

**COURT OF APPEALS NO. 39489-8-II**



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**STATE OF WASHINGTON,**

**Plaintiff/Respondent,**

**v.**

**SIDNEY MCDOWELL,**

**Defendant/Appellant.**

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**Pierce County Superior Court Cause Number No. 08-1-03915-5**

**The Honorable Rosanne Buckner  
Presiding Judge at the Trial Court**

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**OPENING BRIEF OF APPELLANT**

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it admitted the passport and savings bonds confiscated from Mr. McDowell's lunch box under the voluntary abandonment exception to the warrant requirement.
2. The trial court's factual finding that the lunch box was several feet away from Mr. McDowell when the police initially contacted him was in error. (Finding designated "Undisputed Fact" No. IV. <sup>1</sup>)
3. The trial court's conclusions of law that Mr. McDowell abandoned the lunch box were in error. (Conclusions of Law Numbers One and Two.)

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is voluntary abandonment established where Mr. McDowell merely dropped his lunch box and denied it was his? (Assignments of Error Numbers One and Three.)
2. Is the finding that the lunch box was several feet away from Mr. McDowell when the police contacted him supported by substantial evidence where the record shows that Mr. McDowell dropped the lunch box at his feet, and the police moved him several feet away from the lunch box? (Assignment of Error Number Two.)

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To the extent the "Undisputed Facts" are considered factual findings Appellant assigns error to No. IV. See CrR 3.6 Findings and Conclusions. CP 113-117.

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### III. STATEMENT OF THE CASE

#### 1. *Procedural History*

On August 25, 2008, the defendant/appellant, Sidney McDowell, was charged by Information with one count of first degree identity theft.<sup>2</sup> and one count of first degree possessing stolen property.<sup>3</sup> CP 1-2. On June 1, 2009, the Information was Amended to reduce the charge of first degree identity theft to second degree identity theft.<sup>4</sup> CP 45-46.

On June 2, 2009, Mr. McDowell's motions pursuant to CrR 3.5 and CrR 3.6 were heard and denied. RP 1 112. Written findings and conclusions for the trial court's rulings were entered on June 26, 2009. CP 118-122, 113-117.

Mr. McDowell proceeded to trial by jury on June 4, 2009. RP

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RCW 9.35.020 (1)(2)(a)

3

RCW 9A.56.140(1) and 9A.56.150(1)

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RCW 9.35.020(3)

2 151-333. On June 10, 2010 the jury found him guilty of the crime of second degree identity theft, and not guilty of the crime of first degree possessing stolen property. RP 2 334-336; CP 109-110.

On June 26, 2009, the trial court imposed a standard range sentence of fifty (50) months in the Department of Corrections. RP 2 339-346; CP 123-134. A timely Notice of Appeal was filed on the same date. CP 143.

## **2. *Factual Summary***

On August 22, 2008, at about 8:30 p.m., Pierce County Sheriff's Officers Trent Stephens and Tommie Nicodemus were patrolling the 2300 block of 96<sup>th</sup> Street South in Pierce County, Washington. Deputy Nicodemus was driving the patrol vehicle while Sergeant Stephens was the passenger. RP 2 152-154. The officers observed what appeared to be a domestic disturbance between a man and woman who were on foot. It appeared that the man was grabbing hold of the woman. RP 2 198. The officers immediately pulled over and contacted the couple. RP 2 199. The man dropped the orange lunch box he was holding as the officers approached. RP 1 35, RP 2 160, 203.

Upon contact the officers separated and moved the man and woman. Sergeant Stephens spoke with the man and Deputy Nicodemus talked to the woman. RP 2 161. The man was identified as Sidney McDowell and the woman was identified as Paula Fitzhugh. The officers obtained identification from both the man and woman, and established within several minutes that the dispute did not involve any physical injuries, and was of no legal consequence. RP 1 38, RP 2 211, 163. Sergeant Stephens, however, decided to open the lunch box. According to Sergeant Stephens Mr. McDowell denied the lunch box was his when questioned about it. Further, Mr. McDowell declined to respond to a request to open the lunch box. RP 2 163-165. Inside the lunchbox Sergeant Stephens found a large stack of savings bonds and a passport bearing the name Margaret Millin. RP 2 166. Sergeant Stephens ran the name on his computer and discovered Ms. Millin had reported these items stolen. Both Mr. McDowell and Ms. Fitzhugh were arrested.

While Sergeant Stephens was questioning Mr. McDowell, Deputy Nicodemus questioned Ms. Fitzhugh. In response to the questioning, Ms. Fitzhugh pulled a stack of bonds out of the waistband

of her pants and handed them over to the deputy. RP 2 206, 216-218.

Deputy Nicodemus ran the couple for warrants. Following their arrest for possessing stolen property, LESA records reported that both had outstanding arrest warrants. RP 1 38-40, 46.

At trial, Ms. Fitzhugh testified that on August 22, 2008, while walking ahead of Mr. McDowell, she found a large stack of what she believed was foreign money near a fence and some mailboxes at the side of the road. RP 2 237. She found all of the “money” secured with a rubber band. She quickly stuffed about half of it inside the waistband of her pants. Meanwhile, Mr. McDowell caught up with her and grabbed her to see what she had found. He snatched the money that was in her hands. RP 2 239. Mr. McDowell was carrying a lunch box. Ms. Fitzhugh did not recall seeing him place some of the “money” in the lunchbox. RP 2 238.

Ms. Fitzhugh testified that she was very excited and giddy upon finding the “money.” RP 2 239. Within three minutes of finding the “money” she saw the police approaching. RP 2 240. She and Mr. McDowell were separated and questioned. RP 2 261. She learned,

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after being arrested, that the “money” was actually savings bonds with a value in excess of \$37,000. RP 2 271.

**IV. THE TRIAL COURT’S DENIAL OF MR. MCDOWELL’S MOTION TO SUPPRESS EVIDENCE FOUND IN HIS LUNCH BOX, ON THE GROUNDS THAT HE HAD ABANDONED THE LUNCH BOX, CONSTITUTES REVERSIBLE ERROR OF CONSTITUTIONAL MAGNITUDE.**

The Fourth Amendment to the US Constitution 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.

Article 1, § 7 of the Washington Constitution provides “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Although they protect similar interests, “the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.” State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). The Fourth Amendment protects only against

“unreasonable searches” by the State, leaving individuals subject to any manner of warrantless, but reasonable searches. U.S. Const. amend. IV (“The right of the people to be secure in their ... houses ... against unreasonable searches ... shall not be violated...”); Illinois v. Rodriguez, 497 U.S. 177, 187, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (“[W]hat is at issue ... is not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated.”).

By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”). This is because “[u]nlike in the Fourth Amendment, the word ‘reasonable’ does not appear in any form in the text of article I, section 7 of the Washington Constitution.” State v. Morse, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.

State v. Eisfeldt, 163 Wn.2d 628, 634-635, 185 P.3d 580 (2008).<sup>5</sup>

Generally, evidence seized during an illegal search is suppressed

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No analysis is necessary under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) where the court applies “established principles of state constitutional jurisprudence.”

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under the exclusionary rule. See State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). In addition, evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine. See State v. O'Bremski, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

The Washington State Supreme Court has stated: “The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception.” State v. Ladson, 138 Wn.2d 343, 357, 979 P.2d 833.

- a. ***The trial court’s factual finding that The lunch box was several feet away from Mr. McDowell when the police contacted him was unsupported by the facts in the record, and the trial court’s conclusions of law are not supported by the factual findings.***

When reviewing a trial court’s ruling on a motion to suppress evidence, the Court of Appeals independently determines whether (1)

substantial evidence supports the trial court’s factual findings, and (2) the factual findings support the trial court’s conclusions of law. State v. Carney, 142 Wn.App. 197, 201, 174 P.3d 142 (2007), *review denied* 164 Wn.2d 1009, 195 P.3d 87 (2008). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings of fact are treated as verities on appeal. State v. Hill, 123 Wn.2d at 644, 870 P.2d 313. (citations omitted). The trial court’s conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In Mr. Mr. McDowell’s case, the trial court found that “At the time the defendant was contacted the lunch box was several feet away from the defendant.” CP 113-117.<sup>6</sup> Based on this “fact,” combined with the finding that Mr. McDowell denied the lunch box belonged to

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As noted previously, appellant assumes the section entitled “Undisputed Facts” in the CrR 3.6 Findings and Conclusions are considered factual findings. No “factual findings” are listed on the Order. CP 113-117.

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him, the trial court concluded that the lunch box was abandoned.<sup>7</sup>

(Conclusion of Law Nos. I and II) CP 113-117.

The Court's finding that the lunchbox was located several feet away from Mr. McDowell when he was initially contact by the police, however, is not supported by the record. On the contrary, Sergeant Stephens ultimately testified that he was, at times during his testimony, "guessing" as to where the lunch box was, because he could not really recall. RP 2 176. Sergeant Stephens did not prepare a police report and the incident occurred almost a year prior to his testimony.

Deputy Nicodemus, who did prepare a written report, testified that Mr. McDowell simply "let go of it." RP 1 35. " Mr. McDowell "just dropped it, had his hand down to the side" and dropped it at his feet. RP 1 35, RP 2 203. Upon contact, the couple was immediately separated and moved to be questioned individually. RP 2 202. Sergeant Stephens "guessed" that the two were separated by fifteen

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Again, the CrR 3.6 Order is unclear. The statement attributed to Mr. McDowell is listed under "Disputed Facts" but no specific factual finding is made.

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feet. RP 2 161. Deputy Nicodemus, on the other hand, believed the couple was separated by only “a few feet.” RP 2 202. After the couple was separated by Deputy Nicodemus, Ms. Fitzhugh was taken in one direction and Mr. McDowell in another. The lunch box, however, was not moved. RP 2 204. The facts in the record substantially indicate therefore, that Mr. McDowell did not drop the lunch box several feet away from him, but rather he dropped it at his feet and was moved at least several feet away from the lunch box by the police. Certainly, the evidence does not substantially support any contrary finding. This Court should, therefore, determine that the finding that Mr. McDowell was several feet from the lunch box when initially contacted is in error. In fact, the record shows that the lunch box was at his feet where he dropped it, until he was moved by the police. Furthermore, the trial court’s conclusions that Mr. McDowell had abandoned the lunch box were not supported by the findings and were in error.

***b. Mr. McDowell has standing under both the Federal and State Constitutions to challenge the seizure and search of his lunch box.***

of which carry a privacy expectation.

ii. Article 1, § 7 standing.

Unlike the Fourth Amendment and its reasonability determination, article I, section 7 protections are not “confined to the subjective privacy expectations of modern citizens.” Instead article I, section 7 protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.”

Eisfeldt, 163 Wn.2d at 637, 185 P.3d 580.

Pursuant to Article 1 § 7 Washington courts have applied the automatic standing doctrine. State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980); State v. Jones, 146 Wn.2d 328,332,45 P.3d 1062 (2002) (*en banc*), citing Simpson, 95 Wn. 2d at 179. Two requirements must be met to invoke automatic standing: (1) possession must be an essential element of the offense charged; and (2) the defendant must have been in possession of the seized property at the time of the contested search or seizure. Jones, 146 Wn. 2d at 3332, citing Simpson, 95 Wn.2d at 181.

Mr. McDowell has automatic standing to contest the search and seizure of the savings bonds and passport seized from the lunch box.

He meets the first prong of the automatic standing test, because possession is an essential element of the charged crimes of both identity theft and possession of stolen property. He meets the second prong as well, because the court found probable cause that he possessed the stolen property at the time of the seizure and search. *Jones, supra.*

Additionally, Mr. McDowell has standing because he has an actual subjective, reasonable expectation of privacy to challenge the seizure and search of the savings bonds and passport found in the lunch box, which he was holding when police observed him arguing with Ms. Fitzhugh, because the lunch box also held his personal papers and is the functional equivalent of a briefcase or purse. Ms. Fitzhugh testified that the couple used the lunch box in lieu of a purse because she chose not to carry one. RP 2 244. See *State v. Carter*, 127 Wn.2d 836,841,904 P.2d 290 (1995) (a defendant who lacks automatic standing may still possess a legitimate expectation of privacy in the place searched or the thing seized, and on that basis be able to challenge the search seizure); *State v. Kealey*, 80 Wn.App. 162,907 P.2d 319 (1995) (defendant had reasonable expectation of privacy in purse); *State v. Parker*, 129

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Wn.2d 486,987 P.2d 73 (1999) (same); State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002)(same).

- c. ***The warrantless search of Mr. McDowell's lunch box was unlawful under both the Washington and Federal Constitutions because it did not satisfy the voluntary abandonment exception to the warrant requirement.***

“A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement [.]” Flippo v. West Virginia, 528 U.S. 11, 120 S.Ct. 7, 8, 145 L.Ed.2d 16 (1999); State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992).

“The warrant requirement is especially important under article I, section 7, of the Washington Constitution **as it is the warrant which provides the ‘authority of law’ referenced therein.**” State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (emphasis added) (citing City of Seattle v. Mesiani, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

A warrantless search of constitutionally protected areas is presumed unreasonable absent proof that one of the few well-

established exceptions to the warrant requirement applies. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); Ladson, 138 Wn.2d at 349, 979 P.2d 833; State v. Johnson, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996). “The State bears the burden of proof to show that a warrantless search falls within an exception to the warrant requirement.” State v. Link, 136 Wn.App. 685, 695, 150 P.3d 610, review denied 160 Wn.2d 1025, 163 P.3d 794 (2007).

i. **Voluntary abandonment was not established.**

In State v. Reynolds, 144 Wn.2d 282, 287, 27 P.3d 200 (2001), the court held, “Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual’s rights under the Fourth Amendment or under article I, section 7 of our state constitution.” A defendant’s privacy interest in property may be voluntarily abandoned.

Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. 1 Wayne R. LaFave, Search and Seizure § 2.6(b), at 574 (3d ed.1996). “Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged

abandonment should be considered.” *State v. Dugas*, 109 Wn.App. 592, 595, 36 P.3d 577 (2001). The issue is not abandonment in the strict property right sense but, rather, “whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.” *Id.* (quoting *United States v. Hoey*, 983 F.2d 890, 892-93 (8th Cir.1993)); *see also United States v. Nordling*, 804 F.2d 1466 (9th Cir.1986).

*State v. Evans*, 159 Wn.2d 402, 408, 150 P.3d 105 (2007).

As discussed above, whether property has been voluntarily abandoned is a legal conclusion generally based on both act and intent.

*State v. Evans*, 159 Wn.2d at 408. “Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.” *Id.* (quoting *State v. Dugas*, 109 Wn.App. at 595). The ultimate question to be determined is “whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.” *State v. Evans*, 159 Wn.2d at 408 quoting *State v. Dugas*, *supra* (quoting *United States v. Hoey*, 983 F.2d 890, 892-93 (8th Cir.1993)).

In *State v. Evans*, *Supra.*, a briefcase was located in the backseat

of the defendant's truck; the defendant denied ownership. Police seized it and discovered material in it that led to his conviction of manufacturing methamphetamine and unlawful possession of methamphetamine with intent to deliver. Prior to trial, the defendant's motion to suppress the evidence was denied on the basis that he had voluntarily abandoned the briefcase. The Court of Appeals affirmed, but the Supreme Court granted review and reversed, holding that a defendant's denial of ownership alone, of an object seized in an area where he has a privacy interest, did not amount to voluntary abandonment. 159 Wn.2d at 404-05, 412-13. The Evans Court noted:

In the circumstances here, Evans had a privacy interest in the area searched, the item that was seized - the briefcase - was locked, and he objected to its seizure. The fact that Evans denied ownership of the briefcase is not, by itself, sufficient to exhibit the combination of act and intent of abandonment in light of those circumstances.

159 Wn.2d at 413, citing 1 *LaFave, Supra*, sec.2.6(b), at 574.

In *State v. Dugas*, the Court looked to the defendant's "act and intent" in determining whether the appellant had voluntarily abandoned his jacket by placing it on the hood of his car. *State v. Dugas*, 109

Wn. App. 592, 36 P.3d 577 (2001). Mr. Dugas was approached on the street by police officers investigating a domestic violence complaint. He took off his jacket and placed it on top of his car during the conversation. State v. Dugas, 109 Wn. App. At 594. When the officers arrested Mr. Dugas, he left the jacket where it was. The police later seized the jacket and found cocaine in a container in a jacket pocket. *Id.* The appellate Court found that Mr. Dugas did not voluntarily relinquish his expectation of privacy in his jacket by placing it on the hood of his vehicle. *Id.* At 596.

As in Evans and Dugas, the appellant here did not intend to relinquish his expectation of privacy in his lunch box, particularly in view of the numerous personal documents it contained. Denial of ownership is not enough to establish voluntary abandonment. State v. Evans, Supra. The only act that accompanied Mr. McDowell's denial of ownership was the act of dropping the lunch box to his feet. Notably, Mr. McDowell did not throw, toss, or otherwise attempt to conceal the lunch box. He merely "let it drop." This fact is insufficient by which a reasonable conclusion can be reached that Mr. McDowell

voluntarily abandoned his lunch box.

ii. **Alternatively, the lunchbox was involuntarily abandoned.**

“Involuntary abandoned property occurs when the property was abandoned as a result of illegal police behavior.” *State v. Evans*, 159 Wn2d at 408, citing *State v. Reichenbach*, 153 Wn.2d 126, 135-137, 101 P.3d 80 (2004) (trial counsel was ineffective for failure to move to suppress baggie of methamphetamine seized during search of vehicle with invalid warrant, because “property is deemed to be involuntarily abandoned . . . if the defendant shows (1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment.”).

In the case at bar, the trial court relied, in part, on *State v. Nettles*, 70 Wn.App. 706, 895 P.2d 699 (1993) in reaching its conclusion that the lunch box was abandoned. (Conclusion of Law No. II) CP 113-117. *State v. Nettles*, however, involved an analysis of involuntary abandonment rather than voluntary abandonment.

In *State v. Nettles, Supra*, a police officer contacted two

have been free to return to and retrieve his lunch box. While this result may not have been favorable to the rightful owner of the savings bonds and passport, it was, nonetheless, constitutionally required because the police had neither a warrant nor probable cause to search the lunch box.

V. CONCLUSION

The trial court erred when it refused to suppress the evidence unlawfully discovered in Mr. McDowell's lunch box. The State failed to show that Mr. McDowell voluntarily abandoned the lunch box. Alternatively, the lunch box was involuntarily abandoned. For all of the foregoing reasons and conclusions Mr. McDowell respectfully requests that this Court reverse the trial court's order denying his Motion to Suppress, reverse his conviction of second degree identity theft, and remand his case to the trial court.

Respectfully Submitted this 4<sup>th</sup> day of February, 2010.

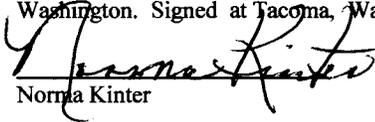


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Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on February 4, 2010, she delivered in person , to the Pierce County Prosecutor, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by United States mail to appellant Sidney McDowell, DOC # 921564, Washington Corrections Center, Post Office Box 900, Shelton, Washington 98584, true and correct copies of this 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 February 4, 2010.

  
Norma Kinter

