

**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

REPLY BRIEF

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

MCCABE LAW OFFICE
PO Box 6324, Bellevue, WA 98008
425-746-0520•mccabejordanb@gmail.com

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II. **SUMMARY OF THE CASE**

Appellant, Eric J. Lipp, appeals his conviction for possession of cocaine.

Lipp was driving through Cowlitz County on his way to Portland, Oregon, for an 8:30 a.m. medical appointment, when Washington State Patrol Trooper Phillip Thoma pulled him over for speeding. RP 9.

Lipp's hands were really shaking as he removed his license from his wallet. This led Thoma to conclude, not merely that Lipp was excessively nervous, but that the reason he was nervous must be because he was either planning "to do something" violent or that he had contraband in his car. RP 9-10.

Lipp contends this was insufficient grounds to do more than identify him, check the status of his license, write him a ticket and send him on his way pursuant to RCW 46.64.015.

Instead, Thoma ordered Lipp out of his pick-up and forced Lipp to accompany him to the rear of the car where he questioned him. RP 10. Thoma asked Lipp if he had anything illegal or any weapons in the truck. Lipp told Thoma his buck knife was under the driver's seat. RP 10.

Thoma then frisked Lipp for weapons, but found none. RP 11. He then ordered Lipp's passenger out of the truck and sent her to the front. Then Thoma reached inside Lipp's truck and removed the knife. RP 11.

As he did so, Thoma saw a plastic *BIC* pen-barrel under the knife and seized it. RP 11. He noticed some sort of residue on this pen-barrel. RP 12. Thoma confronted Lipp with the pen-barrel and asked him about it. Lipp said he sometimes used a pen-barrel to inhale his prescription medication when he needed it to take effect quickly during a severe anxiety attack. RP 13, 26, 60.

The residue field-tested negative for cocaine. Thoma nevertheless conducted a full search of the truck, with Lipp's consent. RP 30. Thoma still found nothing and had no choice but to send Lipp on his way. But Thoma kept the pen-barrel and sent it to the WSP Crime Lab where it tested positive for cocaine. RP 39.

The State charged Lipp by Information with possession of cocaine in violation of RCW 69.50.4013(1). CP 1. Lipp was tried by jury and asserted the defense of unwitting possession. RP 1.

Lipp moved to suppress his statement to Thoma because Lipp was unlawfully ordered out of his vehicle and not allowed back in. Also that a reasonable person would not have felt 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 his passenger to the front, and questioning Lipp about his private affairs constituted a show of authority.

Thoma claimed he could spot drug users just by looking at them. RP 7-8. He also claimed to be able to recognize when someone was committing a crime by observing them driving down the road. RP 19.

Thoma testified that his sole reason for ordering Lipp out of his truck was his apparent nervousness. RP 22. “[D]id you show any kind of authority at all to him?” “No.” RP 13. Thoma testified that Lipp did not appear to be under influence of narcotics or alcohol but was just nervous. RP 31. The judge denied suppression based on a misunderstanding of the evidence. Thoma testified that he first ordered Lipp out of the car for appearing nervous and frog-marched him to the rear of the truck, and then learned about the knife. The court got this backwards and found that Thoma first discovered the knife and that was why he ordered Lipp out of his car. RP 16. Based on this mischaracterization of the facts, the court concluded that Lipp’s statements were admissible. RP 16.

At trial, Lipp’s fiancée testified that his truck was always littered with garbage and clothes. RP 46. He freely loaned it to other people, including numerous coworkers. RP 50. Lipp confirmed that he had owned the truck for 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.

Based on Lipp's clean record, the court imposed 10 days in jail and 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 ordered the 10 days to begin immediately. RP 91, 93.

III. ARGUMENTS IN REPLY

1. THE SUPPRESSION COURT'S FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE.

The State concedes that the record does not support the suppression court's findings of fact here. BR 14. The court erroneously found that Thoma discovered the knife in the first instance and concluded that this was sufficient grounds for exceeding the lawful scope of a traffic stop. RP 16.

The denial of a motion to suppress must be reversed unless the suppression court's findings of fact are supported by substantial evidence in the record and those facts support the court's conclusions of law. *State*

v. Allen, 138 Wn. App. 463, 468, 157 P.3d 893 (2007); *State v. Hill*, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994).

The State cites to no authority for the proposition that a conclusion of law unsupported by the findings can nevertheless be affirmed.

Reversal is required.

**2. ALL THE SUPPRESSION FACTS ARE
IN THE RECORD ON APPEAL.**

The State claims the record is insufficient to permit Lipp to challenge the unlawful search and seizure for the first time on appeal.

BR10. This is wrong.

The issue is both constitutional and manifest. All the facts necessary to adjudicate the claimed error are in the record on appeal, because the same facts developed in Lipp's CrR 3.5 motion to suppress his unlawfully-obtained statement to Thoma also render the search and seizure unlawful and mandate suppression of the physical evidence.

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

The State claims Trooper Thoma acted within his lawful discretion in ordering Lipp out of his car because his hands were trembling. Brief of Respondent (BR) 5-6. The State cites cases addressing the legitimate safety concerns of police officers interacting with suspected criminals where there is reason to believe the suspect might grab a weapon from his

vehicle. BR 6-7. But Lipp was not a suspected criminal. He was merely a motorist who was caught speeding.

Moreover, Thoma did not merely ask Lipp to get out of his car. After Lipp got out, Thoma frog-marched him to the rear of the vehicle and started interrogating him about the contents of the truck. RP 10-11. This far exceeded the lawful scope of a traffic stop and the State cites to no exigent circumstances to justify escalating the traffic stop to a warrantless intrusion of this magnitude.

Stopping a motorist for a traffic violation is a “seizure” that implicates Wash. Const. art. 1 and the Fourth Amendment. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). Both by statute and Washington case law, the permissible scope of a Const. art. 1, § 7 intrusion for a minor traffic offense is limited. *Ladson*, 138 Wn.2d at 362-363.

Unless one of the express warrant exceptions applies, the officer may detain the driver only long enough to issue and serve a citation and notice. RCW 46.64.015. In *Allen*, 138 Wn. App. 463, this Court held that an unlawful seizure occurred when, while conducting a traffic stop, the police asked a motorist to accompany him to the rear of the car and questioned her there. *Allen*, 138 Wn. App. at 468. Here, Thoma exacerbated this violation law by also restricting the freedom of movement

of Lipp's passenger by forcing her to get out of the car and go stand at the front. *Allen*, 138 Wn. App. 469, citing *State v. Rankin*, 151 Wn.2d 689, 699, 92 P.3d 202 (2004).

A warrantless search is per se unreasonable, valid only if made imperative by exigent circumstances. *State v. Valdez*, 167 Wn.2d 761, 768, 224 P.3d 751 (2009). The appropriate remedy for exceeding the lawful scope of a traffic stop is to dismiss. *State v. Hehman*, 90 Wn.2d 45, 50, 578 P.2d 527 (1978).

One warrant exception allows for a valid *Terry* stop if the officer can articulate specific 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). But, before exceeding the scope of a traffic stop, the officer must be able to articulate grounds based on specific facts sufficient to justify his 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).

The scope of this search is "narrowly tailored to the necessities that justify it." *Valdez*, 167 Wn.2d at 768. It does not apply to a motorist who is suspected of a mere traffic infraction. The officer must be confronting a

person suspected of a crime who might reasonably be expected to produce a weapon or try to destroy evidence. *Id.*

An officer may also conduct a warrantless search if articulable facts arise after a traffic stop that create probable cause to suspect criminal activity. For example, the officer may smell marijuana or see readily identifiable contraband in plain view. *Ladson*, 138 Wn.2d at 363-64. In *Glossbrener*, the driver smelled of alcohol, and this justified an otherwise impermissible intrusion. 146 Wn.2d at 676. Also, the driver had made furtive movements and lied about his reason for doing so. This constituted articulable facts justifying the officer's concern for his safety.

Glossbrener, 146 Wn.2d at 676. The State also cited *State v. Larson*, 88 Wn. App. 849, 946 P.2d 1212 (1997), where a suspect made furtive movements down near the floor. *Id.* at 851.

Lipp did none of this. Lipp did not appear to be under influence of narcotics or alcohol. RP 31. His hands were never out of Thoma's sight. In *Larson*, moreover, the motorist who had acted suspiciously had to get back into the vehicle before the stop was concluded. BR 8. Lipp did not. Thoma testified that his sole reason for exceeding the scope of a traffic stop was Lipp's apparent nervousness. RP 22.

Thoma had nothing other than a tremor in Lipp's hands which Thoma attributed to nervousness. But, even if we did not know that Mr.

Lipp was taking medication for anxiety attacks, RP 60, this was not a sufficient reason to justify Thoma's conduct. *See State v. Neth*, 165 Wn.2d 177, 184, 196 P.3d 658 (2008) (nervousness is not grounds to seize.) As distinguished from the officer in *Larson*, Thoma's fear was not objectively unreasonable. *See Larson*, at 857.

Thoma's intrusion went well beyond a routine investigation of a traffic violation. Thoma was fishing for evidence of some unspecified crime. This is exactly the sort of arbitrary intrusion the exclusionary rule prohibits. *Allen*, 138 Wn. App. at 470-471.

In order for Lipp's seizure to be lawful once it exceeded the scope of the original traffic stop, Thoma needed some articulable suspicion of criminal activity by Lipp to further detain and investigate him. *Allen*, 138 Wn. App. at 471. Thoma said he thought Lipp might be trying to "build up courage to do something." RP 10. But this does not amount to an articulable, objective suspicion that Lipp either was armed and dangerous or engaged in criminal conduct. It is no more than an inarticulate, speculative hunch.

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. *Hehman*, 90 Wn.2d at 50; *Ladson*, 138 Wn.2d at 363.

All the evidence Thoma obtained during this fishing expedition should have been suppressed. It was fruit of the poisonous tree, and suppression was the sole remedy.

The Court should reverse the conviction.

4. THOMA UNLAWFULLY SEIZED LIPP'S
PEN-BARREL.

Under Const. art. 1, § 7, a warrantless search is unreasonable per se, 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). One such exception permits an officer to seize readily identifiable contraband that is in plain view. *Ladson*, 138 Wn.2d at 363-64.

The State claims Trooper Thoma immediately identified Lipp's pen-barrel as contraband. BR 6. But a pen-barrel is not readily identifiable as contraband. For one thing, mere possession of drug paraphernalia is not a crime. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

Thoma tried to identify traces of unidentifiable powder as contraband — after he seized the pen-barrel — with his cocaine field testing kit. This test was negative. Thoma nevertheless retained custody

of the presumptively innocuous pen-barrel after his unlawful search and seizure of Lipp turned up absolutely no grounds to detain him or for having intruded upon his privacy in the first place.

The pen-barrel evidence was inadmissible and cannot support a conviction. The Court should reverse and dismiss.

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

The State claims that Thoma was permitted to ask Lipp a moderate number of questions without implicating Miranda, because a traffic stop is equivalent to a *Terry* stop. BR 11-12. But a lawful *Terry* interrogation is strictly limited to determining a suspect's identity and confirming or dispelling the officer's articulable suspicion of criminal activity. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). Thus, for this exception to apply (a) the detainee must be articulably a "suspect" and (b) he must be lawfully detained. That is not what we have here.

Moreover, the State does not address Lipp's Fourth Amendment and art. 1, § 7 challenge to the admission of statements he made obtained in the course of an unlawful detention irrespective of Fifth Amendment concerns. BR 14. But statements obtained while conducting an unlawful search and seizure are inadmissible. *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. Specifically, a confession obtained by confronting a suspect with unlawfully seized evidence is inadmissible. *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.

Although Lipp did not seek to suppress the statement on the grounds of a search and seizure violation, all the facts necessary to adjudicate the claimed error under art. 1, § 7 and the Fourth Amendment are in the record on appeal. 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.

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.

6. ADMITTING LIPP'S STATEMENT WAS NOT HARMLESS.

The State claims that using Lipp's unlawfully-obtained statement against him was harmless error. BR 14. This is wrong.

Admitting a defendant's unlawfully obtained statement 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 (1991).

The untainted evidence against Mr. Lipp was far from overwhelming. Lipp frequently loaned his truck to others, and it contained so much junk that a pen-barrel could easily have escaped Lipp's notice. But for his statement that he sometimes used a pen-barrel to administer his legal medication, the jury could not have found beyond a reasonable doubt that Lipp knew the this pen-barrel was there or why.

Moreover, the State repeatedly pounded on Lipp's admission that he had snorted his pills through a pen-barrel as evidence of his propensity 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.

7. COUNSEL WAS INEFFECTIVE FOR NOT MOVING 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); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The State claims Lipp cannot establish ineffective assistance because a suppression motion was unlikely to have succeeded. BR 16-17. This claim is without merit.

Not only were Lipp's statements to Thoma inadmissible on both Fourth and Fifth Amendment grounds, but the pen-barrel also was unlawfully obtained. No plausible scenario can be conceived whereby both the physical evidence and the statement would have been deemed admissible by a judge who 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.

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

Lipp rests on his brief regarding the impermissible implications introduced by the prosecutor while cross-examining the defense witnesses.

The State does not address the prosecutor's reversible error in closing argument whereby he 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. *Lord v. Wapato Irr. Co.*, 81 Wash. 561, 583-84, 142 P. 1172 (1914). 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). Specifically, where a defendant asserts the affirmative defense of unwitting possession, the State first must prove the elements of possession beyond a reasonable doubt, including the nature of the substance and the fact of possession. Only then 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). The defendant can establish unwitting possession by a mere preponderance of the evidence. *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.2d 931 (1998).

Here, it was logical and consistent for Lipp to argue that the State had not proved the elements of possession and also to argue that, even if they did, that possession was unwitting. The defendant in a criminal prosecution 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).

The tactic of equating the two defenses obfuscated the burdens of proof in such a way as to relieve the State of its burden to prove possession beyond a reasonable doubt. The error also misled the jury to

require proof of prove unwitting possession by the same standard, instead of merely by a preponderance.

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 a pen-barrel he used for a lawful purpose. It was that he did not know 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.

The State again misrepresents the record by claiming that Lipp did not ask the sentencing court to delay execution of his sentence. BR 24. It was manifestly clear 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 dutifully driven to Cowlitz from the Puget Sound area for all his court appearances. RP 90. Mr. Lipp beseeched the court not to send him immediately to jail. because he had already lost his job once because of this charge and did not want to lose it again by requesting a 10-day leave of absence. RP 91. Instead of inquiring into the facts as required by RCW 9.95.602, the court summarily ordered Lipp to be taken from the court room straight to jail. RP 93.

A sentencing court should grant a stay pending appeal unless a preponderance of the evidence shows that the defendant is likely to flee or to pose a danger to the community; or that delay will unduly diminish the deterrent effect of the punishment or cause unreasonable trauma to victims; or that the defendant is not taking care of financial obligations under the judgment. RCW 9.95.062(1)(a), (b), (c), & (d).

Moreover, the Rules of Criminal Procedure instruct the court: **“If the court does not find, or a court has not previously found, probable cause, the accused shall be released without conditions.”** CrR 3.2.

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 a stay, the judge did not exercise any discretion whatsoever. This was a per se abuse of discretion. *State v. Grayson*, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005) (even broad discretion must be exercised in conformity with the law.)

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 resolution of an issue is of general public interest to provide authoritative guidance for future cases, the Court may address it. *PRP of Mines*, 146 Wn.2d 279, 284-85, 45 P.3d 535 (2002).

The Court should review this issue. Otherwise, routinely ignoring the legislative mandate to release defendants pending appeal absent good cause is immune from review because sentences so frequently have been served by the time the appeal runs its course.

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 8th day of December, 2011.

Jordan B 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 via the Division II upload portal to:

baurs@co.cowlitz.wa.us

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

A paper copy of this Reply Brief and a copy of the State'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 B McCabe

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Jordan B. McCabe, WSBA No. 27211

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