

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
C. STATEMENT OF THE CASE.....	4
1. <u>Procedural facts:</u>	4
2. <u>Facts related to suppression hearing:</u>	6
3. <u>Second suppression hearing</u>	10
D. ARGUMENT	11
1. <u>THE TRIAL COURT ERRED BY DENYING THE FIRST MOTION TO SUPPRESS BECAUSE MR. PALERMO WAS ILLEGALLY DETAINED WHEN THE POLICE OFFICER BLOCKED THE PARKED CAR IN WHICH HE WAS SITTING WITH HIS PATROL CAR AND CONDUCTED AN INVESTIGATION BASED SOLELY ON THE CAR BEING OCCUPIED BY THREE PEOPLE IN “A HIGH CRIME AREA.”</u>	11
a. The Officer parked his car behind the car occupied by Mr. Palermo, at least partially blocking him in	13
b. The Officer commanded passenger Cory Aldrich to stop reaching into a backpack.....	14
2. <u>THE ARREST WAS NOT SUPPORTED BY PROBABLE CAUSE AND THE SUBSEQUENT SEARCH WAS NOT INCIDENT TO A VALID ARREST</u>	17
3. <u>THE SEARCH OF THE VEHICLE WAS CONDUCTED IN PART PURSUANT TO MR.</u>	

ALDRICH'S ARREST. ARIZONA V. GANT
DICTATES THAT A VEHICLE SEARCH
CONDUCTED BY OFFICERS AFTER
ARRESTING MR. ALDRICH IS A
VIOLATION OF THE FOURTH
AMENDMENT PROTECTION AGAINST
UNREASONABLE SEARCHES AND
SEIZURES.....20

E. CONCLUSION.....22

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Day</i> , 161 Wn.2d 889, 168 P.3d 1265 (2007)	12, 13, 17
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998)	19
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.3d 410 (2004)	20
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986)	20
<i>State v. Mote</i> , 129 Wn. App. 279, 120 P.3d 596 (2005)	16, 17
<i>State v. McKenna</i> , 91 Wn. App. 554, 958 P.2d 1017 (1998)	19
<i>State v. Neeley</i> , 113 Wn. App. 100, 52 P.3d 539 (2002)	19
<i>State v. O’Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003)	12, 13, 14, 16, 19, 20
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999)	19
<i>State v. Rankin</i> , 151 Wn.2d 689, 92 P.3d 202 (2004)	13
<i>State v. Terrovona</i> , 105 Wn.2d 632, 716 P.2d 295 (1986)	19
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984)	19
<i>State v. Young</i> , 135 Wn.2d 498, 957 P.2d 681 (1998)	12, 14, 15

<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Arizona v. Gant</i> , 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)	2, 4, 5, 6
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) ...	12, 13
<i>United States v. Mendenhall</i> , 446 U.S. 544, 100 S.Ct. 1870 (1980)	15
<i>Wong Sun v. United States</i> , 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963)	20

<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 69.50.412	18

RCW 69.50.412(1).....	5, 18, 19
RCW 69.50.4013(1).....	4

COURT RULE **Page**

CrR 3.5.....	5
CrR 3.6.....	9

CONSTITUTIONAL PROVISIONS **Page**

Wash. Const. art. 1, § 7.....	3, 12, 13, 16, 19, 20, 21
U. S. Const. Amend. IV.....	3, 12, 21

OTHER AUTHORITIES **Page**

<i>State v. Patton</i> , No. 80518-1, slip op. (Supreme Ct. Oct. 22, 2009).....	21
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A. ASSIGNMENTS OF ERROR

1. Following the first suppression motion, the trial court erred by finding that Officer Michael Lowrey's and Officer Doug Lowrey's detention of appellant Jeff Palermo was a "social contact." Conclusion of Law [CL] 2.1, Findings of Fact [FF] 1.6, 1.9, 1.11, and 1.23. A copy of the Findings and Conclusions entered March 26, 2009 is attached as Appendix A. Clerk's Papers [CP] at 54-57.

2. The trial court erred by concluding that there was no seizure and that a reasonable person would feel that his or her freedom of movement had not been curtailed. CL 2.2. Appendix A.

3. The trial court erred by concluding that the arrest of Mr. Palermo was lawful. CL 2.4. Appendix A.

4. Although not made a specific finding of fact or conclusion of law, the trial court erred by denying Mr. Palermo's first motion to suppress the evidence obtained by police during the arrest of a passenger in the car during the seizure.

5. Following the second suppression motion, the trial court erred in finding that Mr. Palermo was not handcuffed and had ready access to any object contained in the car in which he had been seated. FF 1.3. A copy of the Findings of Fact and Conclusions of Law from Second 3.6 Hearing entered August 18, 2009 is attached as Appendix B. CP 21-22.

6. The trial court erred in finding that Mr. Palermo stated that the pipe was a marijuana pipe and that he had marijuana in his pocket. FF 1.4. Appendix B.

7. The trial court erred by concluding that *Arizona v. Gant*¹ is not controlling in this case and has no impact on the admissibility of evidence seized by police. CL 2.1. Appendix B.

8. The trial court erred by concluding that the officers had probable cause to believe that Mr. Palermo was committing the offense of possession of marijuana. CL 2.3. Appendix B.

9. The trial court erred by concluding that the arrest of Mr. Palermo was lawful. CL 2.4. Appendix B.

10. The trial court erred in denying the second motion to suppress.

11. The arrest was not supported by probable cause.

12. The warrantless search was not performed incident to a valid custodial arrest.

13. The trial court erred in entering Finding of Fact 2.1 and Conclusion of Law 3.1 in the Judgment and Sentence, which found the appellant guilty of possession of methamphetamine and unlawful use of drug paraphernalia. CP 29, 31.

¹*Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

14. The trial court erred in entering Conclusions of Law 1.1, 1.2, and 1.3 in the Stipulated Facts and Conclusions of Law finding Mr. Palermo guilty.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by denying the motion to suppress where the police officer parked his patrol vehicle behind Mr. Palermo's car and conducted an investigation based solely on suspicion that there were three people in a parked car in what he called "a high crime area"? Assignments of Error 1, 2, 3, 4, 13 and 14.

2. Whether the State violated Mr. Palermo's constitutional right under the Fourth Amendment of the United States Constitution and Article 1, § 7 of the Washington States Constitution, where the police officer parked his car behind Mr. Palermo's car and conducted an investigation based solely on suspicion that the car in which Mr. Palermo was sitting with two other people appeared to be "an odd situation" in "a high crime area"? Assignments of Error 1, 2, 3, 4, 13 and 14.

3. Mr. Palermo was ordered out of the car after an officer saw a pipe partially hidden under his right leg as the officer was placing a passenger under arrest. Mere possession of drug paraphernalia is not a crime under state statute. The deputy testified that he saw a pipe containing what he

believed to be marijuana residue. Mr. Palermo was searched and police found marijuana and another pipe on his person. Under these circumstances, did the police lack probable cause to arrest? Assignments of Error 6, 8, and 9.

4. Where the arrest is illegal, should all evidence seized as a result of a search incident to that arrest be suppressed, and the case dismissed? Assignments of Error 8, 9, 10, 11, and 12.

5. Whether *Arizona v. Gant*, which holds that police may search the vehicle of its recent occupant after his arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of the arrest, dictates that the search of the car in which Mr. Palermo had been seated was unconstitutional, where a passenger was arrested for having warrants? Assignments of Error 5 and 7.

C. STATEMENT OF THE CASE

1. Procedural facts:

Appellant Jeff Palermo was charged by information filed in Lewis County Superior Court with one count of possession of methamphetamine, contrary to RCW 69.50.4013(1), and unlawful use of drug paraphernalia,

contrary to RCW 69.50.412(1). CP 99-100.

Pursuant to CrR 3.6, Mr. Palermo brought a motion to suppress evidence based on the illegality of his initial seizure. CP at 70-95. Following a hearing on March 18, 2009, the Honorable Nelson Hunt denied the motion to suppress, finding that no seizure occurred and ruled that the evidence obtained by police was admissible. RP at 79; CP 54-57.

Following the Supreme Court's ruling in *Arizona v. Gant*, Mr. Palermo filed a second motion for suppression on May 21, 2009. CP 44-52. The court denied the motion, finding that *Gant* was inapplicable and that the officers had probable cause to believe that Mr. Palermo was committing the crime of possession of marijuana when he was arrested. RP at 100.

Mr. Palermo submitted to a non-jury trial based upon stipulated facts. CP 23-28. Based upon police and lab reports, Judge Hunt found Mr. Palermo guilty as charged in the information. RP 105-06; CP 23-28. Stipulated Facts and Conclusions of Law were entered August 18, 2009.

The matter came on for sentencing on August 18, 2009, and Mr. Palermo was sentenced as first time offender. CP 29-37.

Notice of appeal was filed on August 18, 2009. CP 4-13. This appeal follows.

2. Facts relating to first suppression hearing:

On August 12, 2008, at about 10:45 p.m., Officer Michael Lowrey of the Centralia Police Department, observed a vehicle parked in the 100 block of Chestnut Street in Centralia, Lewis County, Washington. RP at 4. The car was parked in a residential area. RP at 5. Officer Lowrey pulled in behind the stopped car and parked his vehicle behind it. RP at 6. There were three people in the car. RP at 24. Officer Lowrey approached the man seated in the driver's seat and asked him what he was doing. RP at 7, 8. Mr. Palermo said that he was not doing anything. RP at 8. When asked the name of the person who owned the car, Mr. Palermo said it belonged to his mother. RP at 8. Officer M. Lowrey then asked for the name of Mr. Palermo's mother. RP at 20. Officer Doug Lowrey arrived shortly after Officer M. Lowrey spoke with Mr. Palermo. RP at 8.

Officer M. Lowrey determined that the car was registered to someone other than Mr. Palermo's mother. RP at 9. Officer Lowrey confronted him with this information, and Mr. Palermo stated that the title may not have transferred yet and that it was possibly registered under his aunt's name. RP at 9, 59. Mr. Palermo told him his aunt's first name, but could not remember her last name at the time. RP at 59, 68.

Mr. Palermo testified that he did not believe that he was free to leave.

RP at 59. Mr. Palermo also stated that he was blocked in and physically unable to leave because a car was parked approximately one to two feet in front of his vehicle, and that the police vehicle was parked three to four feet from his rear bumper. RP at 59, 60. He stated he was not able to get his car out and enter into traffic. RP at 60.

Officer M. Lowrey twice told the front seat passenger—Cory Aldrich—to keep his hands where he could see them and to keep them from dropping down toward a backpack. RP at 25, 26. Officer D. Lowrey asked the passenger’s name, and he stated he was Cory Aldrich. RP at 9, 44. He was found to have multiple warrants for his arrest, and he was taken into custody. RP at 9, 10, 44. As Officer D. Lowrey took Mr. Aldrich into custody, he saw there was glass pipe sticking out from under Mr. Palermo’s right leg. RP at 10, 45. He told officer M. Lowrey about the pipe, and he then ordered Mr. Palermo and the third person out of the car. RP at 10, 46. He found a pipe on the driver’s seat. RP at 10, 46. Officer M. Lowrey stated that the pipe had some marijuana residue in it. RP at 33. Mr. Palermo told Officer M. Lowrey that he had marijuana on his person and that it was his pipe. RP at 11. Officer M. Lowrey stated that he searched that car incident to Mr. Aldrich’s arrest and because he “had been told he had a glass pipe under his leg, too.” RP at 32.

The court entered the following Findings of Fact and Conclusion of

Law on March 26, 2009:

- 1.1 On 08-13-2008, at approximately 2030hrs, in Lewis County, Officer Mike Lowrey, Centralia Police Department, was on patrol in the area of Chestnut and Pearl Streets, Centralia.
- 1.2 Officer M. Lowrey knew this area of Centralia to have a high crime rate.
- 1.3 Officer M. Lowrey noticed a vehicle parked in the 100 block of the south side of Chestnut.
- 1.4 Officer m. Lowrey saw that the vehicle was occupied by three persons.
- 1.5 Officer M. Lowrey, who was in full uniform, stopped his un-marked patrol vehicle behind the parked, occupied passenger car.
- 1.6 Officer M. Lowrey exited his vehicle and contacted the occupants of the parked car at the driver's side window.
- 1.7 Seated in the vehicle were the defendant, Jeffrey James Palermo, a second male subject later identified as Cory Aldrich, and an un-identified female passenger.
- 1.8 The defendant was seated in the driver's seat, Aldrich in the front passenger seat, and the female in the rear passenger seat.
- 1.9 Officer M. Lowrey identified himself and inquired of the occupants of the vehicle what they were doing.
- 1.10 The defendant stated the three were not doing anything.
- 1.11 Officer M. Lowrey explained to the defendant and his associates that the location where they were parked was a high crime area.
- 1.12 Officer M. Lowrey asked the defendant to whom the vehicle in which he was seated belonged.
- 1.13 The defendant replied that the vehicle belonged to his mother, who he identified by name.
- 1.14 Officer M. Lowrey ran the registration and saw that the owner was listed as someone other than the defendant's mother.
- 1.15 Officer M. Lowrey pointed out the discrepancy to the defendant to the defendant.

- 1.16 The defendant then stated the vehicle had been recently purchased by his mother from his aunt, who he was able to identify by first name only.
- 1.17 Throughout his contact with the defendant, Officer M. Lowrey noticed Aldrich reach into a backpack that was inside the vehicle at his feet.
- 1.18 Officer M. Lowrey asked Aldrich not reach inside the bag for officer safety.
- 1.19 After being asked a second time not to reach into the bag, Aldrich complied with Officer M. Lowrey's request.
- 1.20 After being informed the vehicle had been recently sold to the defendant's mother by his aunt, Officer M. Lowrey removed himself from the driver's side window and walked back to the rear of the defendant's vehicle where he continued to check on the registration.
- 1.21 While Officer M. Lowrey was standing at the rear of the defendant's vehicle, Officer D. Lowrey, Centralia police Department, arrived on scene to assist.
- 1.22 Officer D. Lowrey was in full uniform and operating a fully-marked patrol vehicle.
- 1.23 Officer D. Lowrey contacted the occupants of the vehicle at the driver's side window and asked what the defendant and his associates were doing in the area.
- 1.24 The occupants replied they were not doing anything.
- 1.25 Officer D. Lowrey asked the male occupant seated in the front passenger seat to identify himself.
- 1.26 The male subject indentified himself as Cory Aldrich.
- 1.27 Officer M. Lowrey, who was able to hear Aldrich indentify himself, ran his name through dispatch while still at the rear of the defendant's vehicle.
- 1.28 The Officers, both of whom were wearing ear microphones, were informed Aldrich was wanted on an outstanding warrant.
- 1.29 Officer D. Lowrey walked around the vehicle to the passenger side where he instructed Aldrich to exit the vehicle.
- 1.30 As Aldrich got out of the car, immediately prior to being taken into custody, Officer D. Lowrey saw what he, based on the training and experience, believed to be a marijuana pipe partially tucked under the right leg of the defendant.

- 1.31 Officer D. Lowrey voiced his discovery to Officer M. Lowrey.
- 1.32 Officer M. Lowrey had the defendant exit the vehicle and placed him under arrest for Possession of Marijuana.
- 1.33 The acts occurred in Lewis County in Washington State.

From the foregoing Findings of Fact, the court reaches and makes the following:

II. CONCLUSIONS OF LAW

- 2.1 The interaction between Officers M. and D. Lowrey and the defendant and the other occupants of the vehicle was a social contact.
- 2.2 A reasonable person in the position of the defendant would feel that his or her freedom of movement had not been curtailed.
- 2.3 The marijuana pipe was in open view.
- 2.4 The arrest of the defendant was performed with lawful authority.

CP at 29-37. Appendix A.

3. Second suppression hearing:

Following *Arizona v. Gant*, defense counsel filed a second suppression motion, which was heard by Judge Hunt on July 10, 2009. CP 44-52. After hearing argument, the court made the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

- 1.1 The Findings of Fact from the previous 3.6 hearing are incorporated by reference in these Findings.

- 1.2 When Officer D. Lowrey instructed Aldrich to exit the vehicle, the defendant was still seated in the driver's seat of that same car.
- 1.3 The defendant was not handcuffed and had ready access to any object contained within the interior of the vehicle in which he was seated.
- 1.4 When Officer D. Lowrey voiced his discovery of the marijuana pipe next to the defendant's leg, the defendant, without having been questioned about the marijuana pipe by either officer, stated it was a marijuana pipe and that he had the marijuana in his pocket.

II. CONCLUSIONS OF LAW

- 2.1 The holding in *Arizona v. Gant*, 173 L. Ed. 2d 485 (2009), has no impact upon admissibility of the evidence seized in this case.
- 2.2 The Court could properly consider the contents of police reports submitted by the defendant in support of his Motion to Suppress.
- 2.3 Officer M. Lowrey had probable cause to believe the defendant was committing the offense of Possession of Marijuana.
- 2.4 The arrest of the defendant was lawful.

CP 44-52. Appendix B.

D. ARGUMENT

1. **THE TRIAL COURT ERRED BY DENYING THE FIRST MOTION TO SUPPRESS BECAUSE MR. PALERMO WAS ILLEGALLY DETAINED WHEN THE POLICE OFFICER BLOCKED THE PARKED CAR IN WHICH HE WAS**

**SITTING WITH HIS PATROL CAR AND
CONDUCTED AN INVESTIGATION BASED
SOLELY ON THE CAR BEING OCCUPIED BY
THREE PEOPLE IN “A HIGH CRIME AREA.”**

Contrary to the holding of the trial court, Mr. Palermo was seized without any articulable suspicion that he had engaged in criminal activity prior to his arrest. First, he was seized when the officer parked his vehicle behind his vehicle. Second, he was seized when the officer directed his passenger two times not to reach into a backpack for officer safety. That this was done for “officer safety” does not negate the fact that the directive itself constituted a seizure.

The Fourth Amendment and article I, § 7 of our state constitution prohibit unreasonable searches and seizures. *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007); *State v. O’Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003); *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998). As a general rule warrantless searches and seizures are *per se* unreasonable, and the State bears the burden of demonstrating the applicability of a recognized exception to the rule. *Day*, 161 Wn.2d at 893-94; *Young*, 135 Wn.2d at 510. One such exception is that officers may briefly stop and detain a person they reasonably suspect is, or is about to be, engaged in “criminal conduct.” *Day*, 161 Wn.2d at 893. This is often referred to as a “*Terry* stop.” *Day*, 161 Wn.2d at 893 (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d

889 (1968)). If the initial stop is not lawful or exceeds the scope of a lawful search, the fruits of the search may not be admitted in court. *Day* at 895. In this case, the officer had only the suspicion that the vehicle was parked in what he described as “a high crime area” and that it was occupied by three people. RP at 17. The officer’s suspicion that this was “an odd situation”² did not justify a seizure under the constitution, even a limited seizure such as a *Terry* stop. *Day* states that in these circumstances, the officer may approach and speak with the occupants of the vehicle, but may not detain them. *Day* at 898, fn. 7.

a. The Officer parked his car behind the car occupied by Mr. Palermo, at least partially blocking him in.

The testimony of Officer M. Lowrey established, and the Court found at Finding of Fact 1.5 entered following the first suppression motion, that he parked his patrol car directly behind the car occupied by Mr. Palermo. FF 1.5. CP 55. A seizure occurs, under Article 1, § 7, when considering all the circumstances, an individual’s freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer’s use of force or display of authority. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); *State v. O’Neill*, 148 Wn.2d 564, 574,

²RP at 17.

62 P.3d 489 (2003). “The standard is ‘a purely objective one, looking to the actions of the law enforcement officer.’” *O’Neill* at 574, quoting *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998).

Here, looking objectively at the facts, it is obvious that Mr. Palermo was seized when the officer parked behind his car. Here, Officer M. Lowrey parked his car directly behind the Buick in which Mr. Palermo was seated, with the intent of detaining him. Certainly someone in Mr. Palermo’s position, who observes a patrol car pull in behind him, would reasonably believe that he was seized by the officer and was not free to leave. The trial court erred in holding that Mr. Palermo was not seized at this point and in finding in that a reasonable person would not “feel” that his freedom of movement had been curtailed and that the arrest was performed with lawful authority.

b. The Officer commanded passenger Cory Aldrich to stop reaching into a backpack.

Even if this Court were to find that Mr. Palermo was not seized when Officer M. Lowrey parked his car and approached the stopped car, this Court should find he was seized when Officer M. Lowery repeatedly directed Mr. Aldrich to stop reaching into a backpack. The trial court found, at finding of fact 1.18 and 1.19, that the officer asked him not reach into the backpack. CP 55. The officer testified that his basis for directing Mr. Aldrich not to reach

into the backpack was because he did not know what he had in the backpack.

RP at 26. Because the purpose of this command was “officer safety,” it is axiomatic that Mr. Palermo was not free to disregard this command. It is common knowledge that directives that relate to safety, as opposed to investigation, cannot be disregarded without risk of peril to the subject. “Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” *Young* at 512, quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S.Ct. 1870 (1980). Here, Mr. Palermo was in the driver’s seat of a car where a passenger was directed to act in a certain way, constituting a seizure pursuant to holdings of *Young* and *Mendenhall*. That this directive was motivated by “officer safety” does not negate the fact that it amounted to a seizure of Mr. Palermo.

Mr. Palermo was seized when the officer ordered his passenger to restrict his hand movements, and such seizure was not justified at its inception where the officer lacked any suspicion that he was engaged in criminal activity and where the officer lacked any suspicion that he was armed and dangerous.

The prosecution below relied on *State v. Mote*, 129 Wn. App. 279, 120 P.3d 596 (2005) as legal authority for the officers' actions in this case—ruling that their contact with Mr. Palermo's vehicle was not a "seizure." RP at 73. *Mote* merely reiterates the rule that "An officer's mere social contact with an individual in a public place with a request for identifying information, without more, is not a seizure or an investigative detention." *Mote*, at 282. Yet the conduct in this case exceeds the "social contact" described in *Mote* because Officer M. Lowrey actually prevented Mr. Lowrey's vehicle from leaving by blocking it in—that amounted to a seizure.³

The Court notes in *Mote* that:

A seizure under article I, section 7 occurs only when an individual's freedom of movement is restrained and the individual would not believe that she is free to leave, or decline a request, due to an officer's use of physical force or display of authority.

129 Wn. App. at 282-83 (citing *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003)). In *Mote*, there was no "display of authority"—the officer merely approached the parked car and talked with the occupants. But here, the officer parked behind Mr. Palermo's car, either physically blocking him in, or at least making leaving difficult. That was a "show of authority" that

³ Mr. Palermo testified that the vehicle was blocked in by the patrol car. RP at 60. Judge Hunt noted in his oral ruling that Mr. Palermo had "four to five feet," which "is ample to pull out any kind of a vehicle, including a pickup truck, this was a regular car." RP at 79. This was not included, however, in the findings entered March 26, 2009.

would make any reasonable person believe he is not free to leave. Therefore, unlike *Mote*, there was an illegal seizure in this case.

The officers' conduct in this case exceeded a mere "social contact," as described by the trial court and a mere approach as allowed by *Day* and *Mote*. Officer M. Lowrey stated that he saw the vehicle, thought it was "odd" and in "a high crime area." RP at 17. He parked his police car within three to four feet behind Mr. Palermo's car. Then he approached the car to talk to the occupants, and directly a passenger not to reach into the backpack; by these actions, he detained the occupants, making them believe they were not free to leave. This detention violates the both the state and federal constitution because he had no legal grounds to seize the occupants of the vehicle on suspicion of a traffic infraction. *See Day*. The State has failed to provide legal justification for the officers' seizure of Mr. Palermo. Therefore, the detention amounted to an illegal seizure from that point forward and because the detention was illegal, so was the subsequent arrest and search of the vehicle, which were the "fruits of the poisonous tree." *See Day*, 161 Wn.2d 898.

2. **THE ARREST WAS NOT SUPPORTED BY PROBABLE CAUSE AND THE SUBSEQUENT SEARCH WAS NOT INCIDENT TO A VALID ARREST.**

When arresting Mr. Aldrich, Officer D. Lowrey saw what he thought was a marijuana pipe partially under Mr. Palermo's right leg. RP at 45, 46. He told officer M. Lowery what he had seen, and he went to the driver's side of the car and removed Mr. Palermo from the car. RP at 46. Officer M. Lowrey then picked up the pipe, which he said had marijuana residue on it. RP at 33. He placed him under arrest for possession of marijuana. RP at 34. This arrest was not based on probable cause. He searched Mr. Palermo and found marijuana and another pipe on his person. RP at 34. The second pipe tested positive for the presence of methamphetamine. Stipulated Finding of Fact 1.42. CP 26. Officer M. Lowrey stated that Mr. Palermo had told him that he had marijuana on his person. RP at 34.

The possession of drug paraphernalia does not provide probable cause to arrest. RCW 69.50.412(1) makes it a crime to use drug paraphernalia:

It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

The statute does not make the simple **possession** of drug paraphernalia a crime. RCW 69.50.412. Mere possession of drug paraphernalia is not a crime, and does not give rise to probable cause to

arrest. *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) (citing RCW 69.50.412(1); *State v. Neeley*, 113 Wn. App. 100, 52 P.3d 539 (2002); *State v. McKenna*, 91 Wn. App. 554, 563, 958 P.2d 1017 (1998) ("The drug paraphernalia in the duffle bag did not give cause to arrest, because mere possession of drug paraphernalia is not a crime").

The pipe, even with what appeared to be burnt residue, did not provide probable cause to arrest in this case. Warrantless searches and seizures are generally unreasonable. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). However, an officer may arrest without a warrant if the arrest is based on probable cause, which exists where the "facts and circumstance 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." *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). A bare suspicion of criminal activity is insufficient. *Id.* Article I, § 7 of the Washington Constitution provides greater protection of a person's right to privacy than the Fourth Amendment. *State v. O'Neill*, 148 Wn.2d at 584; *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998). Pursuant to article I, § 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. *State v. O'Neill*, 148 Wn.2d at 585; *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). "It is the fact

of arrest itself that provides the "authority of law" to search, therefore making the search permissible under article I, § 7." *O'Neill*, at 585.

Because mere possession is not a crime, possession with intent must involve some act or evidence other than the simple act of possession. *See State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004) (mere possession insufficient to establish inference of intent to deliver; at least one additional factor required). Such evidence is entirely lacking in this case. Consequently, the search incident to arrest was also invalid.

Because the arrest was unconstitutional, the methamphetamine discovered in a search incident to that arrest should be suppressed as a "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

3. **THE SEARCH OF THE VEHICLE WAS CONDUCTED IN PART PURSUANT TO MR. ALDRICH'S ARREST. ARIZONA V. GANT DICTATES THAT A VEHICLE SEARCH CONDUCTED BY OFFICERS AFTER ARRESTING MR. ALDRICH IS A VIOLATION OF THE FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES**

On April 21, 2009, in *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485, the United States Supreme Court ruled that police may

search the vehicle of its recent occupant after his arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of the arrest.

Under the Fourth Amendment, once the former occupant has been removed from a vehicle and physically restrained so that he is unable to access the contents of the vehicle, and if the basis for the arrest does not involve any possible evidence that could be located in the vehicle, the rationale for the exception for the vehicle search incident to the arrest is dissipated, and a warrant must be obtained for the search. *Arizona v. Gant*, 556 U.S. ____, 129 S. Ct. 1710, 1718-19, 173 L. Ed. 2d 485 (2009).

The vehicle search incident to arrest is similarly limited under Const. Art I, § 7. *State v. Patton*, No. 80518-1, slip op. (Supreme Ct. Oct. 22, 2009).

Here, Officer D. Lowrey arrested Mr. Aldrich on the outstanding warrants. While removing him, the officer saw a pipe located under Mr. Palermo's leg, and Mr. Palermo and the other occupant were both removed from the car. Officer M. Lowrey noted that the search of the car was conducted in part upon a search incident to Mr. Aldrich's arrest. RP at 32. Assuming the warrantless search of the car was conducted pursuant to Mr. Aldrich's arrest, where Mr. Palermo and other occupant had been ordered out of the car so that it could be searched, this violated his rights under both the

State and Federal Constitutions, and the pipe found in the course of the vehicle search should have been suppressed pursuant to *Gant*.

E. CONCLUSION

Officer M. Lowery illegally seized Mr. Palermo when he detained him without legal authority by merely on suspicion of being in a parked car in a high crime area. Because the subsequent search was incident to an arrest based on information obtained during the illegal seizure, the fruits of that search must be suppressed and the convictions must be reversed.

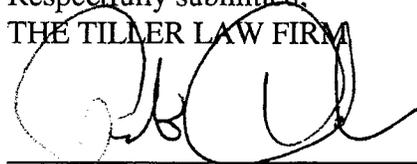
In addition, this Court should reverse and dismiss the convictions because the arrest was not based on probable cause.

Last, the vehicle search was unconstitutional under *Arizona v Gant*.

For all of the foregoing reasons and conclusions Mr. Palermo respectfully requests that this Court reverse the trial court's denial of his motions to suppress evidence and dismiss his convictions.

DATED: January 15, 2010.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Jeffrey Palermo

APPENDIX A

Received & Filed
LEWIS COUNTY, WASH
Superior Court

MAR 26 2009

By Kathy A. Brack, Clerk
Deputy

SCANNED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
JEFFREY JAMES PALERMO,)
Defendant.)

NO. 08-1-00547-4
FINDINGS OF FACT
CONCLUSIONS OF LAW

On March 18, 2009, a hearing pursuant to CrR 3.6 was held in Lewis County Superior Court, the Honorable Nelson Hunt presiding. Also present were Deputy Prosecuting Attorney, Kjell C. Werner, the defendant, Jeffrey James Palermo, and the defendant's attorney, David P. Arcuri. After hearing testimonial evidence and argument, this Court made the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

- 1.1 On 08-13-2008, at approximately 2030hrs, in Lewis County, Officer Mike Lowrey, Centralia Police Department, was on patrol in the area of Chestnut and Pearl Streets, Centralia.
- 1.2 Officer M. Lowrey knew this area of Centralia to have a high crime rate.

- 1 1.3 Officer M. Lowrey noticed a vehicle parked in the 100 block of the south side of
2 Chestnut.
- 3 1.4 Officer M. Lowrey saw that the vehicle was occupied by three persons.
- 4 1.5 Officer M. Lowrey, who was in full uniform, stopped his un-marked patrol vehicle behind
5 the parked, occupied passenger car.
- 6 1.6 Officer M. Lowrey exited his vehicle and contacted the occupants of the parked car at the
7 driver's side window.
- 8 1.7 Seated in the vehicle were the defendant, Jeffrey James Palermo, a second male subject
9 later identified as Cory Aldrich, and an un-identified female passenger.
- 10 1.8 The defendant was seated in the driver's seat, Aldrich in the front passenger seat, and the
11 female in the rear passenger seat.
- 12 1.9 Officer M. Lowrey identified himself and inquired of the occupants of the vehicle what
13 they were doing.
- 14 1.10 The defendant stated the three were not doing anything.
- 15 1.11 Officer M. Lowrey explained to the defendant and his associates that the location where
16 they were parked was a high crime area.
- 17 1.12 Officer M. Lowrey asked the defendant to whom the vehicle in which he was seated
18 belonged.
- 19 1.13 The defendant replied that the vehicle belonged to his mother, who he identified by name.
- 20 1.14 Officer M. Lowrey ran the registration and saw that the owner was listed as someone
21 other than the defendant's mother.
- 22 1.15 Officer M. Lowrey pointed out the discrepancy to the defendant.
- 23 1.16 The defendant then stated the vehicle had been recently purchased by his mother from his
24 aunt, who he was able to identify by first name only.
- 25 1.17 Throughout his contact with the defendant, Officer M. Lowrey noticed Aldrich reach into
26 a backpack that was inside the vehicle at his feet.
- 1.18 Officer M. Lowrey asked Aldrich not to reach inside the bag for officer safety.
- 1.19 After being asked a second time not to reach into the bag, Aldrich complied with Officer
M. Lowrey's request.

- 1
2 1.20 After being informed the vehicle had been recently sold to the defendant's mother by his
3 aunt, Officer M. Lowrey removed himself from the driver's side window and walked
4 back to the rear of the defendant's vehicle where he continued to check on the
5 registration.
6
7 1.21 While Officer M. Lowrey was standing at the rear of the defendant's vehicle, Officer D.
8 Lowrey, Centralia Police Department, arrived on scene to assist.
9
10 1.22 Officer D. Lowrey was in full uniform and operating a fully-marked patrol vehicle.
11
12 1.23 Officer D. Lowrey contacted the occupants of the vehicle at the driver's side window and
13 asked what the defendant and his associates were doing in the area.
14
15 1.24 The occupants replied they were not doing anything.
16
17 1.25 Officer D. Lowrey asked the male occupant seated in the front passenger seat to identify
18 himself.
19
20 1.26 The male subject identified himself as Cory Aldrich.
21
22 1.27 Officer M. Lowrey, who was able to hear Aldrich identify himself, ran his name through
23 dispatch while still at the rear of the defendant's vehicle.
24
25 1.28 The Officers, both of whom were wearing ear microphones, were informed Aldrich was
26 wanted on an outstanding warrant.
1.29 Officer D. Lowrey walked around the vehicle to the passenger side where he instructed
Aldrich to exit the vehicle.
1.30 As Aldrich got out of the car, immediately prior to being taken into custody, Officer D.
Lowrey saw what he, based on his training and experience, believed to be a marijuana
pipe partially tucked under the right leg of the defendant.
1.31 Officer D. Lowrey voiced his discovery to Officer M. Lowrey.
1.32 Officer M. Lowrey had the defendant exit the vehicle and placed him under arrest for
Possession of Marijuana.
1.33 The acts occurred in Lewis County in Washington State.

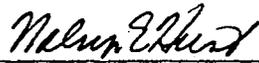
II. CONCLUSIONS OF LAW

- 2.1 The interaction between Officers M. and D. Lowrey and the defendant and the other occupants of the vehicle was a social contact.

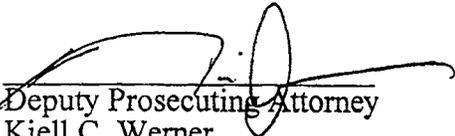
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- 2.2 A reasonable person in the position of the defendant would feel that his or her freedom of movement had not been curtailed.
- 2.3 The marijuana pipe was in open view.
- 2.4 The arrest of the defendant was performed with lawful authority.

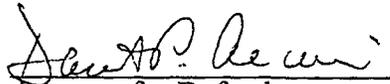
DONE IN OPEN COURT this 26 day of March, 2009.



Superior Court Judge

Presented by:


Deputy Prosecuting Attorney
Kjell C. Werner
WSBA#33810

Approved as to form:


Attorney for Defendant
David P. Arcuri
WSBA#15557

APPENDIX B

Received & Filed
LEWIS COUNTY, WASH
Superior Court

AUG 18 2009

By Kathy A. Brack, Clerk
Deputy

SCANNED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
JEFFREY JAMES PALERMO,)
Defendant.)

NO. 08-1-00547-4

FINDINGS OF FACT
CONCLUSIONS OF LAW
FROM SECOND 3.6
HEARING

On July 10, 2009, a second hearing pursuant to CrR 3.6 was held in Lewis County Superior Court, the Honorable Nelson Hunt presiding. Also present were Deputy Prosecuting Attorney, Kjell C. Werner, the defendant, Jeffrey James Palermo, and the defendant's attorney, David P. Arcuri. After hearing argument, this Court made the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

- 1.1 The Findings of Fact from the previous 3.6 hearing are incorporated by reference in these Findings.
- 1.2 When Officer D. Lowrey instructed Aldrich to exit the vehicle, the defendant was still seated in the driver's seat of that same car.

ORIGINAL

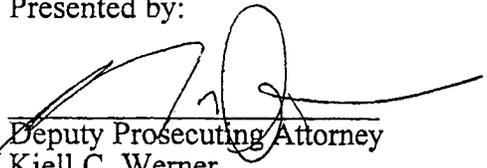
- 1 1.3 The defendant was not handcuffed and had ready access to any object contained within
- 2 the interior of the vehicle in which he was seated.
- 3 1.4 When Officer D. Lowrey voiced his discovery of the marijuana pipe next to the
- 4 defendant's leg, the defendant, without having been questioned about the marijuana pipe
- 5 by either officer, stated it was a marijuana pipe and that he had the marijuana in his
- 6 pocket.

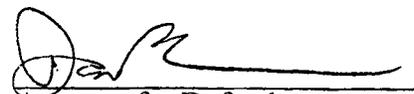
7 **II. CONCLUSIONS OF LAW**

- 8 2.1 The holding in *Arizona v. Gant*, 173 L. Ed. 2d 485 (2009), has no impact upon
- 9 admissibility of the evidence seized in this case.
- 10 2.2 The Court could properly consider the contents of police reports submitted by the
- 11 defendant in support of his Motion to Suppress.
- 12 2.3 Officer M. Lowrey had probable cause to believe the defendant was committing the
- 13 offense of Possession of Marijuana.
- 14 2.4 The arrest of the defendant was lawful.

15 DONE IN OPEN COURT this 18 day of August, 2009.

16 
17 Superior Court Judge

18 Presented by:
19 
20 Deputy Prosecuting Attorney
21 Kjell C. Werner
22 WSBA#33810

Approved as to form:
23 
24 Attorney for Defendant
25 David P. Arcuri
26 WSBA#15557

APPENDIX C

STATUTES

RCW 69.50.412

Prohibited acts: E — Penalties.

(1) It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

(3) Any person eighteen years of age or over who violates subsection (2) of this section by delivering drug paraphernalia to a person under eighteen years of age who is at least three years his junior is guilty of a gross misdemeanor.

(4) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this subsection is guilty of a misdemeanor.

(5) It is lawful for any person over the age of eighteen to possess sterile hypodermic syringes and needles for the purpose of reducing bloodborne diseases.

RCW 69.50.4013

Possession of controlled substance — Penalty.

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

Mr. Jeffrey Palermo
9946 180th Way SW
Rochester, WA 98579

Dated: January 15, 2010.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

CERTIFICATE OF
MAILING

2

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