

**FILED**

JUL 27 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 28802-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**RANDY JAMES JERRED,**

Defendant/Appellant.

---

**APPELLANT'S BRIEF**

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## **ASSIGNMENTS OF ERROR**

1. Randy James Jerred was unlawfully arrested.
2. The trial court's Findings of Fact IX and X do not support the Conclusions of Law. (Appendix "A")
3. The scope of the search of Mr. Jerred's person violated his constitutional rights under the Fourth Amendment to the United States Constitution and Const. art. I § 7.
4. Conclusion of Law II is erroneous due to the unconstitutional search of Mr. Jerred's person. (Appendix "B" )
5. The Information does not charge a crime.

## **ISSUES RELATING TO ASSIGMENTS OF ERROR**

1. Was Mr. Jerred unlawfully arrested?
2. If the arrest was lawful, did the search of Mr. Jerred's person exceed the scope of the search incident to arrest exception?
3. Does the Information contain all of the essential elements of the crime of possession of methamphetamine?

## STATEMENT OF CASE

The Yakima Police Department dispatch advised officers of a shoplifting complaint at 6600 West Nob Hill Boulevard. This is the WalMart Store. Officers Cavin and Bowersox responded. (RP 1, ll. 3-10; Findings of Fact I & II; Supp. CP.61; Appendix "C").

The officers contacted a male, a female and two store employees upon arrival. The female was identified as Elizabeth Crim. The male was Nicholas Allemand. (RP 2, ll. 5-14; RP 21, ll. 4-9; RP 22, ll. 21-24).

Following a discussion with the WalMart employees Ms. Crim was arrested for shoplifting. Mr. Allemand was later identified as being involved in the shoplifting incident and was arrested. (Findings of Fact III and VI; Appendix "D").

Another employee of WalMart advised the officers that "there is one more guy hiding in the car over there." This was the car in which Mr. Allemand had been sitting. (Finding of Fact VII; Appendix "E").

Officer Cavin went to the car. He saw an individual in the back seat who was lying down and acting in a furtive manner. (RP 5, ll. 2-12; RP 11, ll. 20-23; RP 14, ll. 13-15; Finding of Fact VIII; Appendix "F").

Officer Cavin asked the person to get out of the car. He was initially identified as Frank Cruz with a date of birth of January 11, 1963. He said he did not have any identification. He said he was from Texas.

No record of a Frank Cruz in the State of Texas was located with that date of birth. (RP 17, ll. 6-7; RP 18, ll. 5-21)

Officer Cavin placed this individual under arrest for providing a false report under YMC 6.48.010. A search of his person yielded an identity card from the Department of Corrections. The person was Mr. Jerred. He was arrested on outstanding warrants. A search incident to that arrest located a cigarette package which contained methamphetamine (RP 19, ll. 3-8; ll. 21-24; RP 20, ll. 7-10).

No one saw Mr. Jerred inside WalMart. A subsequent investigation revealed that Mr. Jerred never got out of the car. (RP 21, l. 22 to RP 22, l. 1; RP 22, ll. 14-18).

Officer Cavin believed that Mr. Jerred was involved because he was inside the car. The officer had no evidence of a common scheme or plan. The officer did not indicate that he believed Mr. Jerred to be armed or dangerous. He was merely detaining Mr. Jerred as a witness when he asked him to get out of the car. (RP 28, ll. 2-10; RP 29, ll. 7-11; RP 31, l. 25 to RP 32, l. 2; RP 32, ll. 14-23).

An Information was filed charging Mr. Jerred with possession of methamphetamine. The Information states:

On or about October 24, 2009 in the State of Washington, you possessed a certain controlled substance, methamphetamine.

(CP 57)

A CrR 3.6 hearing was conducted on January 19, 2010. The Court ruled the evidence was admissible. Findings of Fact and Conclusions of Law were entered on July 1, 2010.

A stipulated facts trial was held on January 25, 2010. Mr. Jerred was found guilty. Judgment and Sentence was entered that date. (CP 12).

Mr. Jerred filed his notice of appeal on that same date. (CP 3).

### **SUMMARY OF ARGUMENT**

Mr. Jerred's unlawful arrest requires suppression of the evidence seized.

The search of the cigarette package is unconstitutional.

The Information fails to charge a crime.

### **ARGUMENT**

#### **A. ARREST**

Officer Cavin arrested Mr. Jerred under the authority of YMC

6.48.010. Sub-paragraph (A) of that ordinance provides:

It is unlawful for any person to cause to be made or make any willfully untrue, false, misleading, unfounded or exaggerated **statement or report** to the police department of the City of Yakima.

(Emphasis supplied.)

The wording of the ordinance is interesting. It requires that the statement or report be made to the police department. There is nothing in the statute indicating that an individual police officer constitutes a “police department”.

Moreover, the title of the ordinance is “Making False Police Reports Prohibited.”

Mr. Jerred was not making a police report. He responded to a question from Officer Cavin concerning his identity.

**QUERY:** Is answering a question a police report?

**QUERY:** Does the word “statement” encompass both verbal and written statements?

The statute which is akin to YMC 6.48.010 is RCW 9A.76.175. It states:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. “Material statement” means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

The ordinance omits the requirement of “materiality.” As such, it covers a broader spectrum of conduct which includes protected speech.

In *State v. Williamson*, 84 Wn. App. 37, 45, 924 P. 2d 960 (1996) the Court, in discussing the offense of obstructing a law enforcement officer, held:

Nor are we persuaded by the State's argument that the response, "Christopher Columbus," was conduct, not speech. It clearly fit with alternative (2) of former RCW 9A.76.020 (LAWS OF 1975); a "knowingly untrue statement." The State's approach would improperly blur the *White* [*State v. White*, 97 Wn. 2d 92, 99-100, 640 P. 2d 1061 (1982)] court's distinction between speech and conduct, a distinction critical to its constitutional analysis.

Mr. Jerred contends that even though he provided the officer with a false name and date of birth, this does not violate YMC 6.48.010 because he was neither making a report nor was his statement made to the police department.

Mr. Jerred's arrest under YMC 6.48.010 was unlawful.

## **B. SCOPE OF SEARCH**

The Fourth Amendment will be satisfied when the following requirements are met: (1) the initial stop must be legitimate; (2) a reasonable safety concern must exist to justify a protective frisk for weapons; (3) the scope of the frisk must be limited to the protective purpose.

*State v. Collins*, 121 Wn. 2d 168, 173, 847 P. 2d 919 (1993).

Initial contact with Mr. Jerred was based upon the fact that he was in a car parked in the WalMart parking lot and a shoplifting incident had recently occurred inside the store.

Mr. Jerred was being contacted as a potential witness. No safety concerns were immediately identified. A pat-down search was not immediately conducted.

Office Cavin did not have probable cause to arrest Mr. Jerred upon initial contact. If probable cause arose due to Mr. Jerred's providing false information concerning his identity, then only a limited pat-down search would be permissible. *See: State v. Allen*, 93 Wn. 2d 170, 173, 606 P. 2d 1235 (1980).

Mr. Jerred compares his situation to the fact scenario in *State v. Neth*, 165 Wn. 2d 177, 196 P. 3d 658 (2008). The *Neth* Court, after considering the unusual and somewhat suspicious activities of the defendant, concluded at 184:

We do not permit searches merely because people do not have proper identification or documentation, are nervous, or tell inconsistent versions of the event. *See: State v. Coyne*, 99 Wn. App. 566, 574, 995 P. 2d. 78 (200) (suspicious story is not reasonable suspicion justifying investigation detention); *cf. State v. Setterstrom*, 163 Wn. 2d 621, 627, 183 P. 3d 1075 (2008) (**officer must have some basis beyond suspect's nervousness and lying to justify a frisk**)...

(Emphasis supplied.)

Mr. Jerred's outstanding warrants were found only after pat-down search produced the DOC ID card with his true name.

Even assuming that no constitutional violation had occurred at this point, the scope of the search, which resulted in the removal of the cigarette package from Mr. Jerred's person, exceeded the scope of the search incident to arrest exception.

In *State v. Horton*, 136 Wn. App. 29, 38, 146 P. 3d 1227 (2006) the court addressed a similar incident and ruled:

... [I]f the officer withdraws a cigarette pack... the justification for the intrusion ends once he determines that it is not a weapon...

...Only objects that feel that they could be used as weapons in a superficial pat-down of the outer clothing may be removed and examined... .

A cigarette package does not constitute a weapon. When a subsequent search of the cigarette package revealed the methamphetamine, it went beyond the prohibitory framework of either the Fourth Amendment or Const. art. I § 7.

### **C. NO CRIME CHARGED**

RCW 69.50.4013(1) defines the crime of possession of a controlled substance as follows:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her pro-

fessional practice, or except as otherwise authorized by this chapter.

The Information does not contain any of the language after the words “controlled substance.” It does not use the word “unlawful” to describe the possession.

The courts do not treat statutory language as meaningless. Even in cases where a statute is somewhat peculiar, the courts will make every effort to give meaning to each and every word of the statute. *See: State v. Tandecki*, 153 Wn. 2d 842, 847, 109 P. 3d 398 (2005).

Mr. Jerred compares his case to the facts in *State v. Clausing*, 147 Wn. 2d 620, 56 P. 3d 550 (2002). In the *Clausing* case the doctor was charged with not being a licensed practitioner and delivering a legend drug. The *Clausing* Court ruled at 627:

Dr. *Clausing* conceded that he delivered a legend drug. He also conceded that he was not a practitioner. The only factual question before the jury was, therefore, whether [the patient] had a valid prescription for these drugs. **The absence of a physician’s prescription was the single essential element of the offense of unlawful delivery, which the State had to prove beyond a reasonable doubt. Dr. Clausing did not have to prove that [the patient] did have a prescription.** *In re Winship*, 397 U.S. 358, 90 Supp. Ct. 1068, 25 L.Ed 2d 368 (1970) (prosecution must prove the essential elements of the crime and the nonexistence of any defense which by its terms asserts that one of those elements was not present).

(Emphasis supplied.)

The Information charging Mr. Jerred with possession of methamphetamine did not contain all of the essential elements of that offense.

The omission of the statutory language referencing a valid prescription negates the legitimacy of the charging document.

The omission of the word “unlawful” relieved the State of proving the mens rea of the crime.

As was announced in *State v. Hopper*, 118 Wn. 2d 151, 157, 822 P. 2d 775 (1992):

In *State v. Moser*, 41 Wn. 2d 29, 31, 246 P. 2d 1101 (1952) this court held that: “There is no presumption in favor of a pleading charging a crime. Such a pleading must be definite and certain.” *Moser* followed *State v. Unosawa*, 29 Wn. 2d 578, 589, 188 P. 2d 104 (1948), in its holding that the “common understanding” rule could not be applied unless it had first been determined that the information contained all the statutory elements of the particular crime involved. *Moser*, at 31-32.

### CONCLUSION

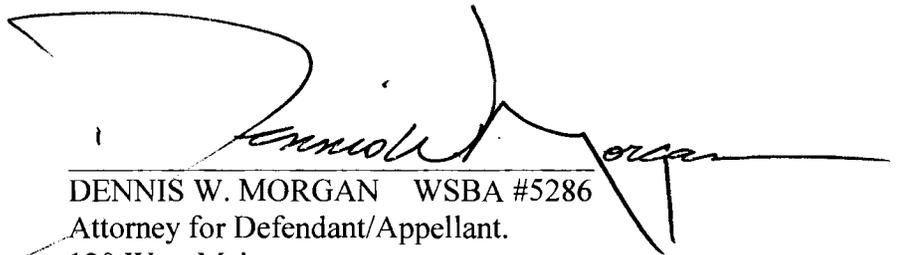
Mr. Jerred was unlawfully arrested under YMC 6.48.010(A). The unlawful arrest requires suppression of the evidence sized from his person.

If the Court determines that Mr. Jerred’s arrest was lawful, then the search of the cigarette package exceeded the constitutional limitation of a pat-down search. The evidence should be suppressed.

If the Court declines to suppress the evidence under either alternative argument, then Mr. Jerred's conviction must be reversed due to the inadequacy of the charging language. The Information does not meet the essential elements rule and Mr. Jerred's conviction must be dismissed without prejudice. *See*: United States Constitution, Sixth Amendment; Const. art. I § 22; *State v. Kjorsvik*, 117 Wn. 2d 93, 105, 812 P. 2d 86 (1991).

DATED this 26<sup>TH</sup> day of July, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis W. Morgan", is written over a horizontal line. The signature is stylized and extends to the right of the line.

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# APPENDIX "A"

IX

The Officer then opened the vehicle door and asked the subject to exit the vehicle. The subject did exit the vehicle. The Officer asked the male if he knew anything about what was going on and the male replied he did not. Officer Cavin asked the male for identification and the male stated he had none. The male was identified verbally as Frank J. Cruz. He also provided his date of birth as January 11, 1963. The male also stated his identification was out of Texas. The Officer looked up that information and found no record.

X

At that point Officer Cavin placed the male under arrest for providing a false report to police (Yakima Municipal Code 6.48.010). Thereafter Yakima Police Sergeant J. Salinas arrived to assist and located an identification card on the defendant identifying him as Randy J. Jerred. Sergeant Salinas asked the defendant if that was his name and he stated yes. The defendant was found to have an outstanding arrest warrant. The defendant was searched incident to arrest and the Officers located suspected methamphetamine in a cigarette pack in the defendant's pocket.

## APPENDIX "B"

## II

The Court finds that the defendant's conduct allowed the Officer to conduct his investigation further based on the Officer's training and experience as both a police officer and former loss prevention officer.

# APPENDIX "C"

I

On October 24, 2009, at approximately 5:40 a.m. Yakima Police Officer Ira Cavin was dispatched to 6600 West Nob Hill Boulevard (Wal-Mart), Yakima, Washington. The officer was called out for a shoplifting in progress. At the time the officer was informed that one shoplifter was in custody and there was an accomplice outside waiting for her.

II

When Officer Cavin arrived on scene another Yakima Police Officer F. Bowersox was already on the scene and was speaking with several Wal-Mart managers, JT Nelson and Christina Zepp.

## APPENDIX "D"

### III

Officer Cavin had observed Officer Bowersox place a suspect female identified as Elizabeth Crim under arrest. The female was identified by the store managers as the suspect who was shoplifting at Wal-Mart.

### VI

During the Wal-Mart managers' statements to the Officers, Mr. Allemand again approached the officers and the store managers and was identified by the store managers as being involved in the shoplifting on this date. Mr. Allemand was then pat searched for officer safety because he was a large man, had a large bulky jacket on, and was taking an aggressive posture and demeanor with the officers. Upon the pat search for officer safety the Officers located a razor blade cutting knife. Mr. Allemand was then handcuffed for officer safety.

## APPENDIX "E"

VII

Thereafter another Wal-Mart employee whom was pushing carts in the parking lot told the officers "there is one more guy hiding in the car over there". The employee had pointed to the car that Mr. Allemand was sitting in before.

## APPENDIX "F"

### VIII

Officer Cavin then walked to the car and observed a male lying down in the back seat attempting to hide from his view. As the officer got closer he observed the male attempt to lay down further in the car to prevent his discovery. The male had his hands clutched to his chest and was acting furtively.