, Section 7?
2. Possession of a controlled substance requires proof that the accused person possessed a controlled substance. The state did not introduce evidence that Mr. Woods had dominion and control over the drugs in this case. Did Mr. Woods's conviction violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Officer Royle was driving in Morton and saw two men inside the entryway of an apartment building in the early morning hours of June 14, 2007. RP (9/10/08) 5-6; RP (9/26/08) 19. The two men were inside a closed glass door at a high bench, facing away from him. RP (9/10/08) 6-10. Royle parked and walked over to the door. RP (9/10/08) 10.

Officer Royle opened the door. RP (9/10/08) 11. He asked the men what they were doing. RP (9/10/08) 11. They told him they were exchanging phone numbers. RP (9/10/08) 11. He asked one of them, Lucas Woods, to show him the number. RP (9/26/08) 22-23. After some fumbling in his wallet, Mr. Woods produced a phone number. RP (9/26/08) 23. At this point, with the door opened and standing in the doorway, after about a minute of conversation, Officer Royle saw white powder on the bench and noticed the second man had a rolled up bill in his hand. RP (9/10/08) 10-12, 16-17.

Both men were arrested. RP (9/26/08) 23. According to Officer Royle, he did not see Mr. Woods consume the substance, and did not find any methamphetamine on him. RP (9/26/08) 29-30.

The state charged both men with possession of the methamphetamine. RP (9/26/08) 23, 29; CP 23-24. Mr. Woods moved to

suppress the evidence, arguing that the officer seized both men when he blocked the doorway. RP (9/10/08) 21-24. The court denied the motion. RP (9/10/08) 25-26.

At trial, Mr. Woods argued that the state had not proven that he had possessed the methamphetamine. RP (9/26/08) 70-73. He was convicted and sentenced, and he timely appealed. CP 4-12, 13.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. WOODS'S CONSTITUTIONAL RIGHT TO PRIVACY UNDER WASH. CONST. ARTICLE I, SECTION 7 BY ADMITTING EVIDENCE SEIZED FOLLOWING A WARRANTLESS SEARCH.

Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.¹ *State v. Parker*, 139 Wn.2d 486,

¹ The Fourth Amendment provides “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 or things to be seized.” U.S. Const. Amend. IV. The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Under Article I, Section 7, the prohibition against warrantless searches is subject to a few well-guarded exceptions; absent an exception, warrantless searches are impermissible. *State v. Eisfeldt*, 163 Wn.2d 628, 584, 185 P.3d 580 (2008). Exceptions to the warrant requirement are narrowly drawn, and the state bears a heavy burden in showing that a search falls within an exception. *Eisfeldt*, at 584. Where the state asserts an exception, it must produce the facts necessary to support the exception. *State v. Johnston*, 107 Wn.App. 280, 284, 28 P.3d 775 (2001). The validity of a warrantless search is reviewed *de novo*. *State v. Kypreos*, 110 Wn.App. 612, 616, 39 P.3d 371 (2002).

One exception to the search warrant requirement is where the search is performed incident to arrest. The rationale behind the exception is that an arrest triggers a concern not only for the officer's safety, but also for the preservation of potentially destructible evidence within the arrestee's control. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). In order for such a search to be valid, however, the

arrest must be a lawful custodial arrest. *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996). A warrantless arrest must be based on probable cause. *State v. Grande*, 164 Wn.2d 135, 140-146, 187 P.3d 248 (2008). Probable cause for arrest exists when the facts and circumstances known to the officer are sufficient to warrant a prudent or cautious person to believe that a crime has been committed. *State v. Chavez*, 138 Wn.App. 29, 34, 156 P.3d 246 (2007). “[M]ere suspicion of criminal activity” is insufficient to establish probable cause. *Chavez*, at 34.

A reviewing court looks to the totality of the circumstances to determine whether a person is in constructive possession of a substance. *Chavez*, at 35. Proximity alone is insufficient to establish constructive possession. *Chavez*, at 35.

In *State v. Chavez, supra*, a police officer heard a snorting noise coming from a bathroom stall containing three men. One man left the stall when he saw the officer. The second man was holding a dollar bill with a white powdery substance, and he attempted to hand it to the defendant, who refused to take it. The Court of Appeals found these facts insufficient to establish probable cause, and reversed the defendant’s conviction. *Chavez, supra*.

This case is nearly identical to *Chavez*. First, the officer’s observation of Mr. Woods and Osborne leaning over a high bench

parallels the sound of snorting overheard in *Chavez*. Second, when the officer confronted Mr. Woods and the other man in the lobby, the other man held a rolled up bill, just as the codefendant did in *Chavez*. RP (9/10/08) 12. Third, the officer discovered a white powder resembling drugs—on the bench in this case, and on the bill in *Chavez*.

Under these circumstances, as in *Chavez*, the officer did not have probable cause to arrest Mr. Woods. Accordingly, the evidence was seized in violation of his right to privacy under Wash. Const. Article I, Section 7.

II. MR. WOODS’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT HE POSSESSED A CONTROLLED SUBSTANCE.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*,

476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra.*

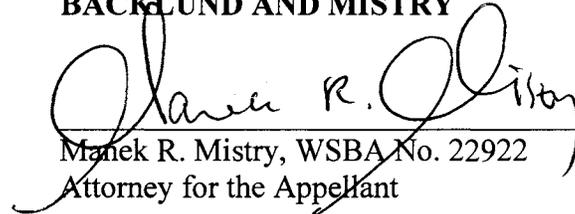
In this case, the evidence was insufficient to prove that Mr. Woods possessed a controlled substance. At most, the state proved that Mr. Woods was in close proximity to Osborne while the latter was using drugs. Even taking the evidence in a light most favorable to the state, there is nothing to show that Mr. Woods had dominion and control over the drugs, or even that he used the drugs prior to the officer's arrival. *See Chavez, supra.* Accordingly, the conviction must be reversed and the case dismissed with prejudice. *Smalis, supra.*

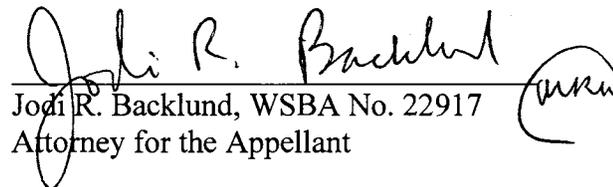
CONCLUSION

For the foregoing reasons, the conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on March 30, 2009.

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BY [Signature]
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Lucas Woods
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and to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 30, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 30, 2009.

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