

42156-9-II

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

State of Washington
Respondent

v.

ERIC J. LIPP
Appellant

42156-9

On Appeal from the Superior Court of Cowlitz County

10-1-01255-6

The Honorable Stephen M. Warning

BRIEF OF APPELLANT

Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant Lipp

MCCABE LAW OFFICE
PO Box 6324, Bellevue, WA 98008
425-746-0520~mccabejordanb@g-mail.com

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1. **ASSIGNMENTS OF ERROR AND ISSUES**

A. Assignments of Error

1. Appellant was unlawfully seized in violation of Const. art 1, § 7 and the Fourth Amendment.
2. Appellant's car was searched and physical evidence seized in violation of Const. art 1, § 7 and the Fourth Amendment.
3. Appellant's incriminating statement to police was erroneously admitted in violation of the Fourth and Fifth Amendments.
4. Appellant received ineffective assistance of counsel in violation of Const. art. 1, § 22 and the Sixth Amendment.
5. The prosecutor committed reversible misconduct.
6. The sentencing court abused its discretion and violated RCW 9.95.602 in failing to consider release pending appeal.

B. Issues Pertaining to Assignments of Error

1. Was Appellant unlawfully seized when, in the course of a routine traffic stop, a State trooper ordered him out of his car and removed him to the rear for questioning, solely because the trooper thought he appeared nervous?
2. Once Appellant and his passenger were both out of the car and in custody, did the trooper have any articulable grounds to conduct the weapons search of Appellant's truck that led to discovery of physical evidence of a controlled substance violation?
3. Was Appellant's incriminating statement to the trooper obtained in violation of the Fourth Amendment?

4. Did the trooper unlawfully elicit incriminating statements from Appellant without benefit of *Miranda*?¹
5. Was defense counsel ineffective in not moving to suppress physical evidence obtained during the unlawful warrantless search of Appellant's truck?
6. Did the prosecutor commit reversible misconduct during closing argument by shifting the burden to the defense to produce exculpatory evidence?
7. Did the prosecutor commit reversible misconduct in commenting on Appellant's exercise of his right to remain silent by not spontaneously sending defense witnesses to report the substance of their proposed testimony to investigators?
8. Did the prosecutor commit reversible misconduct by commenting on Appellant's exercise of his right to present alternative defenses?
9. Did the sentencing court abuse its discretion by not considering staying execution of the judgment pending appeal?

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

II. STATEMENT OF THE CASE

Appellant, Eric J. Lipp appeals his conviction for possession of cocaine. He assigns error to a deficient to-convict instruction and inadmissible physical evidence and incriminating statements that police obtained in the course of a search and seizure that exceeded the lawful scope of a traffic stop.

At 7:30 in the morning on October, 8, 2010, Lipp was driving through Cowlitz County on his way from Lynnwood, Washington to Portland Oregon where his passenger had a medical appointment at 8:30 a.m. Washington State Patrol Trooper Phillip Thoma pulled Lipp over for speeding. RP 9.²

Lipp appeared nervous. His hand was shaking. This aroused Thoma's suspicions that maybe Lipp was planning "to do something" or that he had something in the car. RP 9-10.³

Thoma ordered Lipp out of his pick-up and walked him to the rear where he questioned him. RP 10. Thoma asked Lipp if he had anything

² The transcript is in a single volume denoted RP. The CrR 3.5 hearing is at RP 7-15. The jury trial is at RP 18-73. Sentencing is at RP 89-93.

³ At trial, Thoma elaborated that he thought Lipp's nervousness might mean he had a weapon. RP 22.

illegal or any weapons in the truck. Lipp told Thoma he kept a buck knife under the driver's seat. RP 10. Thoma immediately frisked Lipp for weapons, but found nothing. RP 11. Thoma then ordered the passenger out of the truck and sent her to the front. Thoma then reached inside Lipp's truck and removed the knife. RP 11.

Under the knife, Thoma noticed a plastic pen barrel (described as the outer part of a *BIC* ball-point pen.) RP 11. Thoma seized the pen barrel and noticed a white powder residue on it. RP 12. He confronted Lipp with the pen barrel and asked him about it. Although his purpose was to investigate suspected illegal drug activity, Thoma did not read Lipp his Miranda rights. Lipp said he occasionally used pen barrels to snort his prescription anxiety medication when he needed it to take effect quickly. RP 13, 26, 60.

Thoma field-tested the residue for cocaine, but the result was negative. Thoma then conducted a full search of the truck, with Lipp's consent. RP 30. Finding nothing, Thoma allowed Lipp to go on his way. Thoma confiscated the pen barrel, which was sent to the WSP Crime Lab, and the residue in the pen barrel tested positive for cocaine. RP 39.

On December 10, 2010, the State filed an Information charging Lipp with possession of cocaine in violation of RCW 69.50.4013(1). CP

1. He was tried by jury and asserted the defense of unwitting possession.

RP 1.

At the CrR 3.5 hearing, Trooper Thoma claimed to be able to tell just by looking at a person if he was using drugs. RP 7-8.

Lipp asked the court to suppress the statement made after Thoma discovered the pen barrel. Counsel argued that Lipp had been unlawfully ordered out of his vehicle and not allowed back in, and that a reasonable person would have perceived himself in custody, that is, not free to end the encounter and leave. RP 14. Thoma did not think forcing Lipp to pull over, ordering him out of his vehicle, marching him to the rear, and questioning him about his private affairs constituted a show of authority. “[D]id you show any kind of authority at all to him?” “No.” RP 13.

The State claimed that the traffic stop escalated into a lawful *Terry*⁴ stop when Thoma returned to the rear of the vehicle with the pen barrel. RP 14. Therefore, the State believed Thoma was allowed to ask a reasonable number of questions to investigate a possible crime. The State argued that Lipp’s statement was voluntary. RP 15.

The judge agreed with the State based on a misunderstanding of the evidence regarding the order of events. Contrary to Thoma’s testimony that he first ordered Lipp out of the car and then learned about

⁴ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

the knife, the court ruled: “The Defendant was removed from his vehicle. That was for a specific purpose that he was advised of, to obtain the knife that had already been discussed.” RP 16. Accordingly, the court ruled Lipp’s statements to Thoma were admissible. RP 16.

The record on appeal also includes Thoma’s trial testimony. There, Thoma claimed to be able to recognize when someone was committing a crime while driving down the road. RP 19. Lipp confirmed his CrR 3.5 testimony that the sole reason for ordering Lipp out of his truck was his apparent nervousness. RP 22. Thoma testified that Lipp did not appear to be under influence of narcotics or alcohol but was just nervous. RP 31.

At trial, Lipp’s passenger, his fiancée, Morgan Thompson, testified that his truck is always a mess with garbage and clothes all over the floor and under the seats. RP 46. Lipp had owned the truck since high school and rarely cleaned it. RP 47. He freely loaned it to other people, including Thompson’s sister, a coworker named Sean, and buddies on a harvesting work crew he worked with in Montana. RP 50. The prosecutor commented on the fact that “Sean’s not here to testify today, right?” RP 51. The prosecutor also commented on the fact that Ms. Thompson did not voluntarily appear at the prosecutor’s office pretrial to tell them that Lipp was not a drug-user or that his truck was messy or that he often

loaned it out. RP 52-53. Thompson testified on cross that no-one from the State ever contacted her after she was disclosed as a defense witness. RP 54-55.

Lipp confirmed that he had owned the truck 11 years and that it was always messy. RP 57.

In closing, the prosecutor argued that Lipp's admission that he used a pen barrel to ingest prescribed medication is factually and legally inconsistent with the affirmative defense of unwitting possession of cocaine. RP 68.

Because Lipp had no criminal history, the court imposed 10 days jail time with 24 months community supervision to include treatment. RP 89-91. Lipp asked the judge for leniency regarding jail time to help him keep his job. RP 91. The judge imposed 10 days and ordered Lipp taken immediately to jail. RP 91, 93.

Lipp filed timely notice of appeal. RP 34.

III. **ARGUMENT**

I. THOMA HAD NO LAWFUL REASON TO EXCEED THE SCOPE OF A TRAFFIC STOP.

Article I, section 7 of the Washington Constitution provides that “[no] person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision provides greater protection than

the Fourth Amendment. *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008). A traffic stop is a “seizure” for the purpose of constitutional analysis, no matter how brief. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

Warrantless searches are per se unreasonable under art. 1, §7. *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005), citing *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. *Ladson*, 138 Wn.2d at 349-50. Exceptions to the warrant requirement are “ ‘jealously and carefully drawn.’ ” *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004), quoting *Hendrickson*, 129 Wn.2d at 70-71. The State has the burden of showing that a challenged search falls within an exception. *Hendrickson*, 129 Wn.2d at 71; *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

Both by statute and Washington case law, the permissible scope of an art. 1, § 7 intrusion for a minor traffic offense is limited. *Ladson*, 138 Wn.2d at 362-363; *State v. Reding*, 119 Wn.2d 685, 688, 835 P.2d 1019 (1992). The police may not detain people or conduct a warrantless search without justification. Unless one of the express warrant exceptions

applies, an officer may detain the driver only long enough to issue and serve a citation and notice. RCW 46.64.015. It is unlawful to exceed this limited scope and engage in a fishing expedition.

Sometimes, after stopping a driver for a traffic infraction, such as speeding, the officer may develop probable cause to arrest the driver and conduct a warrantless search. For example, the officer may immediately smell marijuana or see readily identifiable illegal drugs or other evidence of illegal activity in plain view. *Ladson*, 138 Wn.2d at 363-64. Also, an exception to the warrant requirement allows for a valid *Terry* stop when necessary for officer safety, to search for weapons in the interior of a suspect's car. But to justify a warrantless seizure in the context of a traffic stop, the police must be able to point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped is engaged in criminal activity. *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007), citing *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999). Exceeding the scope of a traffic stop requires the police to produce articulable grounds based on specific facts to justify the officer's suspicions and concerns. *State v. Glossbrener*, 146 Wn.2d 670, 677, 49 P.3d 128 (2002), citing *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986).

In *Glossbrener*, for example, the driver smelled of alcohol, which justified an enhanced intrusion. 146 Wn.2d at 676. The driver also had made furtive movements and lied about the reason, which constituted articulable facts justifying the officer's concern for his safety.

Glossbrener, 146 Wn.2d at 676.

Here, by contrast, while Thoma had a reasonable basis to stop Lipp for speeding, ordering him out of his car and marching him to the rear of the vehicle, and then asking him what was in the truck went “well beyond a routine investigation of a traffic violation. This is essentially the fishing expedition that the exclusionary rule seeks to prohibit.” *State v. Allen*, 138 Wn. App. 463, 470-471, 157 P.3d 893 (2007), citing *Reding*, 119 Wn.2d at 688 (custodial arrest unjustified for most traffic violations.) In order for the seizure to be lawful, since it was not within the scope of the original traffic stop, Thoma needed some other lawful reasonable, articulable suspicion of criminal activity by Lipp to further detain and investigate him. *Allen*, 138 Wn. App. at 471.

Thoma had nothing other than a tremor in Lipp's hands which Thoma assumed was nervousness. But, even if we did not know that Lipp was subject to anxiety attacks, RP 60, and really was nervous, this was not sufficient to justify a seizure. *State v. Neth*, 165 Wn.2d 177, 184, 196 P.3d 658 (2008). Thoma said he thought Lipp might be trying to “build up

courage to do something.” RP 10. This does not amount to an articulable, objective suspicion that Lipp either was armed and dangerous or engaged in criminal conduct such as might justify investigating and searching him. *Setterstrom*, 163 Wn.2d at 626.

Whenever a person is unconstitutionally searched or seized,” all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *Ladson*, 138 Wn.2d at 359; *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Dismissal is the appropriate remedy for exceeding the lawful scope of a traffic stop. *State v. Hehman*, 90 Wn.2d 45, 50, 578 P.2d 527 (1978); *Ladson*, 138 Wn.2d at 363.

All evidence obtained after Thoma ordered Lipp out of his car, including both the pen barrel and Lipp’s statements to Thoma, was fruit of the poisonous tree and should never have reached the ears of the jury.

The Court should reverse the conviction.

2. THE PEN-BARREL WAS ILLEGALLY SEIZED.

Under article I, section 7, “a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement.” *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

Even supposing, for the sake of argument, that Thoma had been able to articulate a reason to detain Lipp beyond the scope of the traffic stop, once he had Lipp in custody at the rear of the truck and the passenger in custody in front of the truck, Thoma had no reason to intrude into the interior of the truck to seize a knife. Even if the traffic stop somehow evolved into a *Terry* investigative stop, Thoma exceeded the lawful scope of a *Terry* stop also.

In addition to having no articulable grounds to suspect Lipp of anything illegal just because he was nervous, Thoma cited nothing about Lipp's demeanor or conduct during the seizure that might have suggested he was dangerous. Therefore, Thoma had no grounds even to pat Lipp down, let alone execute a warrantless entry into Lipp's vehicle and conduct a warrantless search.

The Court will address this assignment of error for the first time on appeal because it is both constitutional and manifest. *See, e.g., State v. Jones*, ___ Wn. App. ___, ___ P.3d ___, Slip Op. 39573-8-II at page 5. As in *Jones*, all the facts necessary to adjudicate the claimed error are in the record on appeal. The same facts underlying Lipp's CrR 3.5 motion to suppress his statement to Thoma also justify suppressing the physical evidence.

3. STATEMENTS OBTAINED BY CONFRONTING
LIPP WITH ILLEGALLY SEIZED EVIDENCE
WERE INADMISSIBLE.

Without Miranda warnings, a suspect's statements during custodial interrogation are presumed involuntary. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Custodial interrogation means questioning initiated by a law enforcement officer "after a person has been ... deprived of his freedom in any significant way." *Heritage*, 152 Wn.2d at 215, quoting *Miranda*, 384 U.S. at 444. Constitutional protections apply when a reasonable person in the defendant's position would believe he was not free to leave. *Heritage*, 152 Wn.2d at 217, citing *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). Miranda is required whenever prosecution of the person being questioned is among the purposes for which the officer is eliciting information. *Heritage*, 152 Wn.2d at 214.

As the State argued below, an officer may ask a suspect a moderate number of questions during a *Terry* stop to determine his identity and to confirm or dispel the officer's suspicions, without rendering the suspect 'in custody' for Miranda purposes. *Heritage*, 152 Wn.2d at 218, quoting *Miranda* at 439-40. (See RP 15). This assumes, however (a) that the detainee is articulably a "suspect" and (b) that he is lawfully detained. By contrast, the Fourth Amendment and art. 1, § 7 require suppression of incriminating statements obtained in the course of an unlawful detention.

State v. Byers, 88 Wn.2d 1, 6, 559 P.2d 1334 (1977) (overruled on other grounds by *State v. Williams*, 102 Wn.2d at 741; *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Wong Sun*, 371 U.S. at 488.

Thoma's seizure and interrogation of Lipp was not part of a routine traffic stop. Thoma ordered a motorist out of his car and marched him to the rear of his vehicle. He also ordered a passenger out of the car and marched her to the front. Then the officer conducted a warrantless search of the interior of the vehicle where he found what he believed to be drug paraphernalia with residue under the driver's seat.

In *Heritage*, a group of juveniles were confronted by non-police security guards in a public park. There, by contrast with Lipp's seizure, no-one was physically detained or searched. *Heritage*, 152 Wn.2d at 219. Questions were asked by the park security personnel who immediately told the suspect juveniles they did not have the authority to arrest. *Heritage*, 152 Wn.2d at 219.

Moreover, the security officers in *Heritage* had a reasonable, lawfully-obtained suspicion that the juveniles were smoking marijuana. They smelled it without any intrusion implicating art. 1, § 7 or the Fourth

Amendment. That was not the case here. Thoma had no lawfully obtained reasonable suspicion of criminal conduct. He treated Lipp like a criminal solely because of a tremor in his hands which Thoma arbitrarily attributed to nervousness, which he further — and unlawfully — assumed was evidence Lipp was a dangerous criminal.

In addition, a confession obtained by confronting a suspect with unlawfully seized evidence also is inadmissible on Fourth Amendment grounds. *Byers*, 88 Wn.2d at 8. Thoma induced Lipp to incriminate himself by confronting him with the unlawfully seized pen barrel. That alone is grounds to suppress.

Again, defense counsel did not seek to suppress the statement on the grounds of a search and seizure violation, but all the facts necessary to adjudicate the claimed error under art. 1, § 7 and the Fourth Amendment are in the record on appeal. Court will address this assignment of error for the first time on appeal because it is both constitutional and manifest. *Jones*, Slip Op. 39573-8-II at page 5. The facts underlying Lipp's 3.5 motion to suppress his statement to Thoma justify suppressing the statement on both Fourth and Fifth Amendment grounds.

4. THE COURT ADMITTED LIPP'S STATEMENTS TO THOMA IN VIOLATION OF THE FIFTH AMENDMENT.

Lipp did move to suppress his statement to Thoma on the grounds he was in custody after being unlawfully seized. The court erroneously denied this motion.

Washington courts apply an objective test to determine whether a person defendant is in custody. To establish that an interrogation was custodial, “[t]he defendant must show some objective facts indicating his or her freedom of movement was restricted.” *State v. Post*, 118 Wn.2d 596, 607, 826 P.2d 172 (1992). The analysis boils down to “whether a reasonable person in the individual’s position would believe he or she was in police custody to a degree associated with formal arrest.” *State v. Lorenz*, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004).

Here, the court seemed to think Lipp was not in custody because Thoma told him before removing him from the vehicle why he was being seized. RP . But telling an unlawfully detained motorist why his rights are being violated does not (a) render the detention lawful, or (b) obviate the need for Miranda if the officer’s purpose is to investigate a possible crime. Moreover, the evidence does not support this oral finding.⁵ Thoma did not say he was concerned about Lipp’s knife before ordering him out

⁵ The record contains no written CrR 3.5 findings as required by the rule.

of the vehicle. No mention was made of the knife until after Lipp was in custody behind the car. Second, the objectionable statement was not that Lipp had a perfectly legal hunting knife in his truck. Rather, Lipp made an incriminating statement after Thoma confronted him with the pen barrel in the course of investigating a suspected controlled substance violation.

The record shows that not only did the court base its ruling on an erroneous understanding of the facts, but the State offered no facts sufficient to justify admitting into evidence any statement made by Lipp to Thoma.

Admitting a defendant's statement in violation of *Miranda* is harmless only "if the untainted evidence alone is so overwhelming that it necessarily leads to a finding of guilt." *State v. Ng*, 110 Wn.2d 32, 38, 750 P.2d 632 (1988) , citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986); *see State v. Reuben*, 62 Wn. App. 620, 626-27, 814 P.2d 1177, *review denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991). Here, the untainted evidence was far from overwhelming. Lipp frequently loaned his truck to others, and it was so filled with junk that Lipp could plausibly have been in unwitting possession of a typewriter, let alone a pen barrel. But for the knowledge that he sometimes used a pen barrel to snort his legal

medication, the jury could not have found beyond a reasonable doubt that Lipp knew the this pen barrel was there or why.

The error was highly prejudicial. The State repeatedly pounded on Lipp's admission that he had snorted his pills through a pen barrel as evidence of his propensity also to snort cocaine. RP 26, 52, 67, 68, 82, 83. "He cannot overcome the fact that he admitted to the officer that he uses pens to snort drugs." RP 83.

The sole appropriate remedy is to reverse the conviction and dismiss the prosecution.

5. DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT MOVING UNDER CrR 3.6 TO SUPPRESS THE PEN BARREL.

As discussed above, the Court may address the search and seizure issues raised by Lipp for the first time on appeal because the errors are both constitutional and manifest. See RAP 2.5(a)(3). In addition, the Court will also address a meritorious art. 1, § 7 and Fourth Amendment claim where, as here, the claim raises an essentially legal question with a sufficiently developed factual record for review and defense counsel lacked any plausible ground for failing to seek suppression of the physical evidence. RAP 2.5(a)(3); *McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The Court reviews claims of ineffective assistance of counsel de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). To prevail on a claim of ineffective assistance, Lipp must show both that his counsel erred in a manner significant enough in light of the entire trial record as to call into question the fairness of the trial. *Strickland v. Washington*, 466 U.S. 668, 690-692, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984). Lipp must show (1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced him because there is a reasonable possibility that the jury would have reached a different verdict had counsel performed effectively. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

A defendant alleging ineffective assistance of counsel has the burden to show deficient representation based on the record. *McFarland*, 127 Wn.2d at 335. On direct appeal, the Court evaluates an ineffective assistance claim based solely on the trial record. *McFarland*, 127 Wn.2d at 335. Lipp must overcome "a strong presumption of reasonableness" by showing in the record the absence of legitimate or tactical reasons supporting trial counsel's conduct. *Thomas*, 109 Wn.2d at 226. Here, counsel's ineffective performance is evident in the record.

Failure to move to suppress evidence that tends to prove an essential element of the charge is not per se deficient representation, provided it can be explained by a legitimate strategic or tactical reason. *McFarland*, 127 Wn.2d at 336. So a defendant bears the burden of establishing the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). Ultimately, the question is “not whether counsel's choices were strategic, but whether they were reasonable.” *Grier*, 171 Wn.2d at 34. One such legitimate reason would be a reasonable belief that a suppression motion could not succeed. *See, McFarland*, 127 Wn.2d at 337 n.3. That is not the case here. The record clearly refutes any possible claim of a plausible strategy for not seeking suppression of the pen barrel.

Counsel was deficient in failing to recognize the legal significance of the facts surrounding the stop. The trial record shows that counsel argued to the jury that Lipp’s apparent nervousness could be explained by several plausible, innocent reasons. Lipp had been on the road three hours already. He was concerned about Ms. Thompson who was to undergo a medical procedure. Her appointment was less than an hour away, they still had to drive from Cowlitz County to Portland, and now they would lose time by being stopped. And nervousness at being pulled over is normal. RP 71-72.

So counsel clearly recognized that his client's apparent nervousness was insufficient as a matter of law to justify ordering him out of his car, marching him to the rear and questioning him there. It logically follows that Thoma seized Lipp with no lawful reason. Therefore, not only were Lipp's statements to Thoma inadmissible on both Fourth and Fifth Amendment grounds (please see Issues 3 and 4), but the pen barrel also was unlawfully obtained. No plausible scenario can be conceived whereby both the physical evidence and the statement would not have been suppressed — assuming the trial judge knew the law and got the facts straight.

This error was manifestly prejudicial to Lipp. The State's entire case rested on the physical evidence of the pen barrel and Lipp's statement to Thoma. Without either or both of these facts, the State had no evidence whatsoever, and the prosecution would have been dismissed. The Court should reverse the conviction and order the prosecution dismissed.

**6. THE PROSECUTOR COMMITTED
REVERSIBLE MISCONDUCT BY SHIFTING
THE BURDEN TO THE DEFENSE TO
PRODUCE EXCULPATORY EVIDENCE.**

The prosecutor commented on the fact that Morgan Thompson testified that a co-worker of Lipp's named Sean was one of several people who borrowed Lipp's truck shortly before the stop, yet Sean did not

appear at trial to testify for the defense. RP 51. The prosecutor further remarked on the fact that Thompson herself did not spontaneously report to the police station to disclose to the prosecutor the substance of her proposed testimony. RP 52-53.

Instead of objecting, defense counsel elicited testimony from Thompson that the State knew she would be a defense witness and could have interviewed her. RP 53-54. The failure to object does not preclude review of this issue, because shifting the burden of producing evidence to a criminal defendant is a manifest constitutional violation that may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995) (claim that jury instruction shifted burden).

“Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt.” *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940, 944 (2008), *cert. denied*, 129 S. Ct. 2007 (2009). Specifically, the State violates due process by implying that a criminal defendant has a duty to present evidence. *State v. McKenzie*, 157 Wn.2d 44, 58-59, 134 P.3d 221 (2006). It is reversible misconduct for the State to comment on the lack of defense evidence. *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990). A

defendant “has no duty to present any evidence. The State bears the entire burden of proving each element of its case beyond a reasonable doubt.” *Winship*, 397 U.S. at 361-62. The prosecutor may not imply guilt from a defendant’s failure to call witnesses to prove his innocence. It is misconduct to invite the jury to infer that the defendant had a duty to present favorable evidence if it existed. *Cleveland*, 58 Wn. App. at 648

That is what happened here. The prosecutor unambiguously invited the jury to infer that, by not spontaneously sending his witnesses along to disclose their proposed testimony to the prosecutor, and by not producing the coworker to testify at trial, defense counsel deliberately attempted to ambush the State with surprise evidence that could not be investigated. The inescapable corollary implication is that this was evidence of guilt. RP 74.

The error cannot be deemed harmless. This Court applies the constitutional harmless error standard when improper comments by a prosecutor implicate a constitutional right. *State v. Moreno*, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006). The Court presumes a constitutional error was prejudicial, and the State bears the burden to show the error was not harmless. *Guloy*, 104 Wn.2d at 425. A constitutional error is harmless only if this Court is convinced beyond a reasonable doubt that the prosecutor’s comments did not affect the verdict. *Id.*

The remedy is to reverse and remand with instructions to dismiss the prosecution. *See State v. Dixon*, 150 Wn. App. 46, 58-59, 207 P.3d 459 (2009) (reversed and dismissed where the State improperly shifted the burden in closing argument).

7. IT WAS REVERSIBLE MISCONDUCT FOR THE PROSECUTOR TO COMMENT ON LIPP'S EXERCISE OF HIS FIFTH AMENDMENT RIGHT NOT TO VOLUNTEER EXCULPATORY EVIDENCE.

The prosecutor's impermissible questions to Morgan Thompson also constituted An impermissible comment on Lipp's right to remain silent regarding potential evidence in the form of additional statements from himself or from a defense witness who was properly disclosed during discovery. The State violated Lipp's right to silence if the prosecutor's questions to Thompson were manifestly intended to be a comment on that right. *See, State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008), quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991). "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). By contrast, a remark does not amount to a comment if it can be considered a "mere reference" to silence.

A mere reference is not reversible error absent a showing of prejudice. *Burke*, 163 Wn.2d at 216, quoting *Lewis*, 130 Wn.2d at 706-07. The State's remarks here constituted an impermissible comment.

This error was not harmless. The prosecutor's question was not "so subtle and so brief" that it can be deemed not to have "naturally and necessarily" emphasized Lipp's testimonial silence. *See, Crane*, 116 Wn.2d at 331, quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978). Applying the constitutional harmless error standard, the Court must presume the error was prejudicial, and require the State to show the error was not harmless. *Moreno*, 132 Wn. App. at 671-72; *Guloy*, 104 Wn.2d at 425. It cannot be argued that the prosecutor's comments did not affect the verdict, because the untainted evidence was not so overwhelming that any particular due process violation can be deemed harmless. *Guloy*, 104 Wn.2d at 425.

8. IT WAS REVERSIBLE MISCONDUCT FOR THE PROSECUTOR TO COMMENT ON LIPP'S EXERCISE OF HIS DUE PROCESS RIGHT TO PRESENT ALTERNATIVE DEFENSES.

In closing argument, the prosecutor told the jury that Lipp had admitted he was guilty of being in possession of cocaine by asserting the alternative defense of unwitting possession. "What is his defense here? If he's going with the unwitting possession defense, he's admitted that the

State has met its burden of proof today and proven its case beyond a reasonable doubt because he's admitted that he was in possession of cocaine in Cowlitz County." RP 81. This is false as a matter of logic as well as of law, and amounts to reversible misconduct.

Inconsistent defenses are commonplace and are unobjectionable so long as they do not involve "false swearing or perjury." *Lord v. Wapato Irr. Co.*, 81 Wash. 561, 583-84, 142 P. 1172 (1914). In *Lord*, a party properly challenged the existence of a contract and alternatively demanded damages for breach if a contract was found to exist. *Lord*, 81 Wash. at 583. Defenses "are inconsistent only when one of them is necessarily false." *Lord*, 81 Wash. at 584.

Where a defendant asserts the affirmative defense of unwitting possession, the State first has the burden to prove beyond a reasonable doubt the elements of unlawful possession of a controlled substance as defined in the statute – the nature of the substance and the fact of possession. Only when that is proved does the affirmative defense of unwitting possession come into play to ameliorate the harshness of a strict liability crime. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Then, the defendant's burden is to establish unwitting possession by a mere preponderance of the evidence. *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.2d 931 (1998). Moreover, even where two affirmative

defenses are pleaded, they are not mutually exclusive so long as there is evidence of both. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (accident and self-defense).

Here, just as in *Lord*, it was perfectly consistent for Lipp to argue that the State had not proved the elements of possession and, even if they did, that possession was unwitting. Moreover, *Lord* was a civil matter. In a criminal prosecution, the defendant has a constitutional right to ““a meaningful opportunity to present a complete defense.”” *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

Besides misleading the jury that merely asserting the affirmative defense of unwitting possession entitled the State to a guilty verdict, the tactic of equating the two defenses obfuscated the burdens of proof in such a way as to (a) relieve the State of its burden to prove possession beyond a reasonable doubt; and (b) to require Lipp to prove unwitting possession by the same standard, instead of merely by a preponderance. There is a difference between asserting an affirmative defense and challenging proof of guilt. *State v. Jeppesen*, 55 Wn. App. 231, 236, 776 P.2d 1372 (1989).

Here, by contrast with the defense of unwitting possession, pleading not guilty and arguing that the State failed to prove the elements of the charge was a general denial, not a defense. It did not require Lipp to produce any proof whatsoever. The prosecutor's argument likely confused the jury on this point.

The prosecutor further misrepresented Lipp's affirmative defense during rebuttal (when the defense could not respond to it.) The prosecutor falsely characterized Lipp's defense as claiming he had no idea the pen barrel was in his truck, after admitting he had used it himself. RP 83. But Lipp's defense was not that he was unaware of the existence of the pen barrel which he used for a lawful purpose, but that he was unaware it might contain trace evidence of someone else's unlawful use of cocaine.

A defendant has the due process right to assert alternative defenses, and even mutually contradictory defenses. Here, Lipp properly claimed that (a) the State had not proved he was in possession of cocaine, and (b) if the jury believed cocaine was present on the pen barrel, then Lipp did not know it was there.

Misleading the jury on this important matter of law requires a new trial.

9. THE SENTENCING COURT ERRED BY FAILING TO STAY EXECUTION PENDING APPEAL.

There is no right to release pending appeal, and a trial court's failure to stay execution of sentence pending appeal is reviewed for an abuse of discretion. *State v. Cole*, 90 Wn. App. 445, 446-47, 949 P.2d 841 (1998). It is a per se abuse of discretion, however, for a judge not to exercise any sort of meaningful discretion whatsoever. *State v. Grayson*, 154 Wn.2d 333, 335, 111 P.3d. 1183 (2005). That is what happened here.

It was manifestly clear to the court that Lipp was a first time offender charged with possessing a few grains of cocaine dust insufficient to register on the trooper's field test kit. The State conceded Lipp was a first time offender. RP 90, CP 21, CP 23. He had never been in trouble before this incident or since. He had made all his court dates despite having to travel to Cowlitz from the Puget Sound area. RP 90. Lipp asked the court for leniency and begged the court to help him keep his job. RP 91. The court nevertheless sentenced him to ten days in jail. CP 27; RP 91.

RCW 9.95.602 precludes a stay in certain circumstances. *Cole*, 90 Wn. App. at 447. RCW 9.95.062(1) reads as follows: Notwithstanding CrR 3.2 or RAP 7.2, an appeal by a defendant in a criminal action shall not stay the execution of the judgment of conviction, if the court

determines by a preponderance of the evidence that the defendant is likely to flee or to pose a danger to the community; or delay will unduly diminish the deterrent effect of the punishment; or cause unreasonable trauma to victims; or the defendant is not taking care of financial obligations under the judgment. RCW 9.95.062(1)(a), (b), (c), & (d).

RAP 7.2 simply authorizes the trial court to release the defendant in a criminal case pending appeal subject to RCW 9.95.062. CrR 3.2 instructs the court as follows: **“If the court does not find, or a court has not previously found, probable cause, the accused shall be released without conditions.”** This general rule is followed by a single subsection — CrR 3.2(a) — that sets conditions for release on personal recognizance pending trial. The subsections following subsection (a), by contrast, are not restricted to pretrial release. CrR 3.2(b) – (o). Those sections simply require the least restrictive release conditions to protect the community and assure the accused’s appearance at future proceedings.

Accordingly, by statute, the sentencing court was required to release Lipp without conditions, unless the court found probable cause not to do so. RCW 9.95.062. Not only did the court make no such finding, the judge did not even consider doing so. Despite all the factors pointing to Lipp’s meritorious claim to release pending appeal, the judge did not

exercise any discretion whatsoever in this regard. This was a per se abuse of discretion. *Grayson*, 154 Wn.2d at 335.

Mr. Lipp beseeched the court not to send him to jail because he had already lost his employment once because of this charge and did not want to lose it again by requesting a 10-day leave of absence. Instead of inquiring into the facts as required by RCW 9.95.602, the court summarily ordered Lipp to be taken immediately to jail. RP 93.

Mootness: This issue is technically moot because the Court can provide no effective relief to Mr. Lipp at this point. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225, *aff'd*, 152 Wn.2d 220, 95 P.3d 1225 (2004). But, where an issue one of general public interest such that resolution is necessary to provide authoritative guidance on the issue, the Court may address it. *PRP of Mines*, 146 Wn.2d 279, 284-85, 45 P.3d 535 (2002).

The Court should provide authoratative guidance on this issue. The practice of superior court judges to constructively repeal mandatory release pending appeal legislation is immune from review where, as here, the sentence has been served by the time the appeal comes before this Court. The Court should nevertheless address the issue, because in some counties, the standard procedure of ignoring the possibility of release

pending appeal is so ingrained that defense counsel no longer even bother requesting it. That appears to be the case here.

There was no lawful impediment to Lipp's being released, either on his own recognizance or subject to some condition. He was needlessly subjected to potentially devastating consequences of incarceration without receiving so much as a moment's consideration by the judge of factors that were plainly before the court and conceded by the State.

The Court should hold that this is unacceptable and require sentencing courts to exercise some degree of discretion rather than summarily and arbitrarily ordering deserving defendant's to be taken instantaneously into custody.

IV. CONCLUSION

For the reasons stated, this Court should reverse Lipp's conviction for possession of cocaine, vacate the judgment and sentence, and remand with instructions to dismiss the prosecution with prejudice.

Respectfully submitted this 1st day of September, 2011.

Jordan McCabe

Jordan B. McCabe, WSBA No. 27211
Counsel for Eric J. Lipp

CERTIFICATE OF SERVICE

Jordan McCabe requested electronic service of this Appellant's Brief upon opposing counsel in the course of electronic uploading to:

bours@co.cowlitz.wa.us

Susan I. Baur, Hall of Justice, 312 SW 1st Ave, Kelso, WA 98626-1799

A paper copy of this Appellant's Brief was deposited in the U.S. Mail, first class U.S. postage prepaid addressed to:

Eric J. Lipp, c/o
5216 168th street SW, Apt. 7
Lynnwood . WA 98037

Jordan McCabe

September 1, 2011

Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington

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