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Court of Appeals  
Division II  
State of Washington  
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NO. 52343-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

AARON MYLAN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR JEFFERSON COUNTY

---

REPLY BRIEF OF APPELLANT

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## **A. INTRODUCTION**

Sergeant Pernsteiner stopped and briefly detained Aaron Mylan, ostensibly for driving without a license. Without arresting or frisking Mr. Mylan, Sergeant Pernsteiner emptied Mr. Mylan's front pocket, which contained a bag of heroin and led to the discovery of additional heroin and methamphetamine in the car. The warrantless search violated Mr. Mylan's rights under the state and federal constitutions, and this Court should reverse and remand for suppression and dismissal.

Alternatively, reversal is warranted as the prosecutor engaged in prejudicial misconduct when – without any evidence to support the theory – she attempted to link Mr. Mylan with Mexican cartels by repeatedly referring to the heroin as a “Mexican ounce,” needlessly inserting race into the proceeding and appealing to the passion and prejudice of the jury. In the event this Court affirms Mr. Mylan's convictions, remand for resentencing is nevertheless required as the evidence was insufficient to support the “school bus route stop” sentencing enhancement.

## **B. ARGUMENT**

1. The trial court committed reversible error when it denied the motion to suppress evidence obtained pursuant to the illegal, warrantless search of Mr. Mylan's pocket.

Sergeant Pernsteiner violated Mr. Mylan's constitutional rights when he emptied Mr. Mylan's pocket without a lawful arrest or pat down.

Under the Fourth Amendment to the United States Constitution, warrantless searches are *per se* unreasonable unless they fall within one of the few “jealously and carefully drawn” exceptions to the warrant requirement. U.S. Const. amend. XIV; *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (citing, *inter alia*, *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). Article 1, section 7 of the Washington Constitution provides even greater protection of a person’s right to privacy than the Fourth Amendment. *State v. O’Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). The State bears the heavy burden of proving the validity of a warrantless search by clear, cogent, and convincing evidence. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014).

*a. The warrantless search of Mr. Mylan’s pocket could not qualify as a search incident to arrest because Mr. Mylan was not under custodial arrest.*

Sergeant Persteiner’s warrantless search inside Mr. Mylan’s pocket did not qualify as a search incident to arrest exception as Mr. Mylan was not, in fact, under arrest. The Respondent does not appear to argue that Sergeant Pernsteiner arrested Mr. Mylan prior to putting his hand inside Mr. Mylan’s pocket. *See* Br. of 19-22. Nor does the Respondent challenge the trial court’s finding that “Sergeant Pernsteiner did not arrest Mr. Mylan but detained him for further investigation in order to confirm his

licensing status.” CP 109. As such, it is a verity on appeal. *State v. Link*, 136 Wn. App. 685, 695-96, 150 P.3d 610 (2007) (citing *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006)).

Instead, the Respondent mistakenly concludes that, because probable cause existed to arrest Mr. Mylan for Driving Without a License, the search “falls under the gamut of search incident to a valid arrest.” Br. of Resp’t at 22. This argument should be squarely rejected as it contradicts well-settled law that “*probable cause for a custodial arrest is not enough. There must be an actual custodial arrest to provide the ‘authority’ of law justifying a warrantless search incident to arrest under article I, section O’Neill*, 148 Wn.2d at 584 (emphasis added); *see also State v. Parker*, 139 Wn.2d. 486, 497-98, 987 P.2d 73 (1999) (“Under article I, section 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest.”); *State v. McKenna*, 91 Wn. App. 554, 564, 958 P.2d 1017 (1998) (“the fact that an arrest could have been made, but was not made, is immaterial”); *State v. Radka*, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004) (“Probable cause to arrest is not enough; only an actual custodial arrest provides the authority to justify a search incident thereto.”).

Notably, the Respondent provides no authority for the proposition that probable cause to arrest would justify Sergeant Pernsteiner’s search of

the inside of Mr. Mylan's pocket. *See* Br. of Resp't at 19-22. Nor does the Respondent address the holdings in *O'Neill* or other cases cited by the Appellant, instead relying on cases examining whether officers had probable cause to initiate an arrest or cases in which the defendants were unequivocally under arrest prior to the search. *See* Br. of Resp't at 19-22. In short, the Respondent cannot – and does not – circumvent the fact that the absence of a custodial arrest is fatal to the State's argument.

Precedent compels the result in Mr. Mylan's case: in the absence of a custodial arrest, the State did not meet its high burden to establish the warrantless search qualified as a search incident to arrest. It was a clear violation of his rights under article I, section 7 and the Fourth Amendment, and the evidence should have been suppressed by the trial court.

*b. The warrantless search of Mr. Mylan's pocket exceeded the scope of a weapons frisk under Terry.*

This Court should similarly reject the State's argument that the warrantless search of Mr. Mylan's pocket was authorized under *Terry v. Ohio*, which allows officers "to conduct a carefully limited search of the outer clothing" to discover weapons where officers reasonably believe a person may be armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). "The purpose of this limited search is

not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear.” *Hudson Adams v. Williams*, 407 U.S. 143, 145–46, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). Importantly, the scope of a *Terry* search must be limited to protective purposes. *State v. Adams*, 144 Wn. App. 100, 104, 181 P.3d 37 (2008).

The Respondent takes great pains to point out that a reasonable officer would believe Mr. Mylan may have been armed. Br. of Resp’t 16-19. Notably absent is any mention of the fact that Mr. Mylan was already detained in handcuffs when Officer Pernstenier emptied Mr. Mylan’s pocket or Officer Pernsteiner’s bizarre testimony that an exterior pat down would have been dangerous because the pocket may contain a hypodermic needle. *See* Br. of Resp’t at 14-19; RP 44-45.

While conceding that a *Terry* search must be limited in scope, the Respondent argues that the instant search was “extremely limited” because Officer Pernsteiner searched the inside of only one of Mr. Mylan’s pockets and not his entire person. Br. of Resp’t at 17. Again, the Respondent cites no caselaw supporting this proposition. Br. of Resp’t at 17-19. And again, the Respondent fails to address any of the contrary cases cited by Appellant, all of which make clear that a *Terry* search must initially be limited to the outer clothing. *E.g.*, *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968) (search not limited in scope where

officer put his hand into the defendant's pocket without conducting external pat down ); *Minnesota v. Dickerson*, 508 U.S. 366, 376, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993) (“The very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch.”); *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994) (a *Terry* stop is “strictly limited in its scope to a search of the outer clothing; a patdown to discover weapons which might be used to assault the officer.”)

Here, Officer Pernsteiner's immediately searched of the *interior* of Mr. Mylan's pocket without a pat down; he described his technique as “you grab the pocket and you open it and you pull whatever's in it out.” RP 44-45. Mr. Mylan was already detained in handcuffs, and the search clearly exceeded the scope of a protective frisk under *Terry*.

*a. Mr. Mylan's statements to officers and evidence in the car seized pursuant to the search warrant must be suppressed as fruit of the poisonous tree.*

The search warrant which led to the discovery of heroin and methamphetamine inside Ms. Smith's car was predicated entirely on the warrantless search of Mr. Mylan's pocket, and the resulting evidence must be suppressed as fruit of the poisonous tree. *State v. Gaines*, 154 Wn.2d 711, 717, 116 P.3d 993 (2005) (citing *State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967)).

The Respondent fails to even address this argument. *See* Br. of Resp't at 14-23. Understandably so. Without the heroin in Mr. Mylan's pocket, Officer Pernsteiner's affidavit in support of the search warrant describes only a man driving his girlfriend's car without a license, with a manila envelope on the floor. CP 116.<sup>1</sup> A search based upon this limited information violates article 1, section 7 and the Fourth Amendment, warranting suppression by this Court. Alternatively, this Court should remand to the trial court for determination of whether the search warrant survives absent the illegally obtained evidence.

2. The prosecutor committed prejudicial misconduct when she repeatedly suggested that Mr. Mylan was working with a Mexican cartel.

Without any evidence connecting Mr. Mylan to a Mexican drug cartel, the prosecutor continuously emphasized that Mr. Mylan was in possession of a "Mexican ounce," inserting race into the proceedings and appealing to the passion and prejudice of the jury. This was blatant and reversible misconduct. *State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006) (A prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups or

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<sup>1</sup> Even after discovering the heroin in Mr. Mylan's pocket, Sergeant Pernsteiner believed from the appearance of the envelope that it likely contained currency, which is not illegal. CP 116-17.

invokes racial, ethnic, or religious prejudice as a reason to convict.”)  
(citing *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1998)).

Although defense counsel did not object to each of the prosecutor’s improper questions and arguments, counsel’s pretrial objection to any testimony that Mr. Mylan received the drugs from someone named Mike, who was Mexican, as irrelevant constitutes a standing objection. *See State v. Fisher*, 165 Wn.2d 727, 748 n. 4, 202 P.3d 937 (2009). However, even should this Court find that defense did not have a standing objection to testimony suggesting cartel involvement, reversal is warranted as the prosecutor’s misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” which could not be cured by a jury instruction. *Id.* at 747 (internal quotations omitted).

*a. The prosecutor appealed to racial bias.*

The prosecutor repeatedly elicited testimony and emphasized in closing that Mr. Mylan was not simply in possession of four ounces of heroin, but four “Mexican ounces” in an effort to support the unsubstantiated theory that Mr. Mylan was connected with a Mexican drug cartel. RP 262, 422-23, 533, 558, 562.

The Respondent’s attempt to justify the comments by arguing that they were consistent with the prosecution’s theory is misplaced. Br. of Resp’t at 26-28. Consistency with the prosecution’s theory does not equal

consistency with the evidence. Indeed, it was the very absence of any evidence supporting the prosecutor's theory that formed the basis of the trial court's hesitation to admit testimony regarding the race of Mr. Mylan's associate and the later discussions of Mexican ounces. RP 114, 262, 426. As explained by the court, "[t]he only issue here is the quantity that this Defendant had, is it consistent with personal use or, I guess consistent with selling it, period. ... this case does not involve some distribution chain from Mexico, blah, blah, blah. And we're not going down that road because there is no evidence of that." RP 426.

That the improper arguments were consistent with the prosecution's theory similarly does not render them free from racial bias. The Respondent is correct that "the State was very upfront about its theory of the case" that Mr. Mylan was connected with Mexican cartels. Br. of Resp't at 26. And, from day one the prosecution sought to use racial stereotypes to prove Mr. Mylan was dealing drugs, arguing that the court should admit Mr. Mylan's statement that he got the heroin from a Mexican man because it suggested he was associated with drug cartels. *See* RP 101, 114. The trial court, too, was upfront in opining that the testimony could be "highly prejudicial, particularly in this day and age." RP 114. Thus, having been essentially precluded from presenting evidence that a Mexican man supplied Mr. Mylan with the heroin, the prosecutor

attempted to draw the exact same impermissible inference from the weight of the heroin – asking multiple witnesses whether the recovered ounces were actually a “Mexican ounces” and repeating that Mr. Mylan was in possession of a “Mexican ounce” four times during closing arguments.

The Respondent’s argument that the State was required to show that Mr. Mylan possessed all of the heroin in order to prove its case does not entitle the prosecutor to appeal to racial bias or stereotypes. Br. of Resp’t at 30. Showing that Mr. Mylan possessed a “Mexican ounce” was unnecessary to prove that large quantities of heroin are inconsistent with personal use. Indeed, after the court cut off Sergeant Anglin’s testimony about distribution chains originating in Mexico, he testified simply that four ounces of heroin was consistent with distribution and not personal use based upon his experience in Jefferson County. RP 427. The State could also easily have shown that the packaging and quantity of the packages was the same without emphasizing that they contained “Mexican ounces.” Instead, the prosecutor “needlessly injected” the issue of race into the proceedings. *Perez-Mejia*, 134 Wn. App. 907, 143 P.3d 838 (2006).

Under these circumstances, the State cannot demonstrate beyond a reasonable doubt that the prosecutor’s repeated appeal to racial bias was harmless. *Fisher*, 165 Wn.2d at 747 (internal quotations omitted). Mr. Mylan’s only defense was that the heroin was for personal use; by

repeatedly referring to the drugs as a “Mexican ounce,” the prosecutor used the term to paint Mr. Mylan as a drug dealer and not a drug user. This Court should reverse Mr. Mylan’s convictions and remand for a new trial.

*b. The prosecutor’s repeated reference to a “Mexican ounce” appealed to the passion and prejudice of the jury.*

Even if this Court does not consider the prosecutor’s comments an appeal to racial bias, the arguments were an improper and prejudicial appeal to the passion and prejudice of the jury. Tellingly, the Respondent does not address this argument in its brief. *See* Br. of Resp’t at 23-30.

A prosecutor’s attempt to secure a conviction by connecting a defendant with a particular group constitutes flagrant misconduct. *Belgarde*, 110 Wn.2d at 508-09 (reversible error where prosecutor described defendant as “strong in” the American Indian Movement, which prosecutor argued was equivalent of terrorist organization). Although Mr. Mylan is not himself Mexican, the current political climate aims to create a deep-rooted fear of Mexican cartels as terrorist organizations as evidenced in President Trump’s recent announcement that he was considering designating Mexican cartels as foreign terrorist organizations.<sup>2</sup> This narrative carries with it the derivative prejudice that

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<sup>2</sup> John Wagner, *Trump: ‘Very seriously’ considering designating Mexican drug cartels as terrorists*, The Washington Post (March 12, 2019),

anyone who may be associated with a Mexican cartel must be a drug dealer who poses a threat to the United States.

Repeatedly emphasizing that the ounce packages were “Mexican ounces” was done for the specific purpose of encouraging the jury to infer that Mr. Mylan was involved with a Mexican drug cartel, a theory unsupported by the evidence. It was an appeal to the passion and prejudice of the jury and warrants reversal by this Court.

3. The evidence was insufficient to support the sentencing enhancement.

The State failed to establish that a “student drop off” area photographed by officers in June 2018 was a school bus route stop designated by the school district in June 2017, as required to support Mr. Mylan’s sentence enhancement under RCW 69.50.435(1)(c). Aggravating factors are elements of an offense that must be proven to a jury beyond a reasonable doubt. *See State v. Allen*, 192 Wn.2d 526, 543, 431 P.3d 117 (2018); *see also Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (the State must prove beyond a reasonable doubt any fact that increases punishment, except prior convictions);

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[https://www.washingtonpost.com/politics/trump-very-seriously-considering-designating-mexican-drug-cartels-as-terrorists/2019/03/12/9bfc30f0-44cb-11e9-8aab-95b8d80a1e4f\\_story.html?utm\\_term=.cb106e6e1b04](https://www.washingtonpost.com/politics/trump-very-seriously-considering-designating-mexican-drug-cartels-as-terrorists/2019/03/12/9bfc30f0-44cb-11e9-8aab-95b8d80a1e4f_story.html?utm_term=.cb106e6e1b04).

*Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (same for sentence enhancements).

The plain language of RCW 69.50.435(1)(c) is specific and unambiguous: the State must establish beyond a reasonable doubt that the offense was committed within 1,000 feet of a “school bus route stop ***designated by the school district.***” (emphasis added). RCW 69.50.435(6)(c) confirms that “school bus route stop” is defined as a “school bus stop as ***designated by a school district.***” (emphasis added). Accordingly, the State charged Mr. Mylan with possession with intent to deliver “within 1,000 feet of a bus stop designated as a school bus stop by the Chimacum School District.” CP 26.

It is critical that the State prove a particular bus stop falls within the statutory definition. *See State v. Coria*, 120 Wn.2d 156, 174, 839 P.2d 890 (1992) (noting that bus stops added to official school district map after map was sent to the Superintendent of Public Institution (SPI) did not qualify as stops under enhancement where the statute defined “school bus route stop” as stops designated on district maps provided to SPI); *State v. Nunez-Martinez*, 90 Wn. App. 250, 256, 951 P.2d 23 (1998) (evidence of designation sufficient where school district employee testified regarding a disk sent to SPI showing location of designated bus stops); *State v. Sanchez*, 104 Wn. App. 976, 17 P.3d 1275 (2001) (evidence of designation

sufficient where transportation supervisor for school district testified regarding designated bus stops).

The Respondent appears to gloss over this requirement, declining to even mention the word “designated.” Br. of Resp’t at 31-33. Instead, Respondent points to a picture of a street sign stating “Student Drop Off Point” coupled with the officers’ subjective belief that buses used the area as sufficient to prove its official status. Br. of Resp’t at 32. A closer look, however, reveals that the State failed to present evidence identifying any district-designated bus stops, instead presenting official maps and testimony regarding the general school zone. Although officers testified about measurements made to the student drop off point, Sergeant Persteiner stated that the area was used by parents. RP 304. When specifically asked whether it was used by buses, he replied only that “it could be.” RP 304. He testified it was designated as a drop off point, but did not state that it was designated as a school bus stop or that it was designated by the district. RP 304.

Courts are equally stringent in requiring the State to establish the bus stop was designated at the time of the alleged offense. *State v. Rojas*, 198 Wn. App. 1072, 2017 WL 1927930, at \*2-3 (2017) (map generated six months after offense insufficient to establish bus stop existed on date of offense); *State v. Bodine*, 196 Wn. App. 1013, 2016 WL 5417398, at

\*1-2 (2016) (evidence insufficient where witnesses did not testify that bus stop existed at time of offense, approximately one year prior to trial); *State v. Kolb*, 192 Wn. App. 1067, 2016 WL 917830 (2016) (court accepts State’s concession that evidence insufficient to establish enhancement where school district official did not testify that bus stop existed at time of the offense).<sup>3</sup>

The Respondent apparently urges this Court to assume that the “nature of the sign” and its location near the school suggest it existed in June 2017. *See* Br. of Resp’t at 32. This argument is unsupported. None of the above cases considered the appearance of permanence in assessing whether the State met its burden. In each case, school officials testified that the stops were, in fact, designated school bus stops, presumably indicated on metal signs. Nor is there any exception for school bus stops located near a school. Here, the drop off point was not on school property and could have been added in the most recent school year based upon the changing needs of the district or advocacy by parents.

The officers’ general familiarity with the location is similarly insufficient to remedy this fatal flaw. Sergeant Pernsteiner testified that his daughter attended the school, but did not testify that he dropped his

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<sup>3</sup> These cases are unpublished and are cited as persuasive authorities pursuant to GR 14.1.

daughter off at the drop off point, that the drop off point existed when his daughter attended school, or that he ever observed a bus dropping students off at that location. *See* RP 304.

Finally, this Court should squarely reject the Respondent's argument that "the best argument that there was sufficient evidence" is the fact that the jury found the State met its burden as to the enhancement. Br. of Resp't at 33. This argument is circular and, if accepted, would render any review of sufficiency challenges – necessarily following a conviction or enhancement – meaningless.

Given the State's failure to call any representative of the school district or present any official map of designated school bus routes, a rational juror could not have found the stop was *a bus stop designated by the school district* as required under RCW 69.50.435(1)(c), much less that it existed at the time of the offense. Accordingly, this Court should reverse the sentence enhancement and remand for resentencing.

4. This Court should accept the Respondent's concession and strike the \$200 filing fee pursuant to RCW 36.18.020.

The Respondent agrees that Mr. Mylan is indigent and that the case should be remanded for an order striking the filing fee. Br. of Resp't at 29. This Court should accept the Respondent's concession.

### C. CONCLUSION

This Court should reverse Mr. Mylan's conviction and remand for suppression and dismissal as all evidence of both the heroin and the methamphetamine was admitted in violation of his constitutional right to be free from unlawful search and seizure. Alternatively, this Court should reverse and remand for a new trial due to prosecutorial misconduct. Should this Court affirm Mr. Mylan's convictions, it should nevertheless remand for resentencing as the evidence insufficient to support the "school bus route stop" enhancement.

DATED this 7<sup>th</sup> day of August, 2019.

Respectfully submitted,

s/Devon Knowles

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 52343-4-II
	)	
AARON MYLAN,	)	
	)	
Appellant.	)	

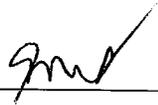
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8<sup>TH</sup> DAY OF AUGUST, 2019, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS – DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <p>[X] AARON MYLAN<br/>345724<br/>AIRWAY HEIGHTS CORRECTIONS CENTER<br/>PO BOX 2049<br/>AIRWAY HEIGHTS, WA 99001</p>                             | <p>(X) U.S. MAIL<br/>( ) HAND DELIVERY<br/>( ) _____</p>                |

**SIGNED IN SEATTLE, WASHINGTON THIS 8<sup>TH</sup> DAY OF AUGUST, 2019.**

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# WASHINGTON APPELLATE PROJECT

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## Transmittal Information

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