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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

AUSTIN A. CIGANIK,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 18-1-00639-18

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BRIEF OF RESPONDENT

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**I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether Ciganik was unlawfully seized without authority of law requiring suppression of evidence against him?

**II. STATEMENT OF THE CASE**

**A. PROCEDURAL HISTORY**

Austin A. Ciganik was charged by information filed in Kitsap County Superior Court with possession of heroin. CP 1.

Ciganik moved to suppress the heroin. CP 6. The trial court entered findings of fact and conclusions of law pursuant to CrR 3.6. CP 59. The trial court denied the motion to suppress. CP 64.

Ciganik agreed to submit the case as a bench trial on stipulated facts. CP 65; (defendant's certificate at CP 66-68). The trial court found Ciganik guilty of possession of heroin. CP 69.

Ciganik pitched for and was granted a residential Drug Offender Sentencing Alternative (DOSA) sentence. CP 71.

Ciganik filed a timely notice of appeal. CP 82.

**B. FACTS**

Police received a call about a car sitting still running in a Burger King parking for a long time. RP, 5/6/19, 11. An officer looked in the car

and saw Ciganik. Id. He appeared to be sleeping. RP, 5/6/19, 12.

On the passenger seat, the officer saw a piece of aluminum foil. RP, 5/6/19, 12. The officer suspected that the dark, burned material on the foil was heroin. Id. Such foil is commonly used to ingest heroin. RP, 5/6/19, 22. The officer admitted that at that point he could not say “for sure” that what he saw was heroin. Id. But the officer had been trained in recognition of controlled substances, including heroin. RP, 5/6/19, 23-24. The officer had handled heroin “hundreds of times.” RP, 5/6/19, 24. His observation of the substance on the foil included his ability to estimate the quantity of drugs on the foil. RP, 5/6/19, 24.

The officer knocked on the car window and opened the car door. RP, 5/6/19, 19. Ciganik was instructed to get out and was placed under arrest. RP, 5/6/19, 20. Ciganik was advised that he was under arrest for possession of heroin. RP, 5/6/19, 21.

From this testimony, the trial court concluded that “Because the arrest was supported by probable cause, the resulting arrest was lawful.” CP 63 (Conclusion of Law VI).

### III. ARGUMENT

#### A. CIGANIK WAS PORPERLY ARRESTED WHERE AN OFFICER SAW HIM PASSED OUT IN THE DRIVER'S SEAT OF A RUNNING VEHICLE WITH DRUG PARAPHERNALIA AND HREOIN RESIDUE ON THE PASSENGER SEAT NEXT TO HIM.

Ciganik argues that evidence should have been suppressed because he was unlawfully seized. This claim is without merit because the arresting officer, armed with significant training and experience, recognized drugs and drug paraphernalia sitting on the passenger seat next to where Ciganik was passed out.

First, the state understands that the defense here is asserting an error because of the unlawful seizure of Ciganik's person. The evidence seized was seized pursuant to a warrant, which warrant Ciganik challenges only because the warrant followed from his allegation of an unlawful arrest.

Next, Ciganik's attack on the trial court's conclusion of law IV is unclear. Ciganik argues that the trial court's conclusion is incorrect because the officer's "belief" that there were drugs in the car was required to be couched in terms of the objective reasonableness of that belief. Brief at 10. While the case cited, *State v. Afana*, 169 Wn.2d 169, 182, 233 P.3d 879 (2010), does say that an arresting officer's formulation of probable

cause to arrest must be objectively reasonable, it does not stand for the proposition that this trial court's conclusions must contain that language.

*Afana* was about the reasonableness of an officer requiring a passenger to identify herself, which led to the discovery of a warrant, which led to a seizure, which led to the discovery of drugs. The Supreme Court's discussion there is rather far removed from the issue in this matter: whether the officer had probable cause to arrest Ciganik. The passage says

What matters is that the arrest was supported by probable cause—i.e., that the arresting officer was aware of facts and circumstances sufficient to cause a reasonable person to *believe* that a crime has been committed. In other words, the validity of an arrest depends upon the objective reasonableness of the arresting officer's belief that probable cause exists. As we emphasized in *Potter* and *Brockob*, this determination is made at the time of arrest. Thus, even if the statute that contributed to the determination of probable cause by proscribing the defendant's conduct is later declared unconstitutional, a reasonable person at the time of the arrest, with knowledge of the fact of the defendant's conduct and the circumstance of the statute, would have reasonably believed that there was probable cause to make an arrest.

*Afana*, 1659 Wn.2d at 183 (emphasis by the court; page break omitted). A reasonable person's belief based on sufficient facts and circumstances is objectively reasonable. Moreover, Ciganik ignores the immediately previous sentence: "Thus, the validity of an arrest does not depend on whether the suspect *actually* committed a crime." *Afana*, 169 Wn.2d at 183. Ciganik's argument seeks certainty where none obtains.

In Washington, “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. This provision is met if a warrant supported by probable cause is issued. *See State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). Warrantless seizures are per se unreasonable unless they are within one of the jealously and carefully drawn exceptions. *State v. Hatchie*, 161 Wn.2d 390, 395, 166 P.3d 698 (2007). The question of whether article 1, section 7 has been violated asks first whether a citizen’s private affairs have been disturbed and, second, if so, “whether authority of law justified the intrusion.” *State v. Villela*, \_\_\_ Wn.2d \_\_\_, ¶10, 450 P.3d 170 (October 17, 2019).

Plain view is a “well-established” exception. *State v. Morgan*, 193 Wn.2d 365, 369-70, 440 P.3d 136 (2019).<sup>1</sup> “A plain view seizure is legal when the police (1) have a valid justification to be in an otherwise protected area, provided that they are not there on a pretext, and (2) are immediately able to realize the evidence they see is associated with criminal activity.” *State v. Morgan*, 193 Wn.2d 365, 371, 440 P.3d 136 (2019). Further, “[o]bjects are immediately apparent under the plain view doctrine when, considering the surrounding circumstances, the police can reasonably conclude that the subject evidence is associated with a crime.”

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<sup>1</sup> Ciganik argues that there is no “automobile exception” to the warrant requirement. The

*Morgan*, 193 Wn.2d at 372 (internal quotation omitted).

Here, the primary complaint is not whether the officer saw what he saw, the drugs, but that the officer arrested Ciganik directly after seeing the drugs. The standards on probable cause to arrest are clear:

Probable cause exists when the arresting officer is aware of facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed. *State v. Terrovona*, 105 Wash.2d 632, 643, 716 P.2d 295 (1986). At the time of arrest, the arresting officer need not have evidence to prove each element of the crime beyond a reasonable doubt. The officer is required only to have knowledge of facts sufficient to cause a reasonable person to believe that an offense had been committed. *State v. Knighten*, 109 Wash.2d 896, 903, 748 P.2d 1118 (1988).

*State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (En Banc) (2004). In stating that an arresting officer need not consider all the elements of an offense in deciding probable cause to arrest, it is again made clear that “objective reasonableness” does not require absolute certainty.

In *State v. Harris*, 9 Wn. App.2d 625, 444 P.3d 1252 (2019), the Court reversed a possession of stolen property conviction because of an article 1, section 7 violation. A citizen told police of two men asleep in a car at midday. The officers looked and found the men to be either asleep or unconscious. The officers suspected heroin use and possibly overdose but did not observe any evidence of drug use when looking into the car.

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state asserted no such exception below and does not here.

The officers opened the door, awoke the occupants, and in so doing discovered drug paraphernalia. Harris was arrested for the paraphernalia.

The state argued that the police actions were justified under the community caretaking exception to the warrant requirement. *Harris*, 9 Wn. App.2d at 629. The Court of Appeals disagreed, holding that “the officers lacked a reasonable, objective basis to justify an intrusion into the vehicle.” 9 Wn. App.2d at 633. In so doing, the Court rejected that the officers’ knowledge of an opioid epidemic justified the intrusion. At bottom, “[t]he mere fact of a person sleeping in a car during the day, without any accompanying observations of a possible medical issue or drug use, would not lead a reasonable person to believe that an emergency existed.”

What if, however, the officer looking into the car in fact observes evidence of drug use as in the present case? Here, the deputy saw what from training and experience he knew to be paraphernalia used to ingest heroin with heroin residue remaining on it. These observations would cause any reasonable officer to conclude, without engaging an analysis of whether there is proof beyond a reasonable doubt, that the offense of unlawful possession of controlled substance, a felony, was being committed in his presence. “A police officer having probable cause to believe that a person has committed or is committing a felony shall have

the authority to arrest the person without a warrant.” RCW 10.31.100.

Thus, on this record, community care taking is not a stretch. The officer, in a public parking lot, had a visual on drugs in the car, a passed-out driver, and a running car engine. Clearly, the community may well have been at some risk by this situation. But, of course, community care taking or any other exception to a search warrant are not the point here. Even if community care taking allowed opening the door to arouse Ciganik, his complaint here is the arrest. And the officer had probable cause to do that.

*State v. Rose*, 175 Wn.2d 10, 282 P.3d 1087 (2012) is instructive on the issue of arresting a suspect on the observation of drug paraphernalia in his possession. There, police responding to a burglary complaint came upon Rose and detained him because he fit the description of the burglary suspect. 175 Wn.2d at 12. In time the burglary detail was cancelled but while detaining Rose, the police observed “a glass tube protruding from Rose’s bag.” *Id.* An officer “thought he could see” white substance in the tube and concluded that the tube was consistent with a drug ingestion tool. 175 Wn.2d at 12. Rose was arrested for possession of drug paraphernalia. *Id.*

In the Supreme Court, Rose argued that possession of drug paraphernalia was not a crime because the statute requires use. *Rose*, 175

Wn.2d at 19. The Court agreed and added that use of drug paraphernalia is a misdemeanor and arrest is not lawful unless the use is done in the officer's presence. *Id.* But this did not end the inquiry because the Court noted the rule that "an arrest supported by probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists." *Rose*, 175 Wn.2d at 19-20.

Under this rule, the Supreme Court held, the Court of Appeals had correctly determined that the officer's observation of the white chalky substance in the tube resulted in the officer's reasonable belief that the substance was illegal and supported probable cause to arrest. *Rose*, 175 Wn.2d at 20. It was decided that "[t]he circumstances of the stop and arrest of *Rose* clearly reflect that Officer Croskrey had a plain view of a glass pipe, with a white residue inside, that in his training and experience he suspected were consistent with drug possession." *Rose*, 175 Wn.2d at 22.

In the present case, the officer had a plain view of the foil with heroin residue on it that from his training and experience he suspected was consistent with drug possession. There was probable cause to arrest Ciganik. The evidence was properly admitted against Ciganik.

**IV. CONCLUSION**

For the foregoing reasons, Ciganik's conviction and sentence should be affirmed.

DATED December 31, 2019.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross", is written over the typed name and title of the Deputy Prosecuting Attorney.

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