

42638-2-II

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

State of Washington
Respondent

v.

MICHAEL JOSEPH MOYLE
Appellant

42638-2-II

On Appeal from the Superior Court of Clallam County

Superior Court Cause number 10-1-00296-0

The Honorable S. Brooke Taylor

BRIEF OF APPELLANT

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II. **ASSIGNMENTS OF ERROR AND ISSUES**

A. Assignments of Error

1. The trial court ruled on Appellant's suppression motions without conducting a hearing, contrary to Wash. Const. art. 1, § 22 and the Fifth, Sixth and Fourteenth Amendments.
2. Appellant received ineffective assistance of counsel, contrary to Const. art. 1, § 22 and the Sixth Amendment.
3. The suppression court made findings and conclusions that are not supported by the record.
 - (a) That three officers, not just one, saw a meth pipe in proximity to Appellant before his arrest.
 - (b) That the arresting officers were concerned about Appellant's welfare, which constituted grounds to remove him from his car and detain him.
 - (c) That the seizure and incident search of Appellant was no more than a lawful *Terry* stop and weapons frisk.
4. The State arrested Appellant with neither probable cause nor reasonable suspicion.
5. The trial court admitted physical evidence and incriminating statements obtained from Appellant in violation of Wash. Const. art 1. § 7 and the Fourth Amendment.
6. The State failed to prove the essential elements of possession of a controlled substance.
7. The court exceeded its lawful authority to impose costs.

B. Issues Pertaining to Assignments of Error

1. May the trial court rule on a criminal defendant's suppression motion without a hearing, relying instead on facts developed in a prior hearing for a different defendant with competing interests whose counsel is conflicted out of representing Appellant? Is this a structural error?
2. Is it per se ineffective assistance to waive a suppression hearing where suppression is the primary defense?
3. Did the suppression court enter findings without support in the record leading to an erroneous conclusion?
4. Did the police have articulable grounds to subject Appellant to custodial arrest or a *Terry* investigative stop?
5. Must all the State's evidence be suppressed as fruit of the poisonous tree?
6. Did the State prove the elements of possession merely by proving Appellant's proximity to a meth pipe in a car whose owner was arrested and charged with possession of drugs and paraphernalia in the car?
7. Did the court exceed its statutory authority to impose costs and determine Appellant's future ability to pay?

II. SUMMARY OF THE CASE

This is a meat-and-potatoes search and seizure case arising from the conviction of Appellant, Michael J. Moyle, on two counts of possessing a controlled substance. The questions presented are:

(1) May the trial court deny a suppression motion without a hearing, relying instead on the transcript of a hearing held in the companion case of another defendant with interests antagonistic to those of the defendant and whose counsel was conflicted out of representing the defendant?

(2) Does defense counsel render ineffective representation by acquiescing to this procedure?

(3) Where an patrol officer notices a man sleeping in the reclined passenger seat of a car in the night-time, does the officer violate the sleeping man's article 1, section 7 and Fourth Amendment privacy rights by shining a flashlight into the car, with no articulable reason to suspect criminal activity, merely out of curiosity as to what the man is doing?

(4) When this flashlight search illuminates what appears to be a meth pipe on the center console next to the sleeper, do the police perpetrate an unlawful warrantless arrest without probable cause when

they open the car door, order the man out, handcuff him, march him to a waiting patrol car, search his person (twice), Mirandize him, bundle him into the car, and transport him to jail?

(5) Can this seizure be characterized as a lawful *Terry* investigatory stop and the incident searches as lawful *Terry* weapons frisks?

(6) Was the admissible evidence sufficient to prove possession of a controlled substance, either actual or constructive?

III. STATEMENT OF THE CASE

On July 19, 2010, between 11:00 and 11:30 p.m., Port Angeles Police Officer Justin LeRoux was patrolling the streets hoping to intercept vehicle prowls. 12/1 RP 14;¹ Finding 1, CP 27;² CP 101.³ He saw a truck parked in a driveway with its door open, the dome light on, and people moving inside and around it. CP 101. The only illumination was from street lights. Visibility was so poor that, from drive-by distance, Deputy Justin LeRoux, an experienced officer, thought he saw two males inside the car and a third male standing at the open door on the driver's side.

¹ The verbatim reports of proceedings are more or less randomly scattered through two volumes. The hearings in one volume are all individually paginated. These are designated with the hearing date and page number. The hearings in the second volume are continuously paginated. These are designated RP #.

² CP 27 is the CrR 3.6 Findings and Conclusions.

³ CP 101 is the State's memorandum opposing suppression.

12/1 RP 15. In reality, there were only two people, one male inside illuminated by the dome light and a woman standing at the open door — of the passenger side, not the driver’s side. *Id.* LeRoux immediately determined that the woman lived at the residence and the man owned the truck. 12/1 RP 16; CP 101.

LeRoux did not immediately move on and leave these people alone. Instead, he continued to detain them and intrude on their privacy for several minutes until two back-up officers, David Arand and Jesse Winfield, arrived. 12/1 RP 16; Finding 4, CP 27; CP 101. While Arand joined LeRoux in annoying the folks in the truck, Corporal Winfield occupied himself by shining his flashlight into other cars parked in the vicinity. CP 101.

Winfield found Michael Moyle lying with his eyes closed in the reclined passenger seat of a red Honda parked nearby. CP 101. Winfield told the other officers Moyle was passed out, although he later conceded Moyle might also have been asleep or awake but “faking.” 12/1 RP 16, 29, 68; Finding 6, CP 27. When Winfield saw the reclining figure, he illuminated the man with his flashlight, to see what he was doing. 12/1 RP 68. (“When I walked up to the car and I saw someone was in it, I pointed that out to the officers and I illuminated the inside of the car to see what

the person was doing because I couldn't tell what he was doing so I looked at him.")

Arand joined Winfield at the Honda. Winfield told him he had seen a glass pipe on the center console between the driver's and passenger seats. 12/1 30-31; Finding 8, CP 28. During his testimony at a CrR 3.6 hearing for another defendant. Arand appears to imply that he saw the pipe.⁴ In all the police reports, however, Arand consistently stated that only Winfield, not Arand, actually saw the pipe at that point. Certification accompanying Motion for Probable Cause at 1, 2nd Supp. CP ____;⁵ Narrative Case Report, filed July 20, 2010; State's Memorandum, CP 101. LeRoux testified unequivocally that he did not see the pipe until after Moyle was in custody. 12/1 RP 17, 24. Corporal Winfield claimed he was able to identify this as a meth pipe because he had been trained to identify specific drug residues by sight.⁶ 12/1 RP 56-57. Wow. When they later viewed the pipe, Arand and LeRoux contradicted each other regarding the appearance of the residue. Arand thought it was white. 12/1

⁴ In the interests of judicial economy, the court ruled on Moyle's suppression motion without a hearing. The court relied instead on a transcript of the CrR 3.6 hearing held in the prosecution of one Fanny Burdette, who was later charged in the same incident and tried separately from Moyle. 12/1 RP 59; Suppression Findings, CP 26.

⁵ The State stipulated to the facts in the police reports. CP 34-35, 43. A party may not contend on appeal that the facts are other than as stipulated. See *State v. Parra*, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993).

⁶ "Meth" denotes methamphetamine.

RP 30-31. LeRoux said it was black. 12/1 RP 24. Winfield claimed that both black and white residues were visible. 12/1 RP 57; Finding 12. CP 28. His flashlight illuminated black or brown residue in the bowl of the pipe and traces of white powder in the neck. 12/1 RP 66.

Arand and Winfield opened the car door and ordered Moyle to get out. 12/1 RP 33; Finding 14, CP 28. When he did so, they told him he was “detained.” He was immediately handcuffed, marched over to a patrol car, searched twice, Mirandized, and placed in the back of the car. Eventually he was transported to jail. 12/1 RP 33-34; Findings 14-16, CP 28. During the first search of Moyle’s person, the officers found a marijuana pipe and a bud of marijuana in a plastic pill bottle. Findings 17, 19, 20, CP 28. The second search was more thorough than the first. It turned up a small baggie of methamphetamine in the pocket of Moyle’s sweater. 12/1RP 46.

After being read his rights, Moyle admitted the pipe in the car was his meth pipe and that he had used it half an hour earlier. 12/1 RP 35. The police obtained a warrant to search the car before removing the pipe. 12/1 RP 37, 43.

Moyle moved to suppress his statements and the physical evidence. With the acquiescence of Moyle’s counsel, the court ruled on Moyle’s suppression motion without conducting an evidentiary hearing. 12/15RP

12. The court relied instead on a transcript of the suppression hearing held in the prosecution of Fanny Burdette, who was later charged in the same incident and tried separately from Mr. Moyle. 12/1 RP 59; 12/15 RP 16-17; Suppression Findings, CP 26.

Having read the transcript, the court proceeded directly to argument. 4/27 RP 3. The prosecutor argued that the seizure of Moyle was merely an investigative detention and that the standard was articulable suspicion, not probable cause. 4/27RP 18, 22-23. The defense responded that probable cause was required, that Moyle was arrested without probable cause, and that all subsequently-obtained evidence must be suppressed. 4/27 RP 11, 24.⁷ The prosecutor conceded that merely being asleep in a car in proximity to a meth pipe did not amount to probable cause to arrest. 4/27 RP 18. The court nevertheless concluded that Moyle was lawfully detained. Conclusion 1, CP 29.

The court found that Winfield and Arand were in possession of articulable facts sufficient to support reasonable and individualized suspicion that Moyle was engaged in criminal activity. In addition to the proximity of the pipe, the court found it significant that Moyle did not wake up when Winfield shined a flashlight on him. And, although neither

⁷ For some reason, the court heard the State's response first, so that the prosecutor was obliged to begin by telling the court what he thought Moyle's suppression arguments were going to be. 4/27 RP 3-4.

Winfield nor Arand testified to it, the court further found that this caused the officers concern for Moyle's well-being. Conclusion 2, CP 29.

The court also concluded that the searches of Moyle's person incident to his detention constituted no more than a "safety frisk" that was justified by the totality of the circumstances. Conclusion 3, CP 29.

Defense counsel objected to the suppression findings and conclusions. CP 30-31.

Once the court denied his suppression motion, Moyle decided to proceed with a stipulated facts trial and seek relief in this Court.

The court found Moyle guilty as charged and sentenced him to a standard range sentence on an offender score of 5. CP 16-17.

The court imposed legal financial obligations totalling \$3,650.00. This included \$1,000 to maintain the drug court program and \$1,000 to maintain the Olympic Peninsula Narcotics Enforcement Team. CP 20. The court entered a finding that Moyle had the ability to pay. The court included in the community supervision conditions a prohibition against consuming alcohol. CP 18, 19.

Mr. Moyle filed timely notice of appeal. CP 13.

IV. ARGUMENT

1. THE COURT ERRONEOUSLY OMITTED THE EVIDENTIARY HEARING ON MOYLE'S MOTION TO SUPPRESS.

Moyle moved to suppress all the State's evidence as fruit of the poisonous tree.⁸ In the interests of judicial economy, the court ruled on Moyle's suppression motion without a hearing. The court relied instead on the transcript of a CrR 3.6 hearing held in the prosecution of Fanny Burdette, the owner of the red Honda. Burdette was charged with possessing various drugs and paraphernalia found there and was tried separately from Moyle. 12/15 RP 16-17. 59; Suppression Findings, CP 26. Moyle's counsel acquiesced in this. 12/15RP 12.

This was a fundamental error that cannot be deemed harmless. It automatically requires reversal.

Constitutional errors fall into two classes. *Arizona v. Fulminante*, 499 U.S. 279, 307-08, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). So-called "trial errors" occur during the presentation of a case, and their effect may be weighed in the context of other evidence presented to determine whether or not they were harmless. *Id.* "Structural defects," by contrast, are not subject to harmless error analysis because they impact "the

⁸ See, *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

framework within which the trial proceeds,” and are not “simply an error in the trial process itself.” *Id.*, at 309–310. *See also Neder v. United States*, 527 U.S. 1, 7–9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Examples of such errors include the denial of counsel, *see Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); the denial of the right of self-representation. *see McKaskle v. Wiggins*, 465 U.S. 168, 177–178, n. 8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); the denial of the right to public trial, *see Waller v. Georgia*, 467 U.S. 39, 49, n. 9, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); infringement of the right to trial by jury by giving a defective reasonable-doubt instruction. *see Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), and denial of Sixth Amendment right to counsel of choice, *see United States v. Gonzalez–Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 2564, 165 L. Ed. 2d 409 (2006). The right to an evidentiary hearing on a claim that all the State’s evidence is tainted by unlawful police conduct falls squarely in the same classification as these structural errors.

No Effective Waiver: Counsel cannot vicariously waive these fundamental rights. To establish waiver of a structural right, the record must show either that the defendant personally gave a statement expressly agreeing to waive or that the trial judge or defense counsel discussed the issue with the defendant prior to defense counsel’s waiver. *State v.*

Strode, 167 Wn.2d 222, 235, 217 P.3d 310 (2009) (Fairhurst, J., concurring), citing *State v. Stegall*, 124 Wn.2d 719, 729, 881 P.2d 979 (1994); *State v. Applegate*, 163 Wn. App. 460, 470, 259 P.3d 311 (2011) (right to public trial). That did not happen here.

Prejudice Is Manifest: Even if the Court deems a harmless error analysis appropriate, Mr. Moyle was clearly prejudiced by having the witnesses cross-examined by counsel for a different defendant whose interests were antagonistic to his own and whose counsel was conflicted out of representing Moyle.

Ms. Burdette was represented by a Clallam public defender, Mr. Alex Stalker. 12/1RP 8-9. The court had previously removed Mr. Stalker from Mr. Moyle's case because of Stalker's conflict of interest as Ms. Burdette's counsel. Order For Withdrawal of Attorney, 2nd Supp. CP ____.

The record of the hearing clearly shows that Burdette's interests were opposed to those of Moyle. Her counsel repeatedly elicited testimony that incriminated Moyle for the benefit of Burdette. For example, that Moyle admitted that the drugs in Burdette's car were his. 12/1 RP 10. Also, Officer LeRoux testified to alleged facts that were beyond the scope of his personal knowledge because his attention was focused on the occupants of a different car. But, because it benefited Ms. Burdette, Mr. Stalker did not object to LeRoux's testimony that the other

officers told him that Moyle told them the meth pipe was his as was a marijuana pipe found in Ms. Burdette's car that Moyle was not charged with possessing. LeRoux also testified without objection that he heard something about drugs having been found on Moyle. 12/IRP 25.

In addition to permitting gratuitous testimony tending to incriminate Moyle, Burdette's counsel had no incentive to rigorously cross-examine Corporal Winfield or Deputy Arand regarding the details of Winfield's flashlight search of the red Honda while Moyle slept, the alleged grounds for seizing Moyle, or what facts were within the officers' knowledge that could conceivably have constituted probable cause to subject Moyle to a custodial arrest.

Burdette had no incentive to object when Winfield persisted in characterizing Moyle as being "passed out." 12/IRP 16, 29, even though neither Winfield nor Arand could articulate any reason to suppose Moyle was not asleep or merely resting with his eyes closed. 12/IRP 30, 56, 68. Winfield even suggested — with no challenge from Ms. Burdette's counsel — that Moyle could have been faking. 12/IRP 68.

This prejudiced Mr. Moyle because the court adopted Corporal Winfield's mischaracterization in its findings of fact. 4/27RP 31; CP 27. Unlike the innocent term "apparently sleeping" the derogatory term "passed out" gratuitously implies drug use at a point where Winfield had

absolutely no grounds to suspect Mr. Moyle of any sort of criminal activity.

The effect of skipping Moyle's evidentiary hearing on his suppression motion cannot be calculated. Reversal is required.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT SEEKING AN EVIDENTIARY HEARING ON SUPPRESSION.

If the Court questions whether the suppression hearing issue was preserved for appeal, the Court may review a constitutional error raised for the first time on appeal in the context of an ineffective assistance claim. *See, State v. Soonalole*, 99 Wn. App. 207, 215, 992 P.2d 541 (2000).

Here, it was per se deficient performance to subjugate the defendant's constitutional right to a complete hearing to concerns about judicial economy and the convenience of the police witnesses.

Wash. Const. art 1, § 22 and the Sixth Amendment guarantee the right to effective counsel. Counsel's performance must meet the standards of the profession. Effectiveness is measured by the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That test is whether counsel's performance was deficient, and whether the appellant was actually prejudiced. *Id.* at 690-692. The Court evaluates an ineffectiveness claim against a strong presumption that a

challenged decision by counsel was strategic or tactical and that counsel's representation was effective. *Id.* at 689-691.

Here, no reasonable basis or strategic reason can be conceived for waiving Moyle's right to have his own counsel challenge the testimony of police witnesses without regard to the interests of another defendant.

The prejudice to Moyle is manifest, because, if the officers' testimony had been zealously challenged, the court may well have been persuaded that Moyle's search and seizure were unlawful.

3. KEY SUPPRESSION FINDINGS ARE NOT SUPPORTED BY THE RECORD AND THE CONCLUSION IS NOT SUPPORTED BY THE FACTS

The trial court's suppression findings must be supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence exists where there is sufficient evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Hill*, 123 Wn.2d at 644. A trial court's conclusions of law on a motion to suppress evidence are reviewed de novo. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). The Court determines whether the substantiated facts establish that a warrantless stop is unconstitutional. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

The court here found that all three officers saw a meth pipe in the Honda before Moyle was arrested. Finding 10, CP 28; 4/27 RP 29. The record does not support this. Officer LeRoux testified unequivocally that he did not see the pipe until after Moyle was in custody. 12/1 RP 17, 24.

The State stipulated to the facts in the police reports. CP 34-35, 43. A party may not contend on appeal that the facts are other than as stipulated. *See State v. Parra*, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993).

During his testimony at the Burdette hearing, Deputy Arand appears to imply that he saw the pipe before Moyle was seized. In all the contemporaneous police reports, however, Arand consistently states that only Winfield actually saw the pipe at that point. Certification accompanying Motion for Probable Cause at 1, 2nd Supp. CP ____; Narrative Case Report, filed July 20, 2010; State's Memorandum, CP 101.

So, only Corporal Winfield claimed he saw a pipe. But Winfield further claimed that he not only identified the glass pipe as meth paraphernalia but also was able to discern and identify methamphetamine residue solely by its appearance in the light of his flashlight through a tinted windshield. 12/1 RP 57. On its face, this is a fairy tale that no reasonable judge could have accepted as fact.

The court also found that Winfield had conducted “thousands” of arrests. Finding 11, CP 28. This finding should be stricken as meaningless. Is it two, three, four thousand? Ten thousand? Unlike an estimate of “dozens,” which is likely to be correct plus or minus a dozen or so, “thousands” could be off by thousands.

Most disturbing is the court’s reliance on non-existent testimony that the officers were concerned about Moyle’s well-being because he did not wake up when Winfield shined a light on him. 4/27 RP 11. Neither Arand nor Winfield mentioned any such concern. But the court relied on this spurious finding to conclude that the officers had articulable grounds to seize Moyle. The court does not use the term “emergency aid exception,” but this apparently is what the court had in mind.

The emergency aid exception to the warrant requirement applies when (1) an officer subjectively believed that someone likely needed assistance for health or safety reasons, (2) a reasonable person in the same situation would believe there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched. *State v. Kinzy*, 141 Wn.2d 373, 386–87, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001). The State must establish that the police had a reasonable subjective belief that all the elements of the emergency aid

exception were satisfied. *State v. Schultz*, 170 Wn.2d 746, 759–60, 248 P.3d 484 (2011).

Here, there was no evidence that either officer entertained the slightest subjective belief, reasonable or otherwise that Moyle needed medical aid. Possibly, such a belief could plausibly have been articulated, but this is not sufficient to justify a warrantless intrusion. The officer must subjectively believe it.

Alternatively, the court concluded that Moyle’s failure to wake up was grounds to suspect he was “up to no good in some manner.” 4/27 RP 30. Again, there is no evidence that either officer thought his. and it is logically false.

The court’s imputing hypothetical motives to the arresting officers calls to mind this Court’s prerogative to affirm a trial court ruling on any plausible grounds. Likewise, the trial court here found that sufficient articulable grounds for a seizure exist because hypothetical grounds conceivably could have been articulated if only the witnesses had thought of them.

This court should reverse and remand with instructions to suppress all evidence obtained after Moyle was seized by the police.

4. THE POLICE SUBJECTED MOYLE TO AN WARRANTLESS CUSTODIAL ARREST WITHOUT PROBABLE CAUSE.

Winfield and Arand had neither probable cause to arrest Moyle nor articulable suspicion to detain him without a warrant.

Warrantless seizures are per se unreasonable, and the State bears the burden of demonstrating that a warrantless seizure falls within a narrow exception to the rule. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). These exceptions are “‘jealously and carefully drawn.’” *Id.*, quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979). Washington’s search and seizure protections are even more rigorous than those of the Fourth Amendment. *State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009). While art. 1, § 7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment, its scope is not limited to subjective expectations of privacy but, more broadly, 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 506, 511, 688 P.2d 151 (1984); *State v. Mendez*, 137 Wn.2d 208, 219, 970 P.2d 722 (1999); *State v. Johnson*, 128 Wn.2d 431, 446, 909 P.2d 293 (1996); *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990). Article I, section 7 creates “‘an almost absolute bar to

warrantless arrests, searches, and seizures.” *State v. Swetz*, 160 Wn. App. 122, 129, 247 P.3d 802 (2011), quoting *State v. Buelna Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009).

The right to be free from unreasonable governmental intrusion into one’s “private affairs” encompasses automobiles and their contents. *See, e.g., Mendez*, 137 Wn.2d at 217, 219, 970 P.2d 72; *State v. Hendrickson*, 129 Wn.2d 61, 69, n.1, 917 P.2d 563 (1996) (citing cases); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456–57, 755 P.2d 775 (1988) (citing cases); *State v. Kennedy*, 107 Wn.2d 1, 4–5, 726 P.2d 445 (1986); *State v. Gibbons*, 118 Wash. 171, 187–88, 203 P. 390 (1922). Washington law guarantees greater privacy for automobiles and a greater protection for passengers than does the Fourth Amendment. *State v. Parker*, 139 Wn.2d 486, 495, 987 P.2d 73 (1999), citing *Mendez*, 137 Wn.2d at 219.

Moyle Was Arrested: An objective test determines whether a person is under custodial arrest. *State v. Lorenz*, 152 Wn.2d 22, 36–37, 93 P.3d 133 (2004). The test is whether a reasonable detainee under the circumstances would consider himself under a custodial arrest. *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). That is, was his freedom curtailed to a degree associated with formal arrest.? *Lorenz*, 152 Wn.2d at 36, citing *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

Some clues that Moyle's seizure was an arrest, not a *Terry* stop,⁹ are that Moyle was ordered to get out of the car, told he was "detained," handcuffed, removed to a patrol car, searched, searched again, and secured in the car for transport. These are typical manifestations of an arrest. *See, State v. Craig*, 115 Wn. App. 191, 195-96, 61 P.3d 340 (2002). Telling a person he is "detained" is the same as telling him he is not free to leave. In other words, he is in custody. When the police follow this up by immediately handcuffing the person and walking him over to a patrol car, the point is no longer debatable. Moyle was arrested.

The State erroneously argued that a suspect is arrested only if a police officer says he is, not when the officer says he is merely detained. 4/27 RP 28-29. This is wrong. The officer need not make a formal declaration of arrest. *State v. Sullivan*, 65 Wn.2d 47, 51, 395 P.2d 745 (1964). The Fourth and Fourteenth Amendments require that an official detention must be supported by probable cause, even if no formal arrest is made. *State v. Smith*, 102 Wn.2d 449, 452, 688 P.2d 146 (1984), citing *State v. Broadnax*, 98 Wn.2d 289, 293, 654 P.2d 96 (1982), and *Dunaway v. New York*, 442 U.S. 200, 208, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).

The probable cause analysis is essentially the same under Const. art.1, § 7. *State v. Grande*, 164 Wn.2d 135, 142, 187 P.3d 248 (2008).

⁹ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Probable cause to arrest someone exists when the arresting officers are aware of facts and circumstances sufficient to cause a reasonable officer to believe the person has committed a crime. *State v. Mance*, 82 Wn. App. 539, 541, 918 P.2d 527 (1996). In order to justify a seizure, the police must have individualized suspicion. *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980).

Here, neither officer knew of any fact or circumstance sufficient to give rise to probable cause to believe Moyle had ever handled the pipe on the console of Burdette's car. It was essentially dead center of the passenger compartment where anybody could have set it down.

By definition, the search incident to this unlawful arrest was also unlawful.

Under art. 1, §7, a lawful custodial arrest is a constitutionally mandated prerequisite to a lawful search incident to arrest. *Parker*, 139 Wn.2d at 496-97, citing cases. It is the fact of arrest itself that provides the "authority of law" to search. *Id.* The search incident to arrest exception functions to secure officer safety and preserve evidence of the crime for which the suspect is arrested, but a lawful custodial arrest is a prerequisite, "regardless of the exigencies." *Parker*, 139 Wn.2d at 496-97. If the arrest is unlawful, the search is unlawful. *Id.*, citing cases.

Terry Stop Distinguished: Under the Fourth Amendment and art.1, §7, a police officer may detain and investigate a person without a warrant if they reasonably suspect that particular person is or is about to be engaged in criminal conduct. *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007); *Mendez*, 137 Wn.2d at 223, quoting *Terry*, 392 U.S. at 21. The seizure of Moyle cannot be justified under a *Terry* analysis.

A lawful *Terry* stop requires the police to have a well-founded suspicion that the defendant has engaged in criminal conduct. *Terry*, 392 U.S. at 21; *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The stop must be justified at its inception. *Terry*, 392 U.S. at 20. A seizure cannot be justified by the fruits of the incident search. *State v. McKenna*, 91 Wn. App. 560, 563, 958 P.2d 1017 (1998).

The officers here had no grounds to intrude on Moyle's privacy other than that he was sleeping in proximity to an apparent meth pipe. But mere possession of drug paraphernalia is not a crime. *McKenna*, 91 Wn. App. at 554, citing RCW 69.50.412.

All these officers knew was that the pipe was in proximity to Moyle as he slept. Mere possession of drug paraphernalia is not a crime, but possession of drug residue in a pipe can be charged as possession of a controlled substance because no minimum amount of substance is

required. *State v. Rose*, 160 Wn. App. 29, 36, 246 P.3d 1277 (2011); *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008).

The officers also lacked any articulable grounds to search Moyle in the context of a *Terry* stop. *Terry* permits an officer to frisk a lawfully detained person for weapons, but only if he can articulate reasonable grounds to believe the person is armed and presently dangerous. *Smith*, 102 Wn.2d at 452, citing *Broadnax*, 98 Wn.2d at 293–94; *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980). The suspicion of dangerousness must be particular to the individual searched, not simply general considerations such as the character of the neighborhood. *Id.*; *Broadnax*, 98 Wn.2d at 295; *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

These officers had no reason to think Moyle might be armed or dangerous. And the State did not suggest any exigent circumstances to obviate the need for a warrant.

Suppression is the sole remedy. Suppression must be granted whenever there is a meaningful causal connection between the State’s unlawful activity and the acquisition of evidence, because the evidence is deemed “fruit of the poisonous tree.” *Wong Sun*, 371 U.S. at 487-88. This includes not only evidence seized directly during an illegal intrusion but also evidence that is subsequently derived from evidence seized in the

illegal search. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Such evidence is inadmissible in any Washington court for any purpose. *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).

This Court should therefore reverse Moyle's conviction and dismiss the prosecution with prejudice.

5. ALL EVIDENCE DERIVED FROM
THE UNLAWFUL SEIZURE MUST
BE SUPPRESSED.

Trial counsel correctly argued that all evidence obtained after the Moyle's unlawful arrest must be suppressed, including his incriminating statements. 4/27 RP 11.

A violation of art. 1, § 7 "automatically implies the exclusion of the evidence seized." *State v. Boland*, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990). This includes unlawfully-obtained statements. A conviction cannot rest on incriminating statements that were obtained as a result of unlawful police conduct, because the confession is infected with the illegality and must be suppressed. *State v. Byers*, 88 Wn.2d 1, 6, 559 P.2d 1334 (1977); *Chenoweth*, 160 Wn.2d at 473; *White*, 97 Wn.2d at 110; *Wong Sun*, 371 U.S. at 488.

Evidence that Mr. Moyle admitted owning and using the meth pipe should have been suppressed. Without Moyle's tainted admission, the State lacked sufficient evidence to prove the essential elements of possession of methamphetamine.

The Court should reverse the conviction and remand with instructions to dismiss the prosecution.

6. THE EVIDENCE WAS INSUFFICIENT TO PROVE POSSESSION.

In reviewing a challenge to the sufficiency of the evidence the Court views the evidence in the light most favorable to the State and decides whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In evaluating the proof, the Court must be convinced that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992). That is, the State must present enough evidence to allow a reasonable fact-finder to find each element beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When reviewing whether the evidence

is substantial, the Court does not rely on guess, speculation, or conjecture. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001). The same standard applies whether the case is tried to a jury or to the court. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), citing *State v. Little*, 116 Wn.2d 488, 491, 806 P.2d 749 (1991).

A defendant may challenge the sufficiency of the evidence for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

The State failed to prove that Mr. Moyle possessed the pipe on the center console between the driver’s and passenger seats in Burdette’s car.

Possession may be either actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession means that an item is in the personal custody of the person charged. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Constructive possession requires a showing that the defendant had dominion and control over the item

or over the premises where it was found. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Automobiles are considered “premises” in this context. *George*, 146 Wn. App. at 920.

Various factors determine dominion and control. *State v. Ibarra-Raya*, 145 Wn. App. 516, 525, 187 P.3d 301 (2008). “The ability to reduce an object to actual possession is one aspect of dominion and control.” *Echeverria*, 85 Wn. App. at 783. But it is settled law in Washington that mere proximity to a controlled substance or the ability to reduce it to immediate possession does not prove dominion and control beyond a reasonable doubt. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989); *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). *State v. Portrey*, 102 Wn. App. 898, 902-03, 10 P.3d 481 (2000); *State v. Huff*, 64 Wn. App. 641, 655, 826 P.2d 698 (1992). “[T]he rule is that ‘where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession.’” *George*, 146 Wn. App. at 520, quoting *State v. Spruell*, 57 Wn. App. 383, 388, 788 P.2d 21 (1990).

Constructive possession is fact-sensitive, and the Court is guided by the results reached in decisions with similar facts. *George*, 146 Wn.

App. at 920. The facts here are comparable to those of *George*, in which constructive possession was not proven.

In *George*, a drug pipe was found on the floor of a car right at the suspect's feet. Here, the pipe was on the center console. As in *George*, Moyle was not the owner or driver of the car, and therefore did not have dominion or control over the premises. Most importantly, as in *George*, it cannot be determined when and by whom the pipe was placed where it was found. The State could not show beyond a reasonable doubt that Moyle, not another recent occupant of the car, placed the pipe on the console, where it was equally likely to have been set down by anyone seated anywhere in vehicle, front or back.

Accordingly, even if any of the State's evidence was admissible, all the State proved against Mr. Moyle was his mere proximity to the meth pipe. It was further undisputed that the owner and driver of the car, Fanny Burdette, possessed a variety of drugs and paraphernalia in her car.

7. THE COURT EXCEEDED ITS LAWFUL
AUTHORITY TO IMPOSE COSTS.

The Court reviews the imposition of costs for abuse of discretion. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). This Court will remand for correction of facially invalid costs where the challenge involves a purely legal question and an immediate decision will facilitate judicial economy. *State v. Hathaway*, 161 Wn. App. 634, 651-52, 251 P.3d 253, 263 (2011).

That is the case here.

The Judgment and Sentence includes several clearly erroneous entries regarding Legal Financial Obligations. CP20.

(a) The court assessed Mr. Moyle \$1,000.00 for the cost of a drug court program. CP 20. But Moyle was not offered and did not receive the option to participate in drug court. Therefore, this cost is prohibited by RCW 10.01.160(2).

Costs are limited by statute to expenses specifically incurred by the State in prosecuting the defendant. RCW 10.01.160(2).

(b) The court assessed Moyle \$1,000.00 for the maintenance and operation of the Olympic Peninsula Narcotics Enforcement Team (OPNET). CP 20, line 24.

The court may not impose costs for “expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law.” RCW 10.01.160(2). That means only those costs incurred in prosecuting this particular defendant’s particular case. *In re Bailey*, 162 Wn. App. 215, 220-21, 252 P.3d 924 (2011).

Specifically, the cost of maintaining the prosecutor’s office cannot be charged to indigent defendants. *Id.*, citing *Utter v. D.S.H.S.*, 140 Wn. App. 293, 310–11, 165 P.3d 399 (2007). By the same reasoning, the costs of maintaining law enforcement agencies cannot be shifted to the backs of the poor, and no precedent exist for doing so.

As with the drug court, the State did not employ OPNET in the prosecution of Moyle. His arrest and prosecution were conducted entirely by local Port Angeles police officer. Moreover, OPNET is a government law enforcement agency that must be maintained and operated irrespective of the specific violations of the law with which Moyle was convicted. The OPNET cost is, therefore, erroneous.

(c) The court found that Moyle had the ability to pay.

The Judgment and Sentence may not include a finding that the defendant has the ability to pay his Legal Financial Obligations, absent a record supporting such a finding. *State v. Bertrand*, ___ Wn. App. ___,

___ P.3d ___, (2011), Slip Op. 40403-6-II at 312. *Bertrand* is dispositive here and requires that the clearly erroneous finding be stricken.

The Court should remand with instructions to strike the two \$1,000.00 assessments for drug court and the Olympic Peninsula Narcotics Enforcement Team and to strike the unsupported finding that Moyle has the ability to pay.

VI. **CONCLUSION**

For the foregoing reasons, the Court should reverse Mr. Moyle's convictions, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this 19th day of December, 2011.



Jordan B. McCabe, WSBA No. 27211
Counsel for Michael J. Moyle

TEXT OF STATUTES

RCW 10.01.160(2)

Costs shall be **limited to expenses specially incurred by the state in prosecuting the defendant** or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They **cannot include expenses inherent in providing** a constitutionally guaranteed jury trial or expenditures in connection with **the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law**. Expenses incurred for serving of warrants for failure to appear and jury fees under RCW 10.46.190 may be included in costs the court may require a defendant to pay. Costs for administering a deferred prosecution may not exceed two hundred fifty dollars. Costs for administering a pretrial supervision may not exceed one hundred fifty dollars. Costs for preparing and serving a warrant for failure to appear may not exceed one hundred dollars. Costs of incarceration imposed on a defendant convicted of a misdemeanor or a gross misdemeanor may not exceed the actual cost of incarceration. In no case may the court require the offender to pay more than one hundred dollars per day for the cost of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision take precedence over the payment of the cost of incarceration ordered by the court. All funds received from defendants for the cost of incarceration in the county or city jail must be remitted for criminal justice purposes to the county or city that is responsible for the defendant's jail costs. Costs imposed constitute a judgment against a defendant and survive a dismissal of the underlying action against the defendant. However, if the defendant is acquitted on the underlying action, the costs for preparing and serving a warrant for failure to appear do not survive the acquittal, and the judgment that such costs would otherwise constitute shall be vacated.

Emphasis Added.

CERTIFICATE OF SERVICE

Jordan McCabe certifies that this Appellant's Brief was served upon opposing counsel electronically via the Division II upload portal.

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Jordan McCabe also mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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