

NO. 42072-4 -II

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

STATE OF WASHINGTON,

Respondent,

v.

HARVEY LEROY COUSINS II,

Appellant.

BRIEF OF APPELLANT

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I. Assignments of Error

1. The trial court erred when it denied Mr. Cousin's motion to suppress evidence under CrR 3.6.
2. The trial court erred in concluding the police lawfully seized Harvey Cousins.
3. Evidence of the items found in the backpack subsequent to the seizure of Harvey Cousins should have been suppressed.

II. Issues Pertaining to Assignments of Error

1. Under article I, section 7 of the Washington State Constitution police officers are prohibited from seizing and searching automobile passengers unless the officer has a reasonable and articulable suspicion a passenger is involved in criminal activity or the officer has a legitimate safety concern. Was the trial court's conclusion that Harvey Cousin's seizure was lawful incorrect under article I section 7 where there was no suspicion Harvey Cousins was engaged in criminal conduct and the officer safety concern was based on the mere presence of unloaded rifles and ammunition located separately in the vehicle? (Assignment of Error Nos. 1, 2)
2. Under article I, section 7 of the Washington State Constitution should the items found in the search of a backpack be suppressed when the search was performed after the unlawful seizure of Harvey Cousins which invalidates his consent to search the backpack. (Assignment of Error No. 3)

III. Statement of the Case

A. Procedural History

I. Procedural History

Mr. Harvey Cousins was charged with possession of methamphetamine. CP 1-7 . A defense motion to suppress evidence was

presented to the Honorable Jay Roof on April 5, 2011. RP 1-50. Deputy John Stacy and Joshua Cousins testified at the hearing. Id. The motion was denied. RP 49. A stipulated facts trial followed on April 18, 2011. 4/18/2011 RP 1-19. The Honorable Leila Mills presided over the stipulated facts trial. Id. Following a review of the stipulated facts Mr. Cousins was guilty of the charge of possession of methamphetamine. 4/18/2011 RP 8. This appeal timely follows.

In the case at hand Findings of Fact and Conclusions of Law were not yet been entered at the time this brief was filed. However, entry of the Findings of Fact and Conclusions of Law are expected to occur shortly after the submission of this brief. Counsel have engaged in discussions regarding the proposed findings of Fact and Conclusions of Law drafted by the State. Unfortunately the severe weather effected counsel's ability to complete the discussions and enter the findings prior to the due date of this brief.

B. Facts

Mr. Joshua Cousins was driving his pickup truck on the evening of November 4, 2010. RP 7, 9. Mr. Harvey Cousins was a passenger in the truck. RP 8. Deputy John Stacy initiated a traffic stop of Joshua's truck due to a non-functioning headlight. RP 7, 16. The Deputy first spoke with Joshua Cousins. RP 7. After contacting Joshua the Deputy noticed two rifles between the occupants of the truck. RP 8. The rifles were unloaded

and were transported properly. RP 19 Deputy Stacy also saw what he believed was a box of ammunition on the seat next to the rifles. RP 9. The ammunition was transported properly as well. RP 20. Joshua Cousins testified that the rifles were in the vehicle with actions open, clips removed, and with the barrels pointing at the floor. RP 29. Joshua followed Deputy Stacy's commands and slowly tilted the rifles to show that the actions were open and the rifles were unloaded. RP 32. Joshua and Harvey had been target practicing earlier that day. RP 31.

The Deputy recognized both Joshua and Harvey Cousins. RP 8. Deputy Stacy asked both Joshua and Harvey to get out of the truck. Id. Deputy Stacy testified he asked Harvey to get out of the vehicle due to officer safety concerns. RP 15. However, neither occupant of the vehicle made any furtive movements or did anything that caused the Deputy to have concerns. RP 20-21 Officer Deatherage arrived at the scene and provided assistance to Deputy Stacy. RP 8. The Deputy recognized Harvey Cousins before he asked him to get out of the truck. RP 26-27. Deputy Stacy ran a records check of Harvey. RP 10. The Deputy wanted to be certain Harvey Cousins was not a convicted felon or had any warrants for his arrest. RP 22, 24. The Deputy asked, and received, Harvey Cousins' identification card. RP 36-37. The records check revealed Harvey Cousins had an outstanding warrant for the charge of driving while license suspended. RP 10-11. Deputy Stacy, although not

one hundred percent certain, thought he performed a record check of Joshua Cousins as well. RP 17 -18. Officer Deatherage was on the scene at the time the records check was conducted. RP 25. Joshua Cousins did not feel that he was free to leave during the traffic stop. RP 35.

Deputy Stacy arrested Harvey Cousins due to the outstanding warrant. RP 11. During the arrest the deputy conducted a pat down search of Mr. Harvey Cousins. RP 11. During that search a glass pipe was found. Id. Harvey was wearing a jacket that belonged to someone else and informed the Deputy as such. RP 11-12. Deputy Stacy then asked Joshua to give permission to search the truck . RP 12-13. Joshua Cousins gave permission to search the vehicle. RP 13. During the search a backpack was located in the passenger side of the car. RP 13. Joshua Cousins told Deputy Stacy the backpack belonged to Harvey. Id. Deputy Stacy next asked Harvey about the backpack. RP 13-14. Harvey reported the backpack did not belong to him but gave authority to search the backpack. RP 14. The Deputy found some marijuana, a pipe, and a ziplock baggie which contained a trace of a white substance which NIK tested positive for methamphetamine, among other items in the backpack. Id. Harvey Cousins also gave Deputy Stacy permission to search a small lock box in the backpack. RP 23. The key to lockbox was found on Harvey Cousins' person. RP 23 A pipe, small bag of marijuana, ziplock

baggie with a white powdery substance (which tested positive for methamphetamine), and a GPS were found in the lockbox. RP 14

D. Argument

As indicated above, at the time of the writing of this brief the Findings of Fact and Conclusions of Law regarding the CrR 3.6 hearing have not been entered. However, the findings have been prepared by the State and reviewed by appellate counsel. At the time of the filing of this brief discussions regarding proposed modifications to the State's proposed Findings of Fact and Conclusions of Law have not been completed. However it is anticipated findings of fact and conclusions of law will be entered in this matter in the immediate future. This brief is filed in advance of the entry of the document in accordance with the due date for the brief of the appellant as ordered by this Court. In this brief error is assigned to Conclusion of Law Nos. 3-5 which are set forth in the State's proposed Findings of Fact and Conclusions of Law. Claims of improper Conclusions of Law are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214 970 P.2d 722 (1999), overruled on other grounds by *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007).

1. The police officer unlawfully seized Mr. Cousins when he ordered Mr. Cousins out of the vehicle and the trial Court improperly concluded officer safety concerns provided a lawful basis for the seizure.

a. Warrantless searches and seizures are per se unconstitutional.

The Fourth Amendment to the United States Constitution protects individual privacy rights. The Fourth Amendment, in pertinent part, provides “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...” *U.S. Const. Amend IV*. Washington State’s Constitution provides individual privacy rights protection in article I, section 7 which states in pertinent part, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” *Washington State Constitution Art. I, section 7; State v. Grande, 164 Wn.2d 141, 187 P.3d 248 (2008)*. Article I, section 7 of this State’s Constitution protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *State v. Myrick, 102 Wn.2d 511, 688 P.2d 151 (1984)* The recognition of individual privacy rights under this State’s Constitution is without express limitation, which differs from the provisions of the Fourth Amendment to the United States Constitution. *State v. White, 97 Wn.2d 110, 640 P.2d 1061 (1982)* It is well settled that Article I, Section 7 of the Washington State Constitution offers greater protection to individual privacy than the Fourth Amendment to the United States Constitution. *State v. Jones, 146 Wn.2d 332, 45 P.3d 1062 (2002)*

The Courts of this State consistently find warrantless searches or seizures per se unconstitutional unless one of the few exceptions to the warrant requirement applies. *State v. Ladson*, 138 Wn.2d 349, 979 P.2d 833 (1999); *State v. Rankin*, 151 Wn.2d 699, 92 P.3d 202 (2004) The analysis of Washington State Constitution Article I, Section 7 should begin “with the proposition warrantless searches are unreasonable per se”. *State v. White*, 135 Wn.2d 769, 958 P.2d 769, 958 P.2d 982 (1998)(citing *State v. Hendrickson*, 129 Wn.2d 70, 917 P.2d 563 (1996)) This is a strict rule. *State v. White*, supra. Exceptions to the warrant requirement are narrowly drawn and limited. *Id.* *State v. Hendrickson*, 129 Wn.2d at 71 The limited exceptions to the warrant requirement include: consent, exigent circumstances, plain view searches and investigatory stops as set forth in *Terry v. Ohio*. *State v. Duncan*, 146 Wn.2d 171-72, 43 P.3d 513 (2002); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The state bears the heavy burden of proving one of the exceptions applies. *State v. Johnson*, 128 Wn.2d 447, 909 P.2d 293 (1996); *State v. Houser*, 95 Wn.2d 149, 622 P.2d 1218 (1980)

Admittedly, not every encounter between a police officer and a citizen is an intrusion. *United States v. Mendenhall*, 446 U.S. 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) Pursuant to Article I, Section 7 of this State’s Constitution, a seizure occurs when considering all circumstances, an individual’s freedom of movement is restrained and the individual

would not believe he is free to leave or decline a request of an officer as a result of the officer's use of force or display of authority. *State v. O'Neill*, 148 Wn.2d 574, 62 P.3d 489 (2003) The determination is made by objectively examining the actions of the law enforcement officer. *State v. Young*, 135 Wn.2d 501, 957 P.2d 681 (1998) All investigatory detentions constitute a seizure of some form. *State v. Armenta*, 134 Wn.2d 10, 948 P.2d 1280 (1997)

In this case Harvey Cousins was seized by Deputy Stacy. Deputy Stacy directed Harvey Cousins' movements by telling him to get out of the vehicle and step to the rear of the vehicle. RP 9 At that point it was clear Harvey Cousins could not leave the scene as was effectively seized at that point. A reasonable person would not have believed he was free to leave. Joshua Cousins testified at the CrR 3.6 hearing that he did not feel he was free to go at the time Deputy Stacy directed him to get out of the vehicle. RP 35 In this case the record indicates Deputy's directive for Joshua and Harvey Cousins to exit the vehicle was in the nature of a command, not a request. Deputy Stacy testified that he "asked" Joshua and Harvey Cousins to exit the vehicle based on concerns for his safety after spotting the rifles and ammunition in the vehicle. RP 10 Given the "request" was allegedly based on officer safety concerns it is unlikely the officer simply asked the Cousins to exit the vehicle. Under these circumstances the men were more likely ordered to exit the vehicle.

Joshua Cousins testified Deputy Stacy told both himself and Harvey Cousins to exit the vehicle and move in a slow manner. RP 33 Both men were patted down after they exited the vehicle. Id. Neither Joshua or Harvey Cousins could have reasonably believed they were free to go with the show of authority evidenced by the actions of the deputies. Given the totality of the objective actions of the deputies a reasonable person would not have believed he was free to leave or otherwise end the encounter with law enforcement.

Next Harvey's identification was obtained by Officer Deatherage. RP 10. That request was further indication of a seizure. Under *State v. Rankin*, supra, a passenger is seized when law enforcement requests identification in the context of a traffic stop of the driver. *State v. Rankin*, 151 Wn.2d 689, 692-94, 699 92 P.3d 202 (2004) The trial court determined the seizure was lawful. CP Supp _____. The trial court's conclusion of law must be reviewed de novo, *State v. Armenta*, 134 Wn.2d at 9.

b. The search and seizure was not justified on the basis of a safety concern because the police officer did not have a reasonable concern for his safety or the safety of the community.

There can be little dispute that Harvey Cousins was seized when instructed to get out of the vehicle and further when a request for identification was made of him. The next question to be examined is whether the seizure was lawful. The privacy interests of vehicle

passengers have been examined in light of the broad protections provided for in article I, section 7 of this State's Constitution. *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999); *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999). The Courts of this state have strongly reinforced the protection of individual privacy provided in this State's Constitution. *State v. Parker*, 139 Wn.2d at 505

In the case of *State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980), the Washington State Supreme Court held a vehicle passenger is unconstitutionally detained under article I, section 7 of this State's Constitution when a law enforcement officer requests identification of the passenger unless other circumstances provide the officer with an independent reason to question the passenger. *State v. Larson*, 93 Wn.2d at 642.

In the case of *State v. Rankin*, supra, the Washington State Supreme Court held vehicle passengers are afforded freedom from disturbance in private affairs under article I, section 7 of the Washington State Constitution. *State v. Rankin*, 151 Wn. 2d at 699. The protections under this state's Constitution prohibit law enforcement officers from seizing a vehicle passenger unless the officer has an reasonable and articulable suspicion the person is involved in criminal activity. *Id.* While an officer may engage a passenger in conversation, when the interaction develops into an investigation, the interaction is contrary to article I

section 7 unless a justification for the intrusion exists. *State v. Rankin*, 151 Wn. 2d at 700 In order to lawfully frisk a person, an officer must be able to articulate specific facts which indicate that the particular suspect was armed and dangerous, and the suspicion must be specific to the particular subject. *State v. Galbert*, 70 Wn.App. 721, 725, 855 P.2d 310 (1993). However, the claim of officer safety is not a incantation law enforcement cannot invoke to inevitably justify an unreasonable detention such as the one in this case.

In the case of *State v. Mendez*, supra, the Washington State Supreme Court held law enforcement officers must “be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle.”. *State v. Mendez*, 137 Wn.2d at 220. This standard also applies when law enforcement orders a passenger to take certain action to control the scene. *State v. Parker*, 139 Wn.2d 502 (quoting *State v. Mendez*, 137 Wn.2d at 220.) The privacy interest of the passenger must be balanced against valid concerns for officer and public safety during traffic stops. *State v. Mendez*, 137 Wn.2d at 219. The Washington State Supreme Court has held an officer’s directive to a passenger to either remain or exit a vehicle for reasons of officer safety must be supported by an articulable objection rationale. *State v. Mendez*, 137 Wn.2d at 220. The factors warranting an officer’s

directive, which are non-exclusive, include: “number of officers, number of vehicle occupants, behavior of the occupants, time of day, location of stop, traffic at scene, affected citizens, or officer knowledge of the occupants. *State v. Mendez*, 137 Wn.2d at 221.

In the case of *State v. Mendez*, supra, two law enforcement officers stopped a vehicle at 12:50pm for failure to stop at a stop sign. Immediately after pulling the car over, the defendant who was a passenger in the vehicle, got out the vehicle and began walking away. An officer told the defendant to get back into the car. After that command was made, the defendant turned, fumbled with his shirt, reached inside his clothes more than once, and continued walking away from the officers. The defendant ran from the scene even after a subsequent command was made directing him to return to the vehicle. *State v. Mendez*, 137 Wn.2d at 213. The officers chased down the defendant and arrested him.

The Supreme Court determined the defendant was seized at the time the officer first gave the command for him to get back into the car. *State v. Mendez*, 137 Wn.2d at 222-23. Because the defendant was seized at the time the command to return was made, the movements the defendant made fumbling with his clothes could not be used retroactively to justify the prior seizure. *State v. Mendez*, 137 Wn.2d at 224. The Court concluded the objective rationale test was not met because the defendant was already walking away at the time he was told to stop, the encounter

was in the broad daylight and no specific safety concerns were present at the scene. *State v. Mendez*, 137 Wn.2d at 225-226. Additionally, the officers had control of the scene as the driver remained where he was directed and the other passengers remained in the vehicle. *Id.* The defendant had not committed a crime. Even in the view of the officers' testimony, the defendant did not take any action to make the officer's fearful for their safety with the exception of running from the scene. *Id.*

In the case at hand, the Deputy claimed he was concerned for his safety based on the presence of two unloaded rifles and ammunition found on the floor in the truck. RP 9. However, the Deputy did not meet the objective rationale test as set forth in the *Mendez* case. Like the *Mendez* case, the vehicle was stopped for a traffic violation, a non-functioning headlight. RP 7. But unlike the facts in the *Mendez* case, Deputy Stacy was joined by Officer Deatherage. RP 9-10 Officer Deatherage arrived according to Deputy Stacy's recollection at the time Joshua and Harvey Cousins stepped out of the vehicle. RP 9-10. Like the officers in the *Mendez* case, the law enforcement officers had control of the scene. Both Joshua and Harvey Cousins followed every directive of the law enforcement officers at the scene.

Unlike the defendant in the *Mendez* case, neither Joshua or Harvey Cousins attempted to get out the vehicle before they were directed to by Deputy Stacy. Also unlike the *Mendez* case, neither Joshua

or Harvey Cousins did not made any furtive movements. RP 20-21. Both Joshua and Harvey were very cooperative. Id. The rifles in the vehicle were transported appropriately. RP 19 The bolts were open and the magazines were empty. RP 19, 29. Joshua Cousins carefully showed the rifles to Deputy Stacy to verify the rifles were not loaded. RP 32. Under these circumstances, the officers could not have reasonably feared Harvey Cousins posed a threat to the officer or the safety of others. The other *Mendez* factors which have not been addressed above also indicate the seizure was unlawful. The number of occupants, two, is small; the record does not indicate the location of the stop was an issue supporting the seizure; the record does not indicate the traffic at the location of the stop was an issue supporting seizure; the record does not indicate any citizens were in the area, and finally although Deputy Stacy recalled recognizing Joshua and Harvey Cousins, the record does not indicate Deputy Stacy was aware of any concern regarding the individuals.

c. Police officers are not permitted to effectuate a seizure against a vehicle passenger unless the officer has a an articulable belief the passenger is involved in criminal activity.

Furthermore, the officers here did not have any articulable suspicion Harvey Cousins was in any way involved in any criminal activity. The officers required Mr. Cousins to get out of the vehicle and provide identification based only on Mr. Cousins' proximity to unloaded rifles in the vehicle where he was sitting. Under our Constitution, officers cannot seize

everyone at or near an alleged crime scene. Association with a person suspected of criminal activity does not strip away constitutional protections afforded to individuals. *State v. Broadnax*, 98 Wn.2d 296, 654 P.2d 96 (1982), overruled on other grounds by *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Additionally, even a brief seizure is not justified by mere proximity to criminal activity. *State v. Cormier*, 100 Wn.App. 457, 461-62, 997 P.2d 950(2000). Something more to indicate the person seized may be a threat to safety or armed and dangerous must exist to justify the seizure. *State v. Horrace*, 114 Wn.2d 386, 393-96, 28 P.3d 753 (2001). In this case there was nothing more than proximity to unloaded weapons to indicate Harvey Cousins could be a threat to the officers' safety. The rifle in the vehicle was unloaded, which was proven to Deputy Stacy and the ammunition was separate from the rifles. RP 32. Therefore, pursuant to the case law cited above, Harvey Cousins was unlawfully seized and his constitutional right to privacy was violated.

Deputy Stacy also indicated he wanted to run a check of Harvey Cousins' name for a warrants check and to see if Harvey Cousins had a felony history which would preclude him from possessing a firearm. RP 10, 22, 24. Neither of which is a proper seizure and is an unwarranted investigation attempting to find evidence of other criminal activity. If this type of "crime searching" was allowed, a warrant check could be run on

every person encountered by law enforcement. Such investigation runs afoul of the privacy protections afforded both the federal and state Constitutions as previously articulated in this brief. A prior felony conviction does not necessarily elevate the dangerousness level of an individual. Many felony crimes are not violent or dangerous types of behavior. Once it was clear to Deputy Stacy that the rifles were not loaded, especially in light of the cooperative behavior of the occupants of the vehicles and the lack of any furtive movements, the inquiry should have ended. The search conducted by law enforcement went beyond the bounds of a lawful search.

d. Evidence obtained from the unlawful seizure and search must be suppressed.

In the event an initial seizure is unlawful, the subsequent search and the fruits of the search are inadmissible, as fruits of the poisonous tree. *State v. Brown*, 154 Wn.2d 799, 117 P.3d 336 (2005); *State v. Kennedy*, 107 Wn.2d 4, 726 P.2d (1986) The evidence obtained through an illegal seizure and search is also inadmissible under both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution. *Nardone v. United States*, 308 U.S. 341, 60 S.Ct. 266, 84 L.Ed.2d 307 (1939); *Wong Sun v. United States*, 371 U.S. 484, 83 S.Ct. 407, 9 L.Ed.441(1963); *State v. White*, 97 Wn.2d 111, 640 P.2d 1061 (1982). In this case after the unlawful seizure, the officers discovered Harvey Cousins had an outstanding warrant. Harvey Cousins

was unlawfully subjected to a pat down search. No evidence suggested Harvey Cousins was armed and dangerous. The rifles in the vehicle were not loaded and he had been removed from the vehicle prior to the pat down search. Harvey Cousins was fully cooperating with the officers. There was no indication Harvey Cousins was armed and dangerous to the Officers. The subsequent search is even more egregious. Officers went beyond searching Harvey's person, which produced a glass pipe and extended the search to the backpack found in Joshua Cousin's car. RP 11,14. In the lockbox found in the backpack, which by Officer Stacy's recollection was searched with Harvey Cousins' permission, another pipe, marijuana, methamphetamine were found. RP 14. Pursuant to the case law previously cited, the trial court was required to suppress any evidence from the unlawful seizure. This Court should order the evidence found suppressed and reverse the conviction entered against Harvey Cousins.

2. The Search of the backpack was a violation of Article I, Section 7 of the Washington State Constitution.

In this case illegal items were found in both the backpack and lockbox. Defense counsel did not raise the issue to suppress evidence found in the backpack located in the vehicle where Mr. Harvey Cousins was a passenger. The issue may be argued based on the lack of proper advice of his ability to refuse the search or the unlawful detention. However, this Court should review the issue of suppression of the items located in the backpack.

a. The record is sufficiently developed for this Court to determine the issue despite the lack of a hearing in the trial court.

The appellate courts will not review alleged errors on appeal unless the claim is a “manifest error affecting a constitutional right. *RAP 2.5(a)(3)*; *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An appellate must demonstrate actual prejudice to establish the error is “manifest”. *State v. Lynn*, 67 Wn.App.339, 346, 835 P.2d 251 (1992). An appellate court can determine whether a motion to suppress would have been granted or denied if a records is sufficiently developed. *State v. Contreras*, 92 Wn.App. 307, 313-14, 966 P.2d 915 (1998). In the case at hand, the record is sufficiently developed to allow this Court to find the backpack was illegally searched and the resulting seizure of the smoking pipes and drugs, was a product of an unlawful search. The testimony of Deputy Stacy indicates he asked Harvey Cousins about the backpack. RP 14 Although Mr. Cousins denied the backpack was his, he granted permission for the bag to be search. Id. Deputy Stacy did not indicate he advised either Joshua or Harvey Cousins of any right to refuse or limit the scope of a consensual search.

b. The consent to the search of the backpack should be invalidated.

As described previously in this brief, article I, section 7 of the Washington State Constitution provides protection against unlawful searches. Also as set forth previously in this brief the Washington State

Constitution provides greater privacy protection than the United States Constitution. The record suggests the backpack was not searched as incident to arrest based on Deputy Stacy's request for permission to search the backpack. RP 14. A search of the backpack under an incident to arrest exception to the warrant requirement would not be lawful pursuant to *Arizona v. Gant*, 556 U.S.332 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) Pursuant to *Arizona v. Gant*, supra, law enforcement may search a vehicle incident to arrest of an occupant of the vehicle only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe evidence of the offense will be found in the vehicle. *Arizona v. Gant*, 129 S.Ct at 1723-24. In this case Mr. Harvey Cousins was arrested for driving while license suspended. RP 11. Harvey Cousins was subject to a directive to provide identification, a pat down search of his person, a search of a backpack, and a search of a lockbox for which the key was found on his person. RP 10, 11, 14.

As previously articulated in this brief, the seizure and subsequent search of Harvey Cousins was unlawful. The continued detention of Harvey Cousins invalidated the subsequent consent to search the backpack. *See State v. Tijerina*, 61 Wn.App. 626, 811 P.2d 241, review denied, 118 Wn.2d 1007 (1991) and *State v. Cantrell*, 70 Wn.App. 340, 853 P.2d 479. (1993). In both *State v. Tijerina*, supra and *State v.*

Cantrell, supra, the Court held the unlawful continued detention of the defendant invalidated the subsequent search. In this case as argued above the continued detention of Harvey Cousins was unlawful. Consequently the subsequent search of the backpack with Harvey Cousins' consent should be invalidated and the fruits of that search should be suppressed under the fruit of the poisonous tree doctrine previously discussed in this brief. Harvey Cousins was subjected to repeated searches during an improper seizure. The fruits of all of the searches should be suppressed in this case.

V. Conclusion

Mr. Cousins respectfully requests this court to reverse the conviction entered against him in this matter for the reasons stated above.

Respectfully submitted this 19 day of January, 2012.



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Attorney for Appellant

NO. 42072-4-II

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

STATE OF WASHINGTON,

Respondent,

vs.

HARVEY L. COUSINS II,

Appellant.

DECLARATION OF MAILING OF
APPELLANT'S OPENING BRIEF

I, Michelle Bacon Adams, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

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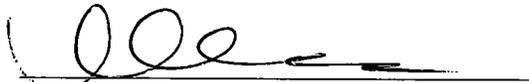
Brief of Appellant Hand Delivered To:

Randall Sutton
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35
Port Orchard, WA 98366

Brief of Appellant of Arrangements Mailed To:

Harvey Cousins II
290 Granat Street #11
Port Orchard, WA 98366

DATED this 19th day of January, 2012, at Port Orchard,
Washington.

A handwritten signature in black ink, appearing to read 'Michelle Bacon Adams', written over a horizontal line.

MICHELLE BACON ADAMS
WSBA#25200
Attorney for Appellant

PORT ORCHARD ASSIGNED COUNSEL

January 19, 2012 - 2:36 PM

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