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Court of Appeals
Division II
State of Washington
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No. 52809-6-II

IN THE STATE OF WASHINGTON
COURT OF APPEALS DIVISION II

STATE OF WASHINGTON, Respondent,

v.

JOSEPH BONOMO, Appellant.

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY
#18-1-01418-4

STATE'S RESPONSE BRIEF

MARY E. ROBNETT
Pierce County Prosecuting Attorney

By Philip J. Buri, WSBA #17637
Special Deputy Prosecutor
Pierce County Prosecutor's Office
930 Tacoma Ave., S.
Tacoma, WA 98402
253-798-7400

TABLE OF CONTENTS

INTRODUCTION 1

I. RESTATEMENT OF ISSUES PRESENTED 2

II. STATEMENT OF FACTS. 3

ARGUMENT 6

III. STANDARD OF REVIEW 6

IV. THE OFFICERS HAD REASONABLE CAUSE TO SEARCH THE CAR DEFENDANT WAS DRIVING 7

V. POSSESSION REMAINS A STRICT LIABILITY CRIME 11

VI. THIS COURT SHOULD STRIKE THE FILING FEE, DNA FEE AND INTEREST PROVISION FROM DEFENDANT'S JUDGMENT AND SENTENCE. 13

CONCLUSION 13

TABLE OF AUTHORITIES

Washington Supreme Court

State v. A.M., __ Wn.2d __, 448 P.3d 35 (2019).....3, 12

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....3

State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004).....6, 12

State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981).....11

State v. Cornwell, 190 Wn.2d 296, 412 P.3d 1265 (2018).....1, 2, 7

State v. Peck, __ Wn.2d __, 449 P.3d 235 (2019).....9

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).....6, 7, 13

State v. Russell, 180 Wn.2d 860, 330 P.3d 151 (2014).....6

State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009).....10

Codes and Regulations

RCW 9.94A.631.....9

INTRODUCTION

"Article I, section 7 permits a warrantless search of the property of an individual on probation only where there is a nexus between the property searched and the alleged probation violation." State v. Cornwell, 190 Wn.2d 296, 306, 412 P.3d 1265 (2018). On April 9, 2018, a Fife Police Department officer pulled over Defendant Joseph Bonomo for failing to wear a seatbelt. When the he learned that Bonomo was on community supervision, driving with a suspended license, and outside King County without permission, the officer called community corrections officers with the Department of Corrections to investigate.

Correction Officer Zachary Johnson responded and arrested Bonomo for violating conditions of his community supervision. During a routine pat-down search as part of the arrest, Officer Johnson discovered a baggie of heroin and a syringe in Bonomo's front pocket. This, as Pierce County Superior Court Judge Kitty-Ann van Doorninck ruled pretrial, gave the officers reasonable cause to search the car Bonomo was driving.

> If there had been no heroin found on him, there is no question in my mind, based on Cornwell, that there could be no search of the car. But once the heroin was found on his person, it's the next logical nexus that

> there could be other drugs or something else in the car -- well, other drugs is what they are looking for.

(3.5/3.6 Ruling VRP 4-5). In the car's trunk was a sawed-off shotgun underneath Bonomo's court paperwork.

After a bench trial, Judge van Doorninck found Defendant guilty of unlawful possession of a firearm, unlawful possession of a short barrel shotgun, and possession of a controlled substance. Defendant now appeals, arguing the search of the car was illegal. Because a nexus exists between Defendant's possession of heroin and a search of the car, the State of Washington respectfully requests the Court to affirm Defendant's conviction and dismiss his appeal.

I. RESTATEMENT OF ISSUES PRESENTED

Defendant Bonomo's appeal presents three issues:

A. Community corrections officers may search "property reasonably believed to have a nexus with the suspected probation violation." State v. Cornwell, 190 Wn.2d 296, 306, 412 P.3d 1265 (2018). Defendant violated probation by possessing heroin and a syringe in his front pocket while driving his girlfriend's car outside King County. Did officers have reasonable cause to search the car?

B. To challenge possession of a controlled substance, Defendant "need prove only by a preponderance of the evidence the affirmative defense of unwitting possession." State v. A.M., __ Wn.2d __, 448 P.3d 35, 40 (2019). Defendant nonetheless argues that the State carries the burden of proving Defendant's intent. Does Washington law continue to recognize possession of a controlled substance as a strict liability crime?

C. Under RCW 10.01.160(3), "the sentencing judge [must] make an individualized inquiry into the defendant's current and future ability to pay before the court imposes" discretionary legal financial obligations. State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). Here, the trial court found Defendant indigent, but also imposed the criminal filing fee, DNA collection fee, and interest as legal financial obligations. Should this Court strike the two fees and interest from the Judgment and Sentence?

II. STATEMENT OF FACTS

Defendant's Opening Brief accurately summarizes the procedural and substantive facts in his case, but two facts deserve highlighting. First, this routine traffic stop and probation violation took a serious turn when officers discovered heroin and a syringe in Defendant's front pocket. As Officer Johnson testified,

A At this point, I called my supervisor, discussed the situation with her and asked for permission to search the vehicle for more violations, as I believed there was possible further violations inside the car.

Q Well, now, is this a common or uncommon situation? If you find someone who has drugs on their person, what makes you think there would be drugs inside the vehicle?

A It's a common situation for us. We typically find things hidden in cars out of plain view, so in containers inside the car, trunks, compartments, that type of thing.

Q If someone has drugs on their person, what makes you think the trunk would have any other contraband?

A It's normally places where drug dealers and drug users keep things because it's out of plain view.

Q How many investigations would you estimate you've done in your peace officer career?

A Dozens.

Q How many times have you seen, just ballpark, how many times have you seen situations like this where an individual has drugs on their person and you also later discover drugs inside the vehicle or trunk?

A Probably upwards of 20.

(12/5/18 RP 104-05). (12/5/18 RP 122) (CCO Steven Depoister) ("more than half" of 600 stops).

Second, when they opened the trunk, the Officers found more than a short-barreled shotgun inside. As Officer Johnson described,

> I was the one who searched in the trunk. Inside the trunk, I found what appeared to be a shotgun. It was located directly on top of some paperwork from the Thurston County Superior Court that had Mr. Bonomo's name on it.

(12/5/18 RP 106). Based on the testimony at trial, Judge van Doorninck concluded "that the defendant acted with knowledge that he was in possession or control of the firearm." (Findings and Conclusions at 3; CP 51). Defendant had control and possession of the car when pulled over, and no reasonable dispute exists that the gun and drugs were his.

After a two-day bench trial, Judge van Doorninck found Defendant guilty of Unlawful Possession of a Firearm in the First Degree, Possession of a Short-Barreled Shotgun, and Possession of a Controlled Substance. (Findings and Conclusions at 3-4; CP 51-52) (Attached as Appendix A).

Defendant now appeals.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the trial court's denial of a motion to suppress under two standards.

> When reviewing a trial court's ruling on a motion to suppress, we determine whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law. Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. We review conclusions of law de novo.

State v. Russell, 180 Wn.2d 860, 866–67, 330 P.3d 151 (2014) (citations omitted).

The Court reviews Defendant's constitutional challenge to the possession statute *de novo*. State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004) ("court reviews statutory construction issues and constitutional issues de novo").

Finally, the Court reviews the trial court's evaluation of Defendant's ability to pay legal financial obligations *de novo*. "Blazina establishes what constitutes an adequate inquiry into a defendant's ability to pay under state law, and the standard of review for an issue involving questions of law is de novo." State v. Ramirez, 191 Wn.2d 732, 741, 426 P.3d 714 (2018). The court reviews the imposition of legal financial obligations for an abuse of discretion.

> The trial court's ultimate decision whether to impose discretionary LFOs is undoubtedly discretionary. The trial court must balance the defendant's ability to pay against the burden of his obligation, which is an exercise of discretion.

Ramirez, 191 Wn.2d at 741.

IV. THE OFFICERS HAD REASONABLE CAUSE TO SEARCH THE CAR DEFENDANT WAS DRIVING.

Because he was under community supervision while driving, Defendant Bonomo did not have same expectation of privacy as other motorists.

> Individuals on probation are not entitled to the full protection of article I, section 7. They have reduced expectations of privacy because they are serving their time outside the prison walls. Accordingly, it is constitutionally permissible for a CCO to search an individual based only on a well-founded or reasonable suspicion of a probation violation, rather than a warrant supported by probable cause. The legislature has codified this exception to the warrant requirement at RCW 9.94A.631. The statute reads in relevant part, "If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a [CCO] may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property." RCW 9.94A.631(1).

State v. Cornwell, 190 Wn.2d 296, 301–02, 412 P.3d 1265 (2018) (citations omitted).

Substantial evidence supports Officer Johnson and Depoister's reasonable cause to search the car Defendant was driving. As both testified, probationers who possessed drugs while driving often had more hidden in the car. (12/5/18 RP 122).

Furthermore, the officers arrested Defendant in an area known for drug use and prostitution.

> Love's, in my experience from working in Fife, it is a high drug, high prostitution area. In my experience, drug trafficking takes place in truck stops such as Love's right there. His being there with narcotics led – I had a reasonable suspicion that he could be possibly involved in either prostitution activity, because of the two younger females in the car with him, or narcotics, trafficking or selling – selling narcotics at the truck stop, which gave me reasonable suspicion there could be further violations inside the vehicle.

(12/5/18 RP 122).

At trial, Judge van Doorninck found reasonable cause for the search.

> [A] search of the Defendant's person revealed a bag of a substance later tested and proven to be heroin was in the Defendant's front pocket along with a syringe. Based on this finding, a new community custody violation of possession of controlled substances without a prescription was now in effect and a further search of the vehicle the Defendant was driving was conducted based on the CCO's training and experience that when a probationer has controlled substances on his person, he is likely to have controlled substances and other contraband in his vehicle.

(Finding ¶ 3; CP 50). Defendant does not assign error to this finding and it is therefore a verity on appeal.

Defendant claims the search is illegal for three reasons: (1) the car did not belong to him; (2) he possessed a "small" amount of

heroin; and (3) there was no reason to search the trunk. (Opening Brief at 9-17). None of these are persuasive.

First, since Defendant possessed and controlled the car, its ultimate ownership was irrelevant. "If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property." RCW 9.94A.631(1). As the Supreme Court held regarding standing to object to a search, possession of a car, rather than its ownership, is the relevant fact. "A defendant has automatic standing to challenge the legality of a seizure even though he or she could not technically have a privacy interest in such property." State v. Peck, __ Wn.2d __, 449 P.3d 235, 238 (2019). Once a nexus exists between Defendant's probation violation and the scope of the search, the title to the vehicle makes no difference.

At trial, the State established that Defendant co-owned the car with his girlfriend and that he was driving it with her knowledge and permission. (4/29/18 Email; CP 20) ("We have bought a Cadillac together"); (State's Response to Motion to Suppress at 12; CP 17).

No dispute exists that the car was in Defendant's possession and control.

Finally, the Supreme Court's decision in State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009) does not invalidate the search here. The officers in Winterstein searched a home, mistakenly believing that a probationer lived there. The Supreme Court held the search illegal, given the special protection for a private residence.

> Protection of third party privacy interests is implicated when there is a question about the residence of a person who is the target of a search. Even though probationers have a lessened expectation of privacy, third parties not under the control of the DOC do not. Anytime a question arises about the actual residence of a probationer, therefore, third party privacy interests must be considered. This is particularly important where, as here, DOC asserts the right to search a probationer's residence even when he is not home.

State v. Winterstein, 167 Wn.2d 620, 630, 220 P.3d 1226 (2009). Defendant Bonomo was driving on a public street in plain view. The third-party interests of the car's owner are not the same.

Second, Defendant argues that he "was found with one gram of heroin, a 'small' amount suggesting personal use." (Opening Brief at 15). But his possession of heroin and a syringe, not the amount of heroin, justified the search of his car. As detailed above, the Community Corrections Officers had extensive experience finding

larger stashes of drugs in a car after discovering a small amount on a probationer. Whether a gram, an ounce or a kilogram, possessing any heroin while on community custody gave the Officers reasonable cause to search Defendant Bonomo's car.

Third, the Officers had reasonable cause to search the trunk. Defendant alleges "there was no reasonable suspicion to believe Mr. Bonomo was secreting additional drugs in the trunk of his car", when the opposite is true. (Opening Brief at 18). Once Officers found a small amount of heroin in Defendant's pocket, a reasonable suspicion was that there were more in the car. And given the high crime area Defendant was visiting, the trunk was the most secure spot to hide it. The Officers had reasonable cause to search all of the car, including the trunk.

V. POSSESSION REMAINS A STRICT LIABILITY CRIME.

The Washington Supreme Court has twice upheld the constitutionality of Washington's possession statutes. In State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981), the Supreme Court held that neither intent nor guilty knowledge is an element of the crime of possession of a controlled substance.

> If the defendant can affirmatively establish his "possession" was unwitting, then he had no possession

> for which the law will convict. The burden of proof, however, is on the defendant.

State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435, 439–40 (1981).

The Court reaffirmed this conclusion twenty-three years later in State v. Bradshaw,

> The legislative history of the mere possession statute is clear. The legislature omitted the "knowingly or intentionally" language from the Uniform Controlled Substances Act. The Cleppe court relied on this legislative history when it refused to imply a mens rea element into the mere possession statute. The legislature has amended RCW 69.50.401 seven times since Cleppe and has not added a mens rea element. Given that the legislative history is so clear, we refuse to imply a mens rea element.

State v. Bradshaw, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004).

Despite this, Defendant argues that the State must prove that he knowingly possessed the heroin in his pocket. "Here, the trial court did not make a factual finding Mr. Bonomo knowingly possessed the heroin." (Opening Brief at 19). Defendant asks to preserve his rights "should the supreme court hold knowledge is a required element." (Opening Brief at 19).

The Supreme Court recently rejected the latest challenge to the possession statute. State v. A.M., 194 Wn.2d 33, 42, 448 P.3d 35 (2019) ("A.M. need prove only by a preponderance of the evidence the affirmative defense of unwitting possession").

Possession remains a strict liability crime and therefore, Defendant's challenge is unpersuasive.

VI. THIS COURT SHOULD STRIKE THE FILING FEE, DNA FEE AND INTEREST PROVISION FROM DEFENDANT'S JUDGMENT AND SENTENCE.

In its Judgment and Sentence, the trial court found Defendant Bonomo was indigent. (Judgment and Sentence at 3; CP 38). Therefore, the State concedes error on the trial court imposing the $200.00 criminal filing fee and $100 DNA database fee, as well as interest on the unpaid balance. This Court appropriately orders them stricken from the Judgment and Sentence on remand. State v. Ramirez, 191 Wn.2d 732, 750, 426 P.3d 714, 723 (2018) ("remand for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs").

CONCLUSION

Community correction officers had reasonable cause to search the car Defendant Joseph Bonomo was driving. Once they discovered heroin in Bonomo's front pocket, they had a nexus between his possession and searching his car. The State of Washington respectfully requests this Court to affirm Defendant's conviction and dismiss this appeal.

DATED this 2nd day of December, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

By _____
Philip J. Buri, WSBA #17637
Special Deputy Prosecutor
Buri Funston Mumford & Furlong
1601 F. Street
Bellingham, WA 98225

DECLARATION OF SERVICE

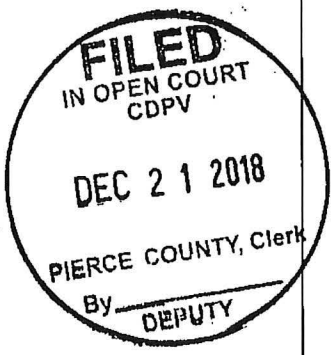
The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Pierce County's Response Brief** to:

Jessica Wolfe
Washington Appellate Project
1511 Third Ave, Ste. 610
Seattle, WA 98101
Attorney For: Joseph Bonomo

DATED this 2ND day of December, 2019.

_____
HEIDI MAIN

APPENDIX A



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOSEPH ANTHONY BONOMO, Defendant.	CAUSE NO. 18-1-01418-4 FINDINGS OF FACT AND CONCLUSIONS OF LAW –TRIAL BEFORE THE COURT

THIS MATTER having come before the Honorable Kitty-Ann van Doorninck on the 5th day of December, 2018 for trial, the defendant, JOSEPH ANTHONY BONOMO, being present and represented by his attorney Dana Ryan, and the State being present and represented by Deputy Prosecuting Attorney Cannon Jones, and the court having reviewed all of the police reports and other documents submitted by the parties, having heard the argument of counsel, and having rendered an oral ruling, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On April 9, 2018, Officer Mark Dorn of the Fife Police Department was on duty and on patrol in Fife: At approximately 10:30 AM he drove on a road adjacent to Love's Truck Stop in Fife where he saw a 2005 Cadillac CTS driving on the same road with the driver not having his seatbelt on. Officer Dorn initiated a traffic stop and identified the driver as Joseph Anthony Bonomo. Bonomo confirmed that he did not have a valid license or insurance and that his license was actually in suspended status. Officer Dorn detained and then handcuffed Bonomo for the offense of Driving While License Suspended in the 3rd Degree. Dorn also observed Bonomo had

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

a knife in a sheath on his waistband, made furtive movements and did not comply fully with Officer Dorn's instructions to exit the vehicle. Officer Dorn then properly read him Miranda warnings as he was in custody. Officer Dorn confirmed that Bonomo, the Defendant, was on active DOC community custody.

2. DOC CCO Zachary Johnson was then contacted to arrive to the scene to conduct a compliance check as the Defendant was in violation of his community custody because he was out of county. The Defendant's community custody conditions restricted him to remaining in King County and that he would need written authorization if he ever sought to leave the county.

3. Approximately 8 minutes from the time the CCO was contacted, CCO Johnson arrived on scene. A compliance check was then performed on the Defendant and a search of the Defendant's person revealed a bag of a substance later tested and proven to be heroin was in the Defendant's front pocket along with a syringe. Based on this finding, a new community custody violation of possession of controlled substances without a prescription was now in effect and a further search of the vehicle the Defendant was driving was conducted based on the CCO's training and experience that when a probationer has controlled substances on his person, he is likely to have controlled substances and other contraband in his vehicle.

4. A search of the Cadillac was then performed and inside the trunk was a shotgun with the Defendant's name on court paperwork found adjacent to the gun. Additional baggies were found along with a huffing straw used to ingest controlled substances. The shotgun was found to be a short-barreled shotgun at 13 7/8 inches as measured by the Fife PD firearms analyst. The shotgun was 4 and 1/8 inches shorter of the statutory minimum.

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Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

5. The Defendant was previously convicted of a serious offense, Residential Burglary, in King County on March 3, 2017 in cause number 16-1-06045-1. Residential Burglary is a serious offense under RCW 9.41.010 (24) (a) as a qualifying violent offense under RCW 9.41.010 (4) (a).

The trial cost find the officers credible. (KMJ)

CONCLUSIONS OF LAW

I.

1) On April 9, 2018 the defendant knowingly was in unlawful possession or control of a firearm in the first degree.
2) The Defendant was previously convicted of a serious offense, Residential Burglary, in King County on March 3, 2017 in cause number 16-1-06045-1.
3) That the defendant acted with knowledge that he was in possession or control of the firearm.
4) That the possession or control of the firearm occurred in Pierce County, Washington.
5) The defendant is guilty of the crime of Unlawful Possession of a Firearm in the First Degree, which occurred on April 9, 2018.

II.

1) On April 9, 2018 the Defendant did knowingly manufacture, own, buy, sell, loan, furnish, transport or have in his possession or under his control a short-barreled shotgun;
2) The Defendant acted with knowledge that he was in possession of the short-barreled shotgun.
3) That the shotgun had one or more barrels less than eighteen inches in length or any weapon made from a shotgun by any means of modification if such modified weapon has an overall length of less than twenty-six inches.
4) That the possession or control of the short-barreled shotgun occurred in Pierce County, Washington.
5) The defendant is guilty of the crime of Possession of a Short-Barreled Shotgun, which occurred on April 9, 2018.

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930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

III.

1) On April 9, 2018 the defendant possessed a controlled substance, to wit: heroin.
2) That the possession of the controlled substance occurred in Pierce County, Washington.
3) The defendant is guilty of the crime of Possession of a Controlled Substance, to wit: heroin, which occurred on April 9, 2018.

The Court's oral ruling was given in open court in the presence of the defendant on December 6th, 2018.

DONE IN OPEN COURT this 21st day of December, 2018.

JUDGE
KITTY-ANN van DOORNINCK

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Presented by:

Cannon Jones
Pierce County Deputy Prosecuting Attorney
WSB# 50948

Approved as to Form:

Dana Ryan
Attorney for Defendant
WSB# 17418

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

BURI FUNSTON MUMFORD, PLLC

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