

No. 290344

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

SEP 27 2010

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STATE OF WASHINGTON
By _____

STATE OF WASHINGTON

Respondent,

vs.

MICHELE MERLYNN MARTINEZ

Appellant.

BRIEF OF APPELLANT

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I. IDENTITY OF THE APPELLANT

Michele Martinez is the Appellant.

II. ASSIGNMENT OF ERROR

- A. Cantrell should only be applied when a vehicle is occupied and on a public road; Cantrell is not applicable when a vehicle is unoccupied and parked on a private, residential driveway.
- B. Under Cantrell, when a co-occupant of a vehicle of equal authority or more objects to a search of said vehicle by law enforcement or is unable to object because she is constrained by law enforcement, in order for the State to be able to use any evidence found in the vehicle against the objecting or constrained person, a search warrant for that vehicle is necessary.
- C. Although Mary Campos is the registered owner of the red Ford Escort, she did not have equal authority or greater, or any authority to consent to a search of Michele Martinez's red Ford Escort by law enforcement, under article 1, section 7 or the Fourth Amendment.
- D. DOC did not have the right to search Michele Martinez's red Ford Escort, because even though Fidel Medina was under DOC supervision and under Community Custody, Medina did not have equal authority or greater, or any authority over the red Ford Escort, under article one, section 7 or the Fourth Amendment.
- E. Michele Martinez never legally consented to the search of the cab of the red Ford Escort.
- F. Any and all evidence found in the trunk of the red Ford Escort should be suppressed, because it is fruit of the poisonous tree.

III. STATEMENT OF THE CASE

On November 26, 2008 Community Corrections Officer (CCO) Brent Martin observed Fidel Medina driving a red Ford Escort in Yakima Washington. RP 7. Martin had seen Medina driving the red Ford Escort one time previously, approximately two weeks prior to the November 26 contact, but did not initiate any contact at that time. RP 9. Upon seeing Martin, Medina stopped the red Ford Escort, and then Martin stopped his vehicle, and both men exited the vehicles with Martin initiating contact. RP 7. Martin was supervising Medina as part of his duties as a CCO, because Medina was a convicted felon, and was under DOC Community Custody during 2008. RP 7. Part of Medina's conditions of his supervision was that he must drive legally. RP 8, 15. However, during the stop, Medina told Martin that he didn't have insurance for the red Ford Escort, but that he was getting insurance the following week. RP 8. Medina told Martin that the red Ford Escort belonged to his wife, Michele Martinez. RP 27, 36. Martin testified at the suppression hearing that at no time during that contact did

Medina ever tell Martin that the red Ford Escort belonged to Medina. RP 36.

Martin told Medina to stop into his office so that could review some possible violations, and that Martin would contact Medina to make sure there was insurance for the red Ford Escort. RP 8.

On December 3, 2008, at approximately 8:00 pm, Martin, accompanied by Sunnyside Police Officer Robert Layman, and Officer Darren Scott, decided to conduct a residential contact with Medina about some possible community custody violations. RP 9, 97. Since Medina's four children were in the living room, the contact was conducted in the garage. RP 10. Once at the residence, Martin decided to detain Medina based on Medina's driving violation, his non-compliance with treatment, and Medina's possible gang contact. RP 7, 9. Martin searched Medina and found what looked like a "small plastic bindle of a white, crystal substance in his (Medina's) pants pocket." RP 10.

At that point, Medina was placed into a patrol car, and the rest of the house was searched. RP 12, 64. No other contraband was discovered during the search. RP 13. CCO

Martin then decided that he was going to search the red Ford Escort. RP 15. CCO Martin, Michele Martinez, Officer Layman and Officer Scott all went outside to the driveway of the residence, where the red Ford Escort was located. RP 15. The red Ford Escort was located directly in front of the garage door, on private property belonging to Martinez. RP 112.

None of the parties, Martinez, Medina or Campos were occupying the vehicle during the investigation or just prior to the investigation. Officer Scott testified that he never observed Fidel Medina near the red Ford Escort on December 3, 2008. RP 101. In fact, Officer Scott had never seen Medina, or Mary Campos, Michele Martinez's mother, drive the red Ford Escort. RP 101.

Officer Layman also testified that when he arrived at Medina's residence on December 3, 2008, that Medina was inside the house, not anywhere near the red Ford Escort. RP 75. In fact, Officer Layman not only testified that he didn't see Medina drive the red Ford Escort that day, but that he had never seen Medina or Mary Campos drive the red Ford Escort. RP 75-76. CCO Martin also testified that he had never seen

Mary Campos drive the red Ford Escort, and had only seen Medina twice driving the red Ford Escort . RP 28, 32.

At the suppression hearing, there was never any evidence presented of there being any occupants in the red Ford Escort just prior to or during the December 3, 2008 investigation. Also, at the suppression hearing CCO Martin stated the following reasons as to why he decided to search Michele Martinez's red Ford Escort, all of the reasons being based on the incorrect notion that Medina had equal or greater authority to give consent to search the red Ford Escort:

“Again, based on the violations that I had at the time, also very specific Mr. Medina having conditions not to drive a motor vehicle without a license and insurance, me contacting him just a week prior, week or two prior driving a vehicle, so he also had informed me that he was going to get insurance, so part of why I went to search the vehicle was to see, again, if there's any additional violations, but also to confirm and look to see if he had actually gotten the insurance that he told me he was going to get.” RP 15.

CCO Martin testified that after arresting Medina, that he and Martinez had a discussion, and Martinez told Martin that she owned the red Ford Escort (RP 18), which was confirmed by Sunnyside Police Officer Darren Scott RP 31, 47, 102. Scott

testified that Martinez told Martin that she owned the red Ford Escort, but that it was registered to her mother, Mary Campos. RP 102. Martin was told twice that Michele Martinez was the owner of the vehicle: Once by Fidel Medina on November 26, and again on December 3, 2008, the day of the illegal search. RP 27, 31, 47, 102. Officer Scott was also aware at the time of the illegal search of Michele Martinez's red Ford Escort that Martinez was the owner. RP 102.

Martinez also stated to Martin that while she is the owner of the red Ford Escort, that Medina drives it occasionally. RP 18. However, Martin never followed up with Martinez to find out how often Medina uses Martinez's vehicle (RP 32), and if Medina had equal or greater authority of the red Ford Escort, or if Medina needed to ask Martinez's permission before using the red Ford Escort. In fact, Martin admitted of only being aware of two occasions that Medina had ever driven Martinez's red Ford Escort. RP 32.

At that point, Martin said to Martinez "Do you mind if we look in your vehicle?," referring to the cab of her red Ford Escort RP 48. However, this was not a polite request to look into

Martinez's red Ford Escort. Martin testified that this was just a "common courtesy;" (RP 16, LN 12) and that he was going to search Martinez's red Ford Escort regardless of her answer. RP

31. Martin gave the following answer as to why he had the legal right to search Martinez's red Ford Escort:

"Defense Counsel Cross: Okay. And, so, at the point where now you're at the red Ford Escort and you had said to Mr. Keller that you were going to search that vehicle and you were just asking as common courtesy to Ms. Martinez, is that correct?

Officer Martin: It's correct. Because based on the totality, based on taking everything into, into circumstances that I had contacted Mr. Medina the week prior, based on them being in a relationship together, seeing him drive the vehicle, knowing that he has conditions which state that the vehicle, the house, you know, him, all the property is subject to search, so when I was speaking with Ms. Medina or Ms. Martinez at that point in time, I was kind of informing her what was going on and what was happening, you know, based on the violations, because she was not where we were when I located the substance and then Mr. Medina was detained and arrested, she wasn't there, so she was kind of asking, 'Hey, what's going on,' so I kind of informed her what was going on, and just in that conversation, you know, I was confirming, 'Hey, this is your guys' vehicle,' or at least, 'I've seen you guys driving it,' or, 'I've seen Mr. Medina driving it,' and she confirmed that, that they both drive it. So at that point I've come into certain things, times where, you know, you have to get the keys, so I just kind of ask, 'Hey, do you have the keys? Do you mind if we just look in it, search it?' 'No, no problem. That's fine.'" RP 29-30.

All of CCO Martin's reasons were based on his incorrect assumption that Medina had equal or greater authority to give consent to search the red Ford Escort.

Martin then testified at the suppression hearing that he had never actually asked to search Martinez's red Ford Escort (RP 33 LN 11-21), and Martinez never gave Martin permission to search her red Ford Escort. RP 33. Martin only asked to be able to "look in it," even though he admitted at the suppression hearing that he was going to search the vehicle, regardless of whether or not Martinez gave consent to look. RP 18, 48.

Martin testified at the suppression hearing that prior to searching Martinez's red Ford Escort, he did not Mirandize her, nor did he inform her of her right to not consent to the search of her vehicle. RP 32.

CCO Martin than opened the door of the red Ford Escort. RP 92. Martin then testified that he "looked down, looked under the seat, and I clearly saw a handgun." RP 20. Martinez told Layman that the gun belonged to her. RP 22, 66. Layman then confirmed with dispatch that Martinez was a convicted felon, and Layman then arrested Martinez for felon in possession of a

firearm. RP 67. Layman then wanted to search the rest of the vehicle, including the trunk, which was locked. RP 70. Layman stated at the suppression hearing that the best course of action going forward would be to either get consent to search the vehicle, or to get a search warrant. RP 67, 70.

Layman stated that he asked Martinez for consent to search the red Ford Escort, but she wasn't sure whether or not to consent to a search. RP 67. Layman had already filled out a consent to search form with Martinez's name filled into the appropriate space on the form, and then discussed the consent to search form with her. RP 70. Martinez asked Layman what would happen if she didn't sign the consent to search form, and Layman told Martinez that he would get a search warrant. RP 70.

At that point, Mary Campos, Martinez's mother, had arrived as a caretaker for Martinez's four children. RP 70. Martinez was not inside a patrol vehicle yet. RP 70. Martinez was standing outside of the patrol vehicle talking with Campos, while Layman was getting information about the red Ford Escort from inside of his patrol car. RP 70. Layman then

discovered that Campos' name was on the title of the red Ford Escort as the registered owner of the vehicle. RP 70, 79. At that point, Layman placed Martinez inside of the patrol vehicle, handcuffed, with the windows and doors shut, crossed out Martinez's name from the consent to search form, wrote in Mary Campos' name, and proceeded to convince Campos to sign the consent to search form. RP 70, 78, 79, 80. Layman then discovered the illegal drugs in the trunk of the red Ford Escort. CP 18.

IV. ARGUMENT

1. A WARRANT IS REQUIRED FOR A SEARCH, BUT FOR A FEW LIMITED EXCEPTIONS.

The exceptions to the warrant requirement fall into a few broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, Terry investigative stops, community caretaking functions, and special searches. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). None of the exceptions to the warrant requirement exist in the present case. Ms. Martinez argues that for purposes of her appeal, that her constitutional right to privacy was violated under both article 1 section 7 of the Washington State Constitution, and the Fourth Amendment of the U.S Constitution. Arguments for both state and federal protection of the right to privacy apply to all sections of this brief.

2. A VEHICLE IS NOT ALWAYS A VEHICLE: THE HOLDING IN CANTRELL SHOULD NOT BE APPLIED TO SITUATIONS LIKE MARTINEZ'S, WHERE A VEHICLE IS NOT OPERATING AS A VEHICLE, BUT IS ACTUALLY JUST AN "EFFECT."

In Cantrell, the defendant and a passenger were driving a vehicle on a public road. State v. Cantrell, 124 Wn.2d 183, 185, 875 P.2d 1208 (1993). The Officer stopped Cantrell for speeding. Id. After writing the citation, the Officer asked the passenger, whose parents owned the vehicle, if he would read a consent to search form, sign it, and allow the Officer to search the vehicle, which he did. State v. Cantrell, 124 Wn.2d at 186. When the Officer began to search, Cantrell didn't object. Id.

The issue in Cantrell was the following:

"For a valid consent search of an automobile, must police obtain the consent of all **occupants** who have approximately equal control over the vehicle before police may conduct a search of the automobile without a warrant?" State v. Cantrell, 124 Wn.2d at 187 (Emphasis added).

The Cantrell Court then went on to make the following analysis with regard to common authority:

"There is also no question in this case that Mr. Schweitzer had the authority to consent to a search of

his parents' car. Common authority rests on the mutual use of the property by persons generally having joint access or control. Generally, the borrower of a car may consent to a search. Here, it is not disputed that the passenger (the owners' son) had sufficient control to consent to a search of the vehicle. The only question, then, is whether this court's decision in *Leach* should be extended to apply to searches of motor vehicles.” Cantrell, 124 Wn.2d at 188.

Then the Cantrell Court made the following analysis, comparing the privacy rights of individuals with regard to a residence and a vehicle:

“While there is a privacy interest in an automobile, the interest does not rise to the level of a person's expectation of privacy in a residence. There is less expectation of privacy in an automobile than in either a home or an office. Since a person enjoys a lesser expectation of privacy in a vehicle than in an office or a home, we decline to extend the rule enunciated in State v. Leach, 113 Wn.2d 735, 782 P.2d 1035 (1989) to vehicle searches. No adequate independent state grounds are advanced in this case to support extending the *Leach* rule to motor vehicles, and, for the reasons which follow, such a result is not mandated by federal law.” State v. Cantrell, 124 Wn.2d at 190.

In Cantrell, both the driver and the passenger were **occupants** of a vehicle that was being driven on a public road. Cantrell at 185. The comparison of the right to privacy of individuals under article 1 section 7 by the Cantrell Court, with

regard to residences and vehicles was made while referring to vehicles that were: 1) Occupied; and, 2) were actually being driven on public roads. State v. Cantrell, 124 Wn.2d at 185. The comparison was never extended to unoccupied vehicles parked at the owner's residence on private property.

The present case is distinguished from Cantrell in the following way: Neither Martinez nor Campos (nor Medina) were occupants of the red Ford Escort at the time that the Officers asked for consent to search the vehicle. RP 60, 64-65, 70, 154. In fact, while the red Ford Escort was unoccupied when CCO Martin and the other Officers arrived, it was parked on private property, in the driveway of Martinez's residence. RP 15.

Since both Cantrell and the passenger were **occupants** of the vehicle while on a public road, with Cantrell being the driver, and the passenger's parents actually owning the vehicle, there was a legitimate argument to be made that at the time of the stop and the search, that both occupants had equal common authority over the vehicle.

In the present case, the following facts occurred: The red Ford Escort was parked in Michele Martinez's driveway of her

residence, on private property. RP 15. The red Ford Escort was unoccupied when CCO Martin and Officer Layman arrived to investigate Fidel Medina. RP 60, 64-65, 70, 154. Martinez's facts are distinguishable from Cantrell, thus, Cantrell does not apply when deciding the suppression issue in Martinez's case.

3. MARY CAMPOS WAS NOT THE OWNER OF THE RED FORD ESCORT FOR PURPOSES OF CONSENTING TO A SEARCH UNDER ARTICLE 1 SECTION 7 OF THE WASHINGTON STATE CONSTITUTION, THUS, HER CONSENT TO SEARCH THE RED FORD ESCORT WAS INVALID.

Michele Martinez is the owner of the red Ford Escort, and was the only person with authority to consent to the search of the vehicle. RP 118-122. While Martinez's mother's name, Mary Campos, was on the registration (RP 152-153), she was never in a position to consent to a search of the red Ford Escort, for purposes of article 1, section 7 of the Washington State Constitution.

Ms. Martinez is a married woman. She doesn't live with her mother (RP 110, 152): She lives with her husband, Fidel Medina. Martinez's red Ford Escort was regularly kept at Martinez's residence, not her mother, Mary Campos' residence.

RP 119, 153. Ms. Martinez stated at the suppression hearing that the red Ford Escort belonged to her alone, not to Fidel Medina or Mary Campos. RP 118. Ms. Martinez is the person that paid for the vehicle, not Medina or Campos. RP 118, 153. Ms. Martinez paid all of the maintenance on the vehicle, not Medina or Campos. RP 119, 153. Ms. Martinez had the keys to the vehicle, not Medina or Campos. RP 119, 153. Ms. Martinez was the primary driver of the vehicle, not Medina or Campos. RP 119, 120, 153. Medina needed to ask Martinez permission to use the red Ford Escort. RP 121. Mary Campos rarely used the red Ford Escort, except for when Martinez needed to borrow Campos' bigger car for longer trips, then they would swap vehicles. RP 121.

The only association that Mary Campos had with the Ford Escort was that her name was on the registration, even though Martinez had already finished paying off the red Ford Escort to the finance company. RP 118. Campos didn't pay for the red Ford Escort. RP 153. Martinez had always been in possession of the red Ford Escort from day one of her buying the vehicle. RP 118-119. Mary Campos has never been in possession

of the red Ford Escort, nor did she ever have the keys, except for the rare occasion that Martinez and Campos swapped vehicles. RP 121, 153. Campos was not an occupant just prior to the search of the red Ford Escort. RP 70, 154.

Based on the law cited in section 4 and 5 of this brief, with regard to article 1, section 7 of the Washington State Constitution and the Fourth Amendment, Mary Campos did not have authority to consent to a search of Martinez's red Ford Escort.

4. SINCE A VEHICLE IS SOMETIMES NOT A VEHICLE, BUT AN "EFFECT," MARTINEZ'S PARKED RED FORD ESCORT SHOULD BE TREATED AS AN EFFECT, AND THE HOLDINGS FROM THE LEACH LINE OF CASES SHOULD BE ADOPTED AND USED WITH REGARD TO THE SUPPRESSION ISSUE.

"Where the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.' Where the police are content to rely upon the consent of a third party to validate a warrantless search, there is an improvident risk of an illegal search and seizure." State v. Leach, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989).

It is the State's burden to prove that the person consenting had the authority to consent. State v. Thompson, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). Under Washington's

constitution, "One who has equal or lesser control over a premises does not have authority to consent for those who are present and have equal or greater control." State v. White, 141 Wn.App. 128, 136, 168 P.3d 459 (2007)(quoting State v. Morse, 156 Wn.2d 1, 4-5, 123 P.3d 832 (2005). In Washington State, "a third party may consent to a search if he or she possesses 'common authority over or other sufficient relationship to the premises or *effects* sought to be inspected.'" White, at 136 (emphasis added).

Common authority exists when there is "mutual use of the property by persons generally having joint access or control for most purposes." State v. White, 141 Wn.App. at 136.

Washington Courts have stated that "Access and permission to enter are the hallmarks of common authority." Id. at 136. The Washington State Supreme Court has stated:

"We have said that the authority does not rest upon the law of property, with its attendant legal refinements, but rests rather on mutual use of the property. State v. Leach, 113 Wn.2d 735, 739, 782 P.2d 1035 (1989). We have, thus, justified the common authority rule based upon the theories of "reasonable expectations of privacy" and "assumption of risk." Morse, at 8; Leach, at 739.

The Leach Court made its ruling in 1993; the Cantrell Court made its ruling in 1994. In 2007, in State v. White, the White Court made its ruling, a case that originated in Yakima County, and a case that the Yakima Superior Court chose to ignore in its denial of Martinez's suppression motion. The White Court stated the following with regard to the issue of common authority and property other than a residence:

“A ‘mere property interest’ does not create common authority; rather, it is based on ‘joint access or control for most purposes.’ State v. White, 141 Wn.App. 128, 138, 168 P.3d 459 (2007). This standard applies to common authority to search “premises or **effects.**” Id. at 138. (**Automobiles are effects.** U.S. v. Chadwick, 433 U.S. 1, 12, 97 S.Ct. 2476 (1977)). **“Co-habitants or co-occupants are merely examples of those with joint access or control.** The authority concerning co-habitants and co-occupants applies equally to joint controllers and those with joint access.” State v. White, 141 Wn.App. 128, 138, 168 P.3d 459 (2007)(emphasis added).

Martinez is arguing that for the purpose of this appeal, that an automobile that is parked in a private driveway and is unoccupied is an “effect,” and should not be characterized the same way as an automobile that has occupants, and is being driven on a public road.

Article 1 Section 7 Provides Greater Protection Than
The Fourth Amendment.

Under the ruling of the Federal Courts, the Fourth Amendment's focus is on whether the police acted reasonably under the circumstances. However, "under article 1, section 7, we focus on expectations of the people being searched and the scope of the consenting party's authority." State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). Law enforcement's "subjective good faith belief about the scope of a consenting party's authority to consent cannot be used to validate a warrantless search under article 1, section 7." Morse, 156 Wn.2d at 12.

The Courts have been quite clear "that under our constitution, the burden is on the police to obtain consent from a person whose property they seek to search." State v. Ferrier, 136 Wn.2d 103, 960 P.2d 928 (1998). The Courts have never allowed that "a cohabitant with common authority can give consent that is binding upon another cohabitant with equal or greater control over the premises when the non-consenting cohabitant is actually present on the premises." State v. Morse, 156 Wn.2d 1, 13, 123 P.3d 832 (2005).

A co-habitant can give consent to the police to search a premises, while the other cohabitant objects, if they are both present, but the consent will only be valid against the consenting party. State v. Walker, 136 Wn.2d 678, 683, 965 P.2d 1079 (1998); State v. Thompson, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). The police must ask for consent; if the police do not ask, and either of the cohabitants does not object, this is to be viewed as having not given consent. State v. Leach, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989).

Washington Courts have ruled that “A consenting occupant has common authority if (1) he or she could permit the search in his or her own right, and (2) the non-consenting party had assumed the risk that a cohabitant might permit a search.” State v. Morse, 156 Wn.2d 1, 13, 123 P.3d 832 (2005) (citing State v. Mathe, 102 Wn.2d 537, 543-544, 688 P.2d 859 (1984); Thompson, 151 Wn.2d 793, 804, 92 P.3d 228 (2004)). However, the consent of a person who has common authority over the premises is valid only if the cohabitant is absent. Thompson, at 803-804; State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). If the non-consenting cohabitant is present and able to

object, the police must also get his or her consent. Thompson, at 803-804; Walker, at 682; Leach, at 744.

In the present case, while the “effect” that was searched was the red Ford Escort, it was not a vehicle that was being used like the vehicle in Cantrell. In fact, the red Ford Escort in the present case was not being used at all: It was parked in a private driveway located at Ms. Martinez’s residence (RP 15), with none of the parties involved being an occupant at the time of the search, or just prior to the search of the red Ford Escort. RP 60, 64-65, 70, 154. The characteristics of the red Ford Escort at the time of the search, or just prior to the search, should be viewed as being akin to a piece of property, an effect, as opposed to being a vehicle, because the red Ford Escort was not being driven or occupied, nor was it on public roads. Martinez is not trying to characterize the red Ford Escort as a residence, rather, Martinez believes that it should be viewed in the same category as any other “effect,” since the vehicle was not being driven, occupied by two or more people, or on public roads at the time of the search or just prior to the search.

When viewing the unoccupied parked red Ford Escort as an effect and not a vehicle, then Cantrell does not apply, and we revert back to using Leach, White, and their progeny as the law that should be applied to Martinez's case. Martinez's position is that Campos had no authority over the red Ford Escort, for article 1 section 7 and Fourth Amendment purposes.

Under Leach and White, the best case scenario for the State is that Campos had less authority or no authority over the red Ford Escort, as compared with Martinez having greater authority. That would mean that in order to use the evidence found in the trunk against Martinez, law enforcement needed to either get her consent or get a search warrant before searching the trunk, neither of which occurred. However, Martinez believes that Campos did not have any authority to consent to the search under the present circumstances.

5. EVEN IF CAMPOS' CONSENT WAS VALID, AND CANTRELL DOES APPLY, MARTINEZ HAD EQUAL OR GREATER AUTHORITY OVER THE RED FORD ESCORT, AND THUS, IN ORDER TO USE THE EVIDENCE IN THE TRUNK AGAINST HER, LAW ENFORCEMENT NEEDED TO GET HER CONSENT OR GET A SEARCH WARRANT.

While Martinez believes that Cantrell is irrelevant to this case and does not control, if the Court rules otherwise, than Martinez still believes that under Cantrell, the evidence in the trunk of the red Ford Escort should have been suppressed.

The Cantrell Court gave the following caveat in its opinion:

“Initially it is important ... the Defendant did not object to the search and, therefore, the issue of whether consent by a co-occupant remains valid in the face of another occupant's *objection* is not before the court.” State v. Cantrell, 124 Wn.2d 183, 187, 875 P.2d 1208 (1993).

The Cantrell Court did not decide the above issue, because it was not raised by either party: Does consent to a search “remain valid in the face of another co-occupant’s objection”? Martinez is raising that issue for this appeal. Currently, this issue has not been decided by the Washington

State Supreme Court, but the Cantrell Court intimated in the above paragraph that the issue “remains valid.”

In Cantrell, the defendant stood by and watched as the vehicle was being searched without objection. Cantrell was the driver of the vehicle. The co-occupant’s parents were the owners of the vehicle. It could be argued that both Cantrell and the co-occupant had equal authority, based on Cantrell being the driver, and the other co-occupant having the authority of his parents to borrow the vehicle.

In the present case, the following occurred: Martinez was already illegally arrested and handcuffed because of a gun found under the front seat of the red Ford Escort. RP 66-67, 70, 79, 117. Officer Layman asked her to sign a consent to search form that Layman had already written her name onto, in the appropriate space on the form. RP 70. Martinez was not sure if she should sign the form and consent to the search of the trunk. RP 70. Before she could decide, Martinez’s mother, Mary Campos, arrived. RP 70-71. Layman placed the arrested and handcuffed Martinez in the patrol vehicle, with the windows and doors closed. RP 70. Layman discovered that the red Ford

Escort was registered to Campos, so he crossed out Martinez's name on the consent form, wrote in Campos' name, and secured Campos' signature on the consent form. RP 78-80, Exhibit SE C.

Thus, Martinez was not afforded the same opportunity to object as Cantrell. Cantrell was standing right in front of the vehicle as it was being searched; Martinez was handcuffed, arrested, then locked in a patrol vehicle with the windows and doors closed, thinking that Layman was getting a warrant, only for Layman to secure consent from Campos to search the red Ford Escort. Through no choice of her own, and through the authority of law enforcement, Martinez was not allowed to be present for the search of the red Ford Escort, a vehicle that she had equal or greater control over, due to Officer Layman locking her in the back of his patrol car. Martinez lost her ability to object to the search due to law enforcement's actions.

Martinez believes that she has a right to privacy under article 1 section 7 of the Washington State Constitution and the Fourth Amendment, that would protect her from warrantless searches of a vehicle that she is a co-occupant of, and which she

maintains control over which is greater or equal to the co-occupant, who has given consent to search the vehicle.

6. NEITHER THE CCO NOR THE POLICE OFFICERS WERE AUTHORIZED BY STATUTE, THE DOC COMMUNITY CUSTODY AGREEMENT (EXHIBIT DE A), OR THE SIGNED DOC COMMUNITY CUSTODY AGREEMENT IN PROBATIONER FIDEL MEDINA'S JUDGMENT AND SENTENCE (EXHIBIT DE B) TO SEARCH MICHELE MARTINEZ'S RED FORD ESCORT.

The red Ford Escort that was searched by the Officers did not belong to Fidel Medina; it belonged to Michele Martinez. Both Medina and Martinez told the CCO and the police officers at different times prior to the red Ford Escort being searched that the vehicle belonged to Ms. Martinez.

On May 6, 2010, the trial court adopted the State's Findings of Fact and Conclusions of Law (FNFCL) with regard to the suppression hearing. RP 5-6-10, p. 3; CP 15-18. Martinez objected to those FNFCL, and submitted her own FNFCL. RP 5-6-10, p.3, LN 1-4; CP 19-29. One of the issues that the defense had with the State's findings was Conclusions of Law no. 1, which stated:

“Officer Martin had authority to search Mr. Medina's person, residence and car pursuant to RCW 9.94A.631 based on the

undisputed violations of his conditions of community custody. He had seen Medina driving the car on November 26, 2008 and had observed the car at the residence. His wife told Martin that she and her husband were the ones who drove the car. Those facts establish that the car was “his” car for purposes of supervision.” CP 17-18 (emphasis added).

Martinez believes that is not sufficient enough to show that Medina had “joint control, ownership” over the red Ford escort. RP 42.

On November 23, 2008, Medina told CCO Martin that the red Ford Escort belonged to Martinez. RP 27. Then on December 3, 2008, the day that CCO Martin and Officer Layman searched the red Ford Escort, Martinez told Martin, and was overheard by Officers Layman and Scott, stating that Martinez owned the red Ford Escort. RP 27, 31, 47, 102.

At the suppression hearing, CCO Martin stated on cross examination that he was authorized on the following basis to search Martinez’s red Ford Escort:

“Defense Counsel : And could you point, please, to the page number, and also approximately the paragraph, where that condition states that you may search any car that Mr. Medina is in?

CCO Martin: “I’m aware I’m subject to search/seizure of my person, residence, automobile or other personal property if there’s reasonable cause on the part of

Department of Corrections to believe I have violated conditions, requirements or instructions above.”

Defense Counsel: Okay.

CCO Martin: And, then, it says, as well, in these conditions that it’s joint control, ownership...

Defense Counsel :Okay. Let’s start off with Defendant’s Exhibit 1.

CCO Martin: Okay.

Defense Counsel: Now, sir, could you identify the page number where it indicates –

CCO Martin: Oh, I’m sorry, yeah.

Defense Counsel: Sure.

CCO Martin: Page 3.

Defense Counsel: If you could identify the page number where it indicates that you have the authority to search any car that Mr. Medina is in?

CCO Martin: It’s not searching the car; it’s searching the offender in their constructive area.” RP 41-42 (referring to Exhibit DE A DOC Instructions, pg. 3).

CCO Martin testified about a few different ways that allowed him to search the red Ford Escort, based on Medina being under DOC Supervision. Martin stated that “It’s not searching the car; it’s searching the offender in their constructive area.” RP 42. However, under the circumstances

relating to this case, Medina was not in the red Ford Escort when Martin arrested him: He was in his residence. RP 10.

At the time of the contact and the search of Medina on December 3, 2008, Medina was not in constructive possession of the red Ford Escort.

Martin also testified that he was allowed to search the red Ford Escort if Medina was in “joint control, ownership” of the vehicle. RP 42. However, there was never any evidence to show that Medina had joint control or ownership of Martinez’s red Ford Escort. Medina did not have equal or greater authority with regard to Martinez’s red Ford Escort. In fact, he had no authority with regard to the red Ford Escort.

At the suppression hearing, Martinez testified as to the following:

“Defense Counsel: Okay. Now, who does the red Ford Escort belong to?

Martinez: That’s my car.

Defense Counsel: It’s just your car?

Martinez: Just my car.

Defense Counsel: And what about your husband, Fidel?

Martinez: No, it's not his car.

Defense Counsel: What about your mom, Mary Campos?

Martinez: It's not her car, either.

Defense Counsel: Now, who paid for the vehicle?

Martinez: I did.

Defense Counsel: And have you paid off the red Ford Escort?

Martinez: Yes.

Defense Counsel: About how long ago?

Martinez: About two years ago.

Defense Counsel: And who pays the maintenance for your vehicle, like lube jobs, tires, that kind of stuff?

Martinez: I would.

Defense Counsel: Has anybody else ever paid the maintenance?

Martinez: No.

Defense Counsel: And typically who's in charge of the keys to the Ford Escort?

Martinez: Myself.

Defense Counsel: And where do you keep the Ford, the red Ford Escort at night?

Martinez: In my driveway.

Defense Counsel: And who uses -- Who primarily uses the Ford Escort on a daily basis?

Martinez: I do.

Defense Counsel: Does anybody else use it on a daily basis?

Martinez: No.

Defense Counsel: Now, how often does Fidel use your vehicle?

Martinez: Fidel didn't have a license so he wouldn't use the vehicle. It was my responsibility since it was under my mom's name, and so -- RP 118-119.

To support the testimony by Martinez about paying for the red Ford Escort, Martinez had three money gram receipts admitted into evidence, showing that Martinez had made the payments for the red Ford Escort. RP 123-125, Exhibits DE E, DE F, DE G. Martinez also had two auto maintenance receipts admitted into evidence, with only her name on the two receipts. RP 125-126, Exhibits DE H, DE I. Martinez testified that there was nobody else's name on the maintenance records. RP 125-126, Exhibits DE H, DE I. Martinez testified that she made other payments as well, for

both the payment of the red Ford Escort and its maintenance, but no longer had those receipts. RP 127-128.

Martinez also testified at the suppression hearing that if Medina wanted to use the red Ford Escort, he first had to ask Martinez's permission. RP 120. It was important for Martinez to control the use of the red Ford Escort, because she needed it for transportation to work, school, and running errands. RP 120.

At the suppression hearing, Martinez stated that she owned the red Ford Escort for about five years, and that she finished paying it off about two years ago, which would mean that she owned the red Ford Escort approximately since January 2005, and paid it off approximately January 2008. RP 118, 126. Fidel Medina was incarcerated for approximately 2-3 years during that period of time when Martinez was paying off the red Ford Escort. Exhibit DE B.

The State offered little to no evidence at the suppression hearing to support their basis of the search of the red Ford Escort: That Fidel Medina had joint ownership or control. The State relied on the fact that Martinez owned the red Ford

Escort, and that Martinez let Medina drive it occasionally. RP 18, LN 1-9. However, on cross examination, CCO Martin admitted that he never followed up and asked Martinez how often Martinez let Medina drive the red Ford Escort. RP 32, LN 4-5. Then CCO Martin admitted that to the best of his knowledge, Medina had only driven the red Ford Escort two times. RP 32, LN 6-8.

There was no evidence presented by the State that Medina was one of the owners of the red Ford Escort, nor was there any evidence presented by the State that Medina had any authority over the red Ford Escort that would give him a right to consent to a search of the vehicle, or in this case, would give CCO Martin the right under the Community Custody agreement to search Martinez's red Ford Escort. Thus, under the authority granted by the State for Medina's Community Custody (Exhibit DE A, Exhibit DE B), and based on the case law cited in section 4 and 5 of this brief, the State did not have the legal authority to search Martinez's red Ford Escort.

7. MARTINEZ'S FACTS ARE SIMILAR TO WINTERSTEIN, THUS, UNDER WINTERSTEIN, THE POLICE DID NOT HAVE PROBABLE CAUSE TO SEARCH THE RED FORD ESCORT BASED ON MEDINA HAVING EQUAL OR GREATER AUTHORITY TO THE VEHICLE.

Martinez believes that Winterstein does not apply; that it would only apply if Martinez was the probationer. However, if the Court decides otherwise, Martinez believes that even under the probable cause standard of Winterstein, that CCO Martin did not get over the threshold to find probable cause that Medina had common authority with regard to Martinez's red Ford escort.

In Winterstein, the defendant was on probation, and his CCO decided to do a warrantless search of Winterstein's residence. There was a question as to whether the place that DOC searched was actually Winterstein's residence. State v. Winterstein, 167 Wn.2d 620, 627, 220 P.3d 1226 (2009). The question in Winterstein was "What standard a probation officer will be held to in determining a probationer's residence in order to justify a warrantless search of that residence." Id. at 624. The Winterstein Court held that "a probation officer must have

probable cause to believe that a probationer resides at a particular residence before searching that residence.” State v. Winterstein, 167 Wn.2d. at 624. When comparing that holding to the present case, Martinez’s facts are similar to Winterstein.

In the present case, the State is arguing that CCO Martin had a right to search Martinez’s red Ford Escort. At the suppression hearing, Martin stated the following with regard to his belief:

CCO Martin: “Again, based on the violations that I had at the time, also very specific Mr. Medina having conditions not to drive a motor vehicle without a license and insurance, me contacting him just a week prior, week or two prior driving a vehicle, so he also had informed me that he was going to get insurance, so part of why I went to search the vehicle was to see, again, if there’s any additional violations, but also to confirm and look to see if he had actually gotten the insurance that he told me he was going to get.” RP 15.

Then CCO Martin clarified the reason why he thought he had a right to search Martinez’s red Ford Escort:

“Defense Counsel Cross: Okay. And, so, at the point where now you’re at the red Ford Escort and you had said to Mr. Keller that you were going to search that vehicle and you were just asking as common courtesy to Ms. Martinez, is that correct?

Officer Martin: It’s correct. Because based on the totality, based on taking everything into, into circumstances that I had contacted Mr. Medina the week prior, based on them being

in a relationship together, seeing him drive the vehicle, knowing that he has conditions which state that the vehicle, the house, you know, him, all the property is subject to search, so when I was speaking with Ms. Medina or Ms. Martinez at that point in time, I was kind of informing her what was going on and what was happening, you know, based on the violations, because she was not where we were when I located the substance and then Mr. Medina was detained and arrested, she wasn't there, so she was kind of asking, 'Hey, what's going on,' so I kind of informed her what was going on, and just in that conversation, you know, I was confirming, 'Hey, this is your guys' vehicle,' or at least, 'I've seen you guys driving it,' or, 'I've seen Mr. Medina driving it,' and she confirmed that, that they both drive it. So at that point I've come into certain things, times where, you know, you have to get the keys, so I just kind of ask, 'Hey, do you have the keys? Do you mind if we just look in it, search it?' 'No, no problem. That's fine.'" RP 29-30.

However, the State offered little to no evidence at the suppression hearing to support their basis of the search of the red Ford Escort: That Fidel Medina had joint ownership or control. The State relied on the fact that Martinez owned the red Ford Escort, and that Martinez let Medina drive it occasionally. RP 18, LN 1-9. However, on cross examination, CCO Martin admitted that he never followed up and asked Martinez how often Martinez let Medina drive the red Ford Escort. RP 32, LN 4-5. Then CCO Martin admitted that to the best of his knowledge, Medina had only driven the red Ford Escort two times. RP 32, LN 6-8.

Then when you consider that on November 23, 2008, Medina told CCO Martin that the red Ford Escort belonged to Martinez (RP 27), and that on December 3, 2008, the day that CCO Martin and Officer Layman searched the red Ford Escort, Martinez told CCO Martin, and was overheard by Officers Layman and Scott, that Martinez owned the red Ford Escort. RP 27, 31, 47, 102. When you consider all of these facts, Martinez believes that CCO Martin did not have probable cause to search Martinez's red Ford Escort, thus, violating Martinez 's right to privacy under article 1, section 7, and the Fourth Amendment.

8. MARTINEZ NEVER LEGALLY CONSENTED TO THE SEARCH OF THE CAB OF THE RED FORD ESCORT.

Michele Martinez never legally consented to the search of the cab of the red Ford Escort. However, if the Court disagrees and believes that Martinez did consent to the search of the cab of her vehicle, Martinez argues that there was no legal consent for the search of the cab red Ford Escort by Martinez.

The state is obligated to meet three requirements in order to show that a warrantless, but consensual search was valid: 1) The consent must be voluntary; 2) the person granting consent

must have authority to consent; 3) the search must not exceed the scope of the consent.” State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998).

The issue as to whether “a search was ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.” Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 2048 (1973); State v. Shoemaker, 85 Wn.2d 207, 533 P.2d 123, 125 (1975); State v. Jensen, 44 Wn.App. 485, 723 P.2d 443, 445 (1986).

Under the U.S. Constitution, “the fourth and fourteenth amendment requires that consent not be coerced, by explicit or implicit means, by implied threat or covert force. For no matter how subtly the coercion was applied, the resulting ‘consent’ would be no more than a pretext for the unjustified police intrusion against which the fourth amendment is directed.” Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 2048 (1973). It is the obligation and the burden of the State, “in demonstrating that the consent to search is voluntary.” State v. Jensen, 44 Wn.App. 485, 723 P.2d 443, 445 (1986); Bumper v.

North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797, 802 (1968).

The test that is used to determine whether or not consent was voluntary is a three-prong test that was used in Shoemaker: “1) Whether Miranda warnings had been given prior to obtaining consent; 2) the degree of education and intelligence of the consenting person; 3) whether the consenting person had been advised of his right not to consent. These factors should be judiciously balanced against each other with no particular factor necessarily being dispositive.” State v. Shoemaker, 85 Wn.2d 207, 533 P.2d 123, 125 (1975); Jensen, 44 Wn.App. 485.

The Jensen Court decided that the evidence, cocaine, which was found in Jensen’s vehicle should not be suppressed. This was because after applying the three-prong test, it was found that Jensen had voluntarily consented to a search of his vehicle. First, Jensen was advised of his Miranda rights before consenting to the search. Second, Jensen was not particularly young, had prior experience with the police, and was not of low intelligence. Third, Jensen signed a consent card to search his vehicle that also informed him of his right not to consent. (The

marijuana that was found in the vehicle prior to Jensen being read his Miranda rights and prior to the consent form being signed was suppressed). State v. Jensen, 44 Wash.App. 485, 723 P.2d 443 (1986).

When comparing the present case to Jensen, and when applying the three prong test to the present case, it would appear that Martinez never legally consented to the search of the inside of the cab of the red Ford Escort, where the gun was found. First, Martinez was never mirandized prior to the search of the Ford Escort (RP 32); second, Martinez was never informed that she did not have to consent to the search of her vehicle (RP 32); third, Martinez never finished high school, although she did obtain a G.E.D. and has taken some classes at a local community college, and is about three quarters away from getting a two year degree, an associate's degree. RP 136, 148-149. However, while Martinez has been arrested a couple of times in the past, there was never any evidence presented at the suppression hearing that she has ever had any experience with the law with regard to her constitutional right to privacy under article 1, section 7, or the Fourth Amendment.

When applying the three prong test as previously cited in Shoemaker and Jensen, the search and seizure by CCO Martin was coercive, improper, and should be suppressed. CCO Martin had just arrested Martinez's husband, handcuffed him, and placed him in the back of the patrol vehicle. There were three officers present when Ms. Martinez, who was by herself, in the dark in front of her house at sometime after 8:00 pm at night, allegedly agreed to allow the CCO Martin to "look" in the cab of the red Ford Escort. RP 9, 65, 97, 20, LN 8. Martinez never actually consented to the search of her vehicle, because CCO Martin admitted that he never asked to search it. RP 33, LN 18-24. However, even if Martinez did say to CCO Martin that it was okay to look in the cab of her red Ford Escort, CCO Martin admitted that he was going to search the vehicle, whether she agreed or not. RP 31.

According to the three prong test in Shoemaker and Jensen, Martinez did not legally consent to the search of her vehicle's cab. The gun found under the driver's seat in Martinez's vehicle should have been suppressed. For other reasons, the State decided to dismiss the gun charge at the

stipulated facts trial. RP 7, Sentencing 5-6-10. However, the unconstitutional search of the cab of the red Ford Escort that produced the gun, and caused the arrest of Martinez, led to the unconstitutional search of the trunk of the red Ford Escort, which should be considered fruit of the poisonous tree.

9. ANY AND ALL EVIDENCE FOUND IN THE TRUNK OF THE RED FORD ESCORT SHOULD BE SUPPRESSED, BECAUSE THE SEARCH OF THE TRUNK WAS A PROGRESSION AND CONTINUATION OF THE SEARCH OF THE CAB OF THE CAR, AND THUS, ALL OF THE EVIDENCE DISCOVERED IN THE TRUNK WAS FRUIT OF THE POISONOUS TREE.

As stated in section 6 of this brief, there was no evidence presented at the suppression hearing that supported the notion that Fidel Medina was either one of the owners of the red Ford Escort, or that he had authority and control over the red Ford Escort that would allow CCO Martin to search the red Ford Escort as part of Medina's community custody obligations. Thus, the search of the red Ford Escort was unconstitutional, as was the arrest of Michele Martinez, which violated her right to privacy under article 1, section 7, and the Fourth Amendment.

Once Officer Martin finished the unconstitutional search of the red Ford Escort's cab, and arrested Michele Martinez, Officer Layman took control of the criminal investigation. Until that point, Officer Layman was at Martinez's residence as support for CCO Martin, for Martin's probation investigation of Medina. RP 11. Once Martinez was illegally arrested for the gun, CCO Martin was finished with his business, and Officer Layman took control of the investigation, because it now became a criminal investigation, and went beyond the scope of CCO Martin's responsibilities. RP 67, LN 12-24.

Officer Layman then attempted to continue the search of the red Ford Escort, by asking Martinez to consent to a search of the trunk of the vehicle. RP 78. Martinez asked Layman what would happen if she didn't consent, and Layman told her "we would have to impound her vehicle to the police department and get a search warrant for it." RP 78. When that didn't seem to work, Officer Layman then placed the arrested and handcuffed Martinez in his patrol vehicle, windows closed, doors closed, and obtained consent to search the red Ford Escort from Mary Campos. RP 79-81.

From start to finish, this was a natural progression and continuation of an unconstitutional search of the red Ford Escort. This is why Martinez believes that it is fruit from the poisonous tree: If it weren't for the unconstitutional search of the red Ford Escort and illegal arrest of Martinez, Officer Layman, as support for CCO Martin, would have never been in a position of control to ask Campos for consent to search the red Ford Escort.

As a rule, evidence obtained through exploitation of an unconstitutional search must be suppressed. Wong Sun v. U.S., 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). Evidence obtained as a result of an unconstitutional investigatory seizure must also be suppressed. State v. Cole, 73 Wn. App. 844, 871 P.2d 656 (1994). "Where the original detention is illegal, the government cannot claim any advantage which it gained on the subject of the pursuit by doing the illegal act." State v. Hobart, 94 Wn.2d 437, 447, 617 P.2d 429 (1980), citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 64 L. Ed. 2d 319, 40 S. Ct. 182, 24 A.L.R. 1426 (1920). "[V]iolation of a constitutional immunity

automatically implies exclusion of the evidence seized." State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990).

As the Washington Supreme Court noted in State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995), a "fruit" may be admitted if it is sufficiently attenuated from the original illegality. (citing Nardone v. United States, 308 U.S. 338, 341, 84 L. Ed. 2d 307, 60 S. Ct. 266 (1939)). However, for the fruit to be sufficiently attenuated from the original illegality there should be either "intervening independent factors in the chain of causation from the original illegality" or an independent source for the evidence. Warner, 125 Wn.2d at 888 (citing Silverthorne Lumber Co. v. United States, 251 U.S. at 392, for the independent source doctrine).

Stated positively, evidence is sufficiently tainted to be suppressed if "the illegally-obtained evidence 'tended significantly' to direct the investigation towards the evidence in question." United States v. Padilla, 960 F.2d 854, 862 (9th Cir. 1992) (quoting three prior decisions: United States v. Johns, 891 F.2d 243, 245 (9th Cir. 1989); United States v. Bacall, 443 F.2d 1050, 1056 (9th Cir.), cert. denied, 404 U.S. 1004, 30 L. Ed. 2d 557, 92 S.

Ct. 565 (1971); and Durham v. United States, 403 F.2d 190, 196 (9th Cir. 1968)).

Here, there is nothing to suggest either intervening independent factors or an independent source, for the search by law enforcement of the trunk of the red Ford Escort. The chain of causation between the illegal search of the cab, the arrest of Martinez, and the quest for obtaining consent to search the trunk and searching the trunk was direct and unbroken.

Officer Layman went from a supporting player in a probationer investigation, to a leading player in a criminal investigation of Michele Martinez, all because CCO Martin unconstitutionally searched the red Ford Escort, and then illegally arrested Martinez. RP 11, 67, LN 12-24. Once that occurred, Officer Layman couldn't convince Martinez quickly enough to consent to a search of the red Ford Escort, so he tossed her aside and quickly moved to the next person: Mary Campos, Martinez's mother. RP 79-81. Officer Layman sought to obtain her consent to search the red Ford Escort only after "stowing away" the arrested and handcuffed Martinez in the back of his patrol car, with the doors and windows shut. RP 79-81.

The illegal search tended significantly to direct the investigation toward the search of the trunk and the discovery of the drugs. The drugs should not be admissible under the "attenuation" exception to the "fruit of the poisonous tree" doctrine.

Washington State does not recognize the inevitable discovery doctrine, when trying to apply it to cases with right to privacy issues involving article 1, section 7. State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009); State v. Afana, 169 Wn.2d 169, 181, 233 P.3d 879 (2010). Thus, under the Washington State Constitution, an inevitable discovery argument by the State is not valid.

Similarly, under the Fourth Amendment, the drugs would not be admissible under the inevitable discovery exception to the "fruit of the poisonous tree" doctrine, as set out in Nix v. Williams, 467 U.S. 431, 444, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984). See Warner, 125 Wn.2d at 889. The inevitable discovery rule requires that:

- (1) The police did not act unreasonably or to accelerate the discovery of the evidence in question; [footnote omitted]
- (2) proper and predictable

investigatory procedures would have been utilized;
and (3) those procedures would have inevitably
resulted in the discovery of the evidence in question.

State v. Broadnax, 98 Wn.2d 289, 309, 654 P.2d 96 (1982)
(Dolliver, J. dissenting); State v. White, 76 Wn. App. 801, 809, 888
P.2d 169 (1995). While "absolute inevitability" is not required, the
state must prove by a preponderance of the evidence that there is
"a reasonable probability that evidence in question would have
been discovered other than from the tainted source." Warner, 125
Wn.2d at 889.

Here, it cannot be established that proper and predictable
investigatory procedures would have inevitably resulted in the
discovery of the drugs, had Officer Martin not unconstitutionally
searched the red Ford Escort and illegally arrested Martinez.
Martin's unconstitutional search of the red Ford Escort, which led
to the discovery of the gun and the illegal arrest of Martinez, was
the entire basis for Officer Layman going forward and searching
the trunk. It was only because of the arrest of Martinez that
Officer Layman moved from assisting CCO Martin in "looking" in
the cab of the red Ford Escort, to wanting to now search the
trunk.

V. CONCLUSION

Ms. Martinez respectfully requests the Court to reverse the trial court denial of Martinez's motion to suppress, suppress the evidence from the trunk, and reverse and dismiss the conviction.

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