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Court of Appeals  
Division III  
State of Washington

30274-1-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CORNELIO ISSAC MENDOZ MALTOS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF ADAMS COUNTY

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APPELLANT'S BRIEF

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## A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Conclusion of Law 4:

To challenge the legality of a search, the person objecting must demonstrate a reasonable expectation of privacy in the items or area concerned. Here, the evidence establishes Defendant purposefully left the duffle bag in the store when he went to the restroom and made no effort to retrieve it when directed to leave. He otherwise claimed no interest in the duffel [sic] bag prior to it being searched. In effect, Defendant abandoned his property in the store and thus could no longer have a reasonable expectation of privacy as to its contents. Accordingly, the search of the duffle bag was lawful.

(CP 93-94).

2. The trial court should have suppressed the fruits of the warrantless search of the defendant's duffle bag.
3. The trial court erred in not listing the total legal financial obligation owed by Mr. Maltos.
4. The trial court erred in ordering, as a condition of his sentence, that the defendant shall not own, use or possess ammunition.

## B. ISSUES

1. After being detained by the police, Mr. Maltos entrusted two known store clerks with his closed duffle bag, asking

them to hold and keep it for him. Mr. Maltos did not deny ownership of his duffle bag. The store clerks informed Adams County Deputy Sheriff Jason Erickson that Mr. Maltos had given his duffle bag to them. Deputy Erickson unzipped and searched the duffle bag without obtaining a warrant. Did Deputy Erickson violate provisions prohibiting unreasonable searches and seizures, Const. art. I, § 22 and the Fourth Amendment, by searching Mr. Maltos's duffle bag without a warrant?

2. At sentencing, the trial court imposed legal financial obligations, but did not set forth the total owed. Should Mr. Maltos be relieved of paying the legal financial obligation or, at a minimum, should the case be remanded for entry of the total legal financial obligation owed?
3. At sentencing, the trial court ordered that the defendant shall not own, use or possess ammunition. No authority exists for ordering this condition. Did the trial court err in ordering this sentencing condition?

### C. STATEMENT OF THE CASE

While on routine traffic patrol, Adams County Deputy Sheriff Jason Erickson stopped a car after he noticed the front passenger was not wearing a seatbelt. (CP 91-92; RP 14, 19-21). The car stopped in the parking lot of a convenience store. (CP 92; RP 20). Deputy Erickson contacted the driver and the front passenger, identified as Cornelio Maltos. (CP 92; RP 22). After smelling marijuana in the car, Deputy Erickson obtained consent to search the car from the driver. (CP 92; RP 22). Prior to the search of the car, Deputy Erickson told the driver and Mr. Maltos to sit on the curb in front of the convenience store. (CP 92; RP 23). Deputy Erickson saw Mr. Maltos enter the convenience store. (CP 92; RP 23-24). He followed Mr. Maltos into the store restroom, and ordered him to go back outside. (CP 92; RP 24). Mr. Maltos complied. (CP 92; RP 24-25).

After searching the car, Deputy Erickson went into the convenience store to ask if the car could be left in the parking lot for a while. (CP 92-93; RP 25-26, 28). Two store clerks told Deputy Erickson they saw Mr. Maltos throw a duffle bag behind the counter as he walked towards the restroom. (CP 93; RP 28-31, 47-49). Mr. Maltos did not attempt to collect the duffle bag when Officer Erickson ordered him to go back outside after using the restroom. (CP 93; RP 34-35). Mr. Maltos did

not mention the duffle bag to Deputy Erickson. (CP 93; RP 34-35). Deputy Erickson searched the duffle bag and found a large quantity of marijuana. (CP 93; RP 32).

The State charged Mr. Maltos with one count of possession with intent to deliver marijuana, and later added a second count of possession of more than 40 grams of marijuana. (CP 1-2, 18-20). Mr. Maltos moved to suppress the evidence obtained during Deputy Erickson's warrantless search of his duffle bag.<sup>1</sup> (CP 25-30).

At the hearing held on the motion to suppress, Deputy Erickson told the court the duffle bag was zipped when he searched it. (RP 32, 50). He admitted he unzipped the duffle bag, and searched it without a warrant. (RP 32, 46-47).

Deputy Erickson said that one of the store clerks, a Ms. Cruz, told him that she and Mr. Maltos had gone to the same school. (RP 48). He said that the other store clerk, a Ms. Lozano, told him that Mr. Maltos was a frequent customer of the convenience store. (RP 48). Deputy Erickson told the court that both Ms. Cruz and Ms. Lozano told him that Mr. Maltos threw the duffle bag behind the store counter and said "[h]old this for me . . . [k]eep this for me." (RP 55-57).

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<sup>1</sup> Mr. Maltos also challenged the stop of the car he was riding in. (CP 25-30). The stop is not challenged here.

Deputy Erickson told the court Mr. Maltos had personal items in the duffle bag, including a set of keys, earphones, some business cards, and a beanie. (RP 49). He acknowledged Mr. Maltos did not discard the duffle bag in the garbage. (RP 49). Deputy Erickson said that, as he walked out of the convenience store with the duffle bag, past Mr. Maltos, he asked “[w]hose bag is this,” and Mr. Maltos did not respond. (RP 32).

In hearing Mr. Maltos’s motion to suppress, in addition to Deputy Erickson’s testimony, the trial court considered Deputy Erickson’s police report; the police report of another officer involved in the case, Deputy Ben Buriak; and a written statement given by Mr. Maltos. (RP 54, 59, 60, 99; Pl.’s Ex. 3, 5, 6). Mr. Maltos stipulated to the admission of these exhibits. (RP 7-8).

In his written statement, Mr. Maltos stated he was using medical marijuana. (Pl.’s Ex. 3). He stated he was suffering from anxiety and depression. (Pl.’s Ex. 3). Mr. Maltos admitted he left his medicine in the convenience store. (Pl.’s Ex. 3).

In his police report, Deputy Buriak stated he contacted two female subjects at the convenience store: clerk Yesenia Cruz-Rosas and assistant manager Maria Delaluz Laureano. (Pl.’s Ex. 5). Deputy Buriak stated Ms. Cruz told him Mr. Maltos “told me to hide the bag for him.” (Pl.’s Ex. 5). Ms. Cruz informed Deputy Buriak she had know Mr. Maltos

for the past 12-13 years. (Pl.'s Ex. 5). Deputy Buriak stated he viewed a security tape at the convenience store. (Pl.'s Ex. 5). On the tape, a male, whom he later identified as Mr. Maltos, entered the store carrying a blue duffle bag. (Pl.'s Ex. 5). Mr. Maltos approached the counter where Ms. Cruz was located, and it appeared that Mr. Maltos was talking to Ms. Cruz. (Pl.'s Ex. 5). Deputy Buriak stated that on the video, Mr. Maltos "goes around the counter to where the access opening is and sits the duffel [sic] bag down and walks away from it." (Pl.'s Ex. 5).

In his police report, Deputy Erickson stated that he spoke to the convenience store clerks, Yesenia Cruz and Adela Lozano. (Pl.'s Ex. 6). Ms. Cruz told him "[Mr.] Maltos threw a bag behind the counter when he entered the store and walked by the counter." (Pl.'s Ex. 6). She also told Deputy Erickson that Mr. Maltos asked her to watch the duffle bag for him. (Pl.'s Ex. 6). Ms. Cruz told Deputy Erickson she knew Mr. Maltos from school, when they were younger. (Pl.'s Ex. 6). Ms. Lozano told Deputy Erickson that as Mr. Maltos came "round the corner of the counter he threw the duffel [sic] bag behind the counter." (Pl.'s Ex. 6). She also told Deputy Erickson she heard Mr. Maltos say, "[h]ide this for me." (Pl.'s Ex. 6). Ms. Lozano said Mr. Maltos was a frequent customer of the store. (Pl.'s Ex. 6). Deputy Erickson stated that Mr. Maltos admitted the duffle bag was his. (Pl.'s Ex. 6). Deputy Erickson also stated the contents

of the duffle bag included two lighters, a set of keys, and earphones. (Pl.'s Ex. 6).

The trial court denied Mr. Maltos's motion to suppress. (CP 91-94; RP 99-106). The trial court entered findings of fact and conclusions of law on the motion. (CP 91-94).

Following a bench trial, Mr. Maltos was convicted of possession of more than 40 grams of marijuana. (CP 37, 44-60; RP 115-229). He was sentenced to 45 days confinement in the county jail, converted to home detention. (CP 46; RP 238). As conditions of his sentence, the trial court ordered "[t]he defendant shall not own, use, or possess any . . . ammunition." (CP 55; RP 239). The trial court did not list the total legal financial obligation owed by Mr. Maltos, either in the Judgment and Sentence or in a subsequent order. (CP 48).

Mr. Maltos appealed. (CP 66-80).

#### D. ARGUMENT

##### 1. THE TRIAL COURT SHOULD HAVE SUPPRESSED THE FRUITS OF THE WARRANTLESS SEARCH OF THE DEFENDANT'S DUFFLE BAG.

In reviewing the denial of a suppression motion, the court determines whether substantial evidence supports the challenged findings of fact, and whether the findings support the conclusions of law.

*State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Conclusions of law from an order on a suppression motion are reviewed *de novo*. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

As a general rule, warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment and article I, § 7 of the Washington State Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The general rule is subject to a few jealously and carefully drawn exceptions, including consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). There is also an exception to the warrant requirement for voluntarily abandoned property. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007) (*citing State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001)). The State bears the heavy burden of showing the search falls under an exception to the warrant requirement. *Garvin*, 166 Wn.2d at 250. It must establish such an exception by clear and convincing evidence. *Id.*

“Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual’s rights under the Fourth Amendment or under article I, section 7 of our state constitution.” *Reynolds*, 144 Wn.2d at 287. “Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent.” *Evans*, 159 Wn.2d at 408. “Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.” *Id.* (quoting *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001)). The issue is “whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.” *Id.* (internal quotation marks omitted) (quoting *Dugas*, 109 Wn. App. at 595). To avoid a finding of voluntary abandonment, the defendant must show a reasonable expectation of privacy in the item searched, and that he did not voluntarily abandon it. *See id.* at 408-09.

To show a reasonable expectation of privacy in the item searched, the defendant must satisfy the following two-prong test: “(1) Did he ‘exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private?’ and (2) ‘[d]oes society recognize that expectation as reasonable?’” *Id.* at 409 (alteration in original) (quoting

*State v. Kealey*, 80 Wn. App. 162, 168, 907 P.2d 319 (1995)). The burden to establish a subjective expectation of privacy is on the defendant. *Id.* “The court must determine whether the defendant ‘took normal precautions to maintain his [or her] privacy.’” *Kealey*, 80 Wn. App. at 168.

Mr. Maltos satisfies the first prong of the test because he took normal precautions to maintain his privacy with respect to his duffle bag. The bag was zipped shut, closed from viewing by the public. *See Kealey*, 80 Wn. App. 168-69 (finding that the defendant exhibited a subjective expectation of privacy, where her purse was zipped shut and closed from public viewing). Mr. Maltos entrusted his duffle bag to two store clerks he knew, and asked them to “[h]old this for me . . . [k]eep this for me[,]” and hide the bag. (RP 48, 55-57; Pl.’s Ex. 5, 6). These actions show that Mr. Maltos was attempting to maintain his privacy in his duffle bag.

Mr. Maltos also satisfies the second prong of the test because society recognizes a general expectation of privacy in luggage.<sup>2</sup> *See Kealey*, 80 Wn. App. at 170 (stating that “[p]urses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.”).

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<sup>2</sup> In its closing argument at the suppression hearing, the State conceded that Mr. Maltos had an expectation of privacy in the duffle bag. (RP 73).

The next issue is whether Mr. Maltos relinquished or abandoned his expectation of privacy. *See Evans*, 159 Wn.2d at 408-09. “The status of the area searched is critical when one engages in an analysis of whether or not a privacy interest has been abandoned.” *Evans*, 159 Wn.2d at 409. “[C]ourts do not ordinarily find abandonment if the defendant had a privacy interest in the searched area.” *Id.* However, “[t]he opposite generally holds true if the search is conducted in an area where the defendant does not have a privacy interest.” *Id.* at 409-10.

The area searched here, the convenience store, was not an area where Mr. Maltos had a privacy interest. Nonetheless, Mr. Maltos did not relinquish or abandon his expectation of privacy in the duffle bag. Cases where voluntary abandonment was found, where the search took place in an area where the defendant did not have a privacy interest, are distinguishable from the case here. *See, e.g., Reynolds*, 144 Wn.2d at 282; *State v. Young*, 86 Wn. App. 194, 935 P.2d 1372 (1997).

In *Reynolds*, the court upheld a warrantless search of the defendant’s coat that he placed underneath the vehicle he was riding in. *Reynolds*, 144 Wn.2d at 284-85, 291. The defendant denied ownership of the coat. *Reynolds*, 144 Wn.2d at 285, 291. Here, in contrast, Mr. Maltos did not deny ownership of the duffle bag. (RP 32; Pl.’s Ex. 3,6).

In *Young*, the court upheld a warrantless search of an item the defendant tossed behind a tree. *Young*, 86 Wn. App. at 197, 200-01. The court concluded the defendant discarded the property. *Id.* at 201. Here, in contrast, Mr. Maltos did not discard the duffle bag in the trash or in an unguarded area. Rather, he entrusted the duffle bag to two people he knew, behind a counter, for safekeeping. *Cf. United States v. Morgan*, 936 F.2d 1561, 1570-71 (10th Cir. 1991) (concluding that the defendant voluntarily abandoned his gym bag, the court noted that the bag was not left in the care of another, and there was no indication that the defendant requested assistance to protect the bag).

The personal items in Mr. Maltos's duffle bag, including two lighters, set of keys, earphones, some business cards, and a beanie, show he would have come back for it. (RP 49; Pl.'s Ex. 6).

Rather than relinquishing his expectation of privacy in the duffle bag, Mr. Maltos attempted to protect his duffle bag from inspection. Mr. Maltos had a reasonable expectation of privacy in his duffle bag, and he did not voluntarily abandon it. *See Evans*, 159 Wn.2d at 408-09. Therefore, the trial court should have suppressed the fruits of the warrantless search, the marijuana discovered inside the duffle bag. *See State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005) (evidence

obtained during an illegal search is subject to suppression under the exclusionary rule and the fruit of the poisonous tree doctrine).

2. THE TRIAL COURT ERRED IN NOT LISTING THE TOTAL LEGAL FINANCIAL OBLIGATION OWED BY MR. MALTOS.

Under RCW 9.94A.760:

Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. The court *must* on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law.

RCW 9.94A.760(1) (emphasis added).

The trial court did not list the total legal financial obligation owed by Mr. Maltos, either in the Judgment and Sentence or in a subsequent order. (CP 48). Under RCW 9.94A.760(1), the trial court must set forth the total. Accordingly, Mr. Maltos should be relieved of paying the legal financial obligation. At a minimum, the case should be remanded for entry of the total legal financial obligation owed, as mandated by RCW 9.94A.760(1).

3. THE TRIAL COURT ERRED IN ORDERING THAT MR. MALTOS SHALL NOT OWN, USE OR POSSESS AMMUNITION.

As conditions of Mr. Maltos's sentence, the trial court ordered "[t]he defendant shall not own, use, or possess any . . . ammunition." (CP 55; RP 239). There is no authority for this condition. RCW 9.41.040 prohibits the possession of firearms by a felon, but not ammunition. RCW 9.41.045 prohibits the possession of ammunition, but it applies only to offenders under the supervision of the Department of Corrections (DOC). Mr. Maltos was sentenced to 45 days' confinement in the county jail, converted to home detention. (CP 46; RP 238). He is not under DOC supervision in this case. Therefore, the sentencing condition stating "[t]he defendant shall not own, use, or possess any . . . ammunition[ ]" must be stricken.

E. CONCLUSION

Deputy Erickson's search of Mr. Maltos's duffle bag did not fall under the exception to the warrant requirement for voluntarily abandoned property. The trial court should have suppressed the fruits of the warrantless search of Mr. Maltos's duffle bag, the marijuana. Mr. Maltos's conviction for possession of more than 40 grams of marijuana should be dismissed.

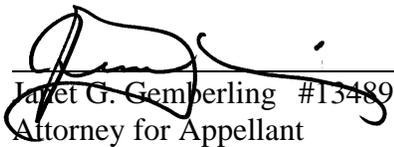
Mr. Maltos should be relieved of paying the legal financial obligation, or the case should be remanded for entry of the total legal financial obligation owed, as mandated by RCW 9.94A.760(1).

There is no authority for the sentencing condition stating that Mr. Maltos shall not own, use or possess ammunition. This condition should be stricken.

Dated this 29th day of March, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 30274-1 -III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
CORNELIO ISSAC M. MALTOS,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on March 29, 2012, I mailed copies of Appellant's Brief in this matter to:

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