

FILED

JUN 19 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

NO. 302741

STATE OF WASHINGTON,
Respondent,

vs.

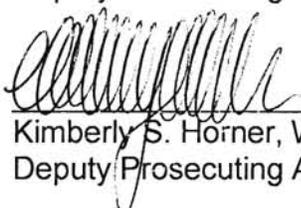
CORNELIO ISAAC MENDOZ MALTOS,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 10-1-00041-1

BRIEF OF RESPONDENT



for: Lucas G. Downer, WSBA #44248
Deputy Prosecuting Attorney



Kimberly S. Horner, WSBA #42534
Deputy Prosecuting Attorney

Adams County Prosecutor's Office
210 West Broadway
Ritzville, WA 99169
509-659-3219

Attorneys for Respondent

FILED

JUN 19 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

NO. 302741

STATE OF WASHINGTON,
Respondent,

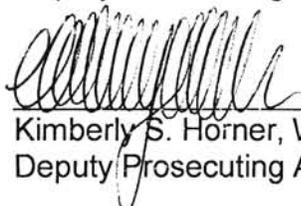
vs.

CORNELIO ISAAC MENDOZ MALTOS,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 10-1-00041-1

BRIEF OF RESPONDENT


for:  #2970;
Lucas G. Downer, WSBA #44248
Deputy Prosecuting Attorney


Kimberly S. Horner, WSBA #42534
Deputy Prosecuting Attorney

Adams County Prosecutor's Office
210 West Broadway
Ritzville, WA 99169
509-659-3219

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

CONSTITUTIONAL PROVISIONS ii

OTHER AUTHORITIES ii

RESPONSE TO ASSIGNMENT OF ERROR 1

STATEMENT OF THE CASE..... 1

ARGUMENT 5

CONCLUSION..... 12

TABLE OF AUTHORITIES

CASES

1.	<u>State v. Dugas</u> , 109 Wn.App 592, 36 P.3d 577 (2001)	6
2.	<u>State v. Evans</u> , 159 Wn.2d 402, 150 P.3d 105 (2007)	5, 7
3.	<u>State v. Levy</u> , 156 Wn.2d 709, 733, 132 P.3d 1076 (2006)	5
4.	<u>State v. Parker</u> , 139 Wn.2d 486, 987 P.2d 73 (1999)	5
5.	<u>State v. Reynolds</u> , 114 Wn.2d 282, 27 P.3d 200 (2001)	5, 6, 7
6.	<u>State v. Walker</u> , 136 Wn.2d 678, 952 P.2d 1079 (1998)	5
7.	<u>State v. Whitaker</u> , 58 Wn. App 851, 795 P.2d 182 (1990)	6, 7
8.	<u>State v. Young</u> , 86 Wn.App. 194, 935 P.2d 1372 (1997)	6, 7
9.	<u>United States v. Hoey</u> , 983 F.2d 890, 892-893 (8th Cir. 1993)	6

CONSTITUTIONAL PROVISIONS

Article I, § 7 of the Washington State Constitution	5
Fourth Amendment to the United States Constitution	5

OTHER AUTHORITIES

RCW 9.41.040(2)	10
RCW 9.94A.030(10)	11
RCW 9.94A.505	10
RCW 9.94A.505(8)	11
RCW 9.94A.760	1, 8, 10
RCW 9.94A.760(1)	8, 9

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court was correct in entering its Conclusion of Law 4, finding that the duffle bag was voluntarily abandoned in the store and that the ensuing search of the duffle bag was lawful.
- B. The trial court was correct in not suppressing the fruits of the warrantless search of the duffle bag, as the search was lawful.
- C. The trial court substantially complied with the requirements of RCW 9.94A.760.
- D. The trial court may have lacked the authority to order Mr. Maltos not to own, use, or possess ammunition.

II. STATEMENT OF THE CASE

On March 22, 2010, Deputy Jason Erickson, of the Adams County Sheriff's Office, initiated a stop of a vehicle after noticing that the front seat passenger in the vehicle was not wearing a seatbelt. (CP 91-92; RP 14, 19-20.) The subject vehicle stopped in the parking lot of Pik-A-Pop, a local convenience store. (CP 92; RP 30.) Deputy Erickson contacted the front seat passenger, who was identified as Cornelio Maltos, the Appellant in this matter, and advised him that the vehicle had been stopped because Mr. Maltos was not wearing his seatbelt. (CP 92; RP 20-22.) After noticing the

odor of marijuana coming from inside the vehicle, Deputy Erickson asked the driver and Mr. Maltos if they had been smoking marijuana, and Mr. Maltos admitted that he had. (CP 92; RP 22.)

After glimpsing a plastic bag containing green vegetable matter just outside of the vehicle, near the driver's door, Deputy Erickson asked for and obtained consent to search the vehicle from the driver and asked him and Mr. Maltos to sit on the curb near the store. (CP 92; RP 22-23.) Mr. Maltos disregarded Deputy Erickson's request and entered the convenience store. (CP 92; RP 23-24.) Deputy Erickson followed Mr. Maltos into the store, found him in the restroom, and advised him to return outside to the curb. (CP 92; RP 24.)

Deputy Erickson then searched the vehicle, finding drug paraphernalia in the passenger compartment. (CP 92; RP 25.) After the search of the vehicle was concluded, Deputy Erickson returned to the convenience store to obtain permission from the two store clerks to temporarily leave the vehicle in the parking lot. (CP 93; RP 25, 28.) The clerks then advised Deputy Erickson that Mr. Maltos had thrown a duffle bag behind the counter as he had walked by towards the restroom earlier. (CP 93; RP 28.) They showed Deputy Erickson the duffle bag, and after noticing that the

bag smelled of marijuana, Deputy Erickson unzipped it and observed that it contained a large quantity of marijuana. (CP 93; RP 28-32.) Mr. Maltos had made no attempt to retrieve the duffle bag when Deputy Erickson ordered him to go back outside; nor had he mentioned the duffle bag to Deputy Erickson. (CP 93; RP 34-35.) After discovering that the duffel bag contained marijuana, Deputy Erickson took the duffle bag out to his patrol car, and as he passed the two subjects sitting on the curb, he asked whose duffel bag it was. (RP 33-34.) Mr. Maltos did not answer. (RP 33-34.)

Mr. Maltos was charged with one count of possession with intent to deliver marijuana, and possession of more than 40 grams of marijuana. (CP 1-2, 18-20.) Mr. Maltos moved to suppress the evidence discovered in the duffle bag, arguing primarily that Deputy Erickson's unzipping of the duffel bag and viewing of its contents constituted an unlawful warrantless search. (CP 25-30.)

A CrR 3.6 hearing was held, during which Deputy Erickson testified that one of the store clerks told him that she and Mr. Maltos had gone to school together, and the other store clerk, Ms. Lozano, told him that Mr. Maltos had frequented the convenience store in the past. (RP 48.) Deputy Erickson also testified that according to the clerks, Mr. Maltos told them, as he threw the duffel

bag behind the counter, to “[h]old this for me ... [k]eep this for me.” (RP 56-57.) The court denied Mr. Maltos’ motion to suppress, finding that Mr. Maltos had abandoned the duffel bag in the store and thus relinquished any expectation of privacy that he may have previously held as to the duffel bag’s contents. (CP 94.)

Following his trial, Mr. Maltos was convicted of possession of more than forty grams of marijuana. (CP 44-60; RP 226.) He was sentenced to forty-five days in jail, converted to electronic home detention. (CP 46; RP 238.) As one of the conditions of his sentence, the trial court ordered that “[t]he defendant shall not own, use, or possess any firearm or ammunition.” (CP 55; RP 239.) The trial court also listed in the judgment and sentence, dated August 22, 2011, each fine, cost, and other monetary assessment that Mr. Maltos was required to pay in connection with his case, and stated the amount that Mr. Maltos was required to pay every month. (CP 48-50.) Mr. Maltos signed a legal financial obligation payment agreement, also dated August 22, 2011, which set out the total amount owed: \$2845.00. (CP 65.)

This appeal followed. (CP 66.)

III. ARGUMENT

A. The trial court was correct in finding that the duffle bag was voluntarily abandoned and that the ensuing search by Deputy Erickson was lawful.

In reviewing a suppression ruling, an appellate court determines whether substantial evidence supports the trial court's findings of fact. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Conclusions of law are reviewed de novo. Id.

Under Article I, Section 7 of the Washington State Constitution, warrantless searches are per se unreasonable unless they fall under a specific exception to the warrant requirement. State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Such exceptions are limited and narrowly drawn. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). One such exception is for voluntarily abandoned property. State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). Law enforcement may retrieve and search voluntarily abandoned property without implicating an individual's privacy rights under the Fourth Amendment or under Article 1, Section 7 of the Washington State Constitution; thus, a warrant is not required for a search of voluntarily abandoned property. State v. Reynolds, 144 Wn.2d 282, 287, 27 P.3d 200 (2001).

Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. State v. Dugas, 109 Wn.App. 592, 595, 36 P.3d 577 (2001). “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” by the finder of fact. Id. “The issue is not abandonment in the strict property right sense, but rather, ‘whether the defendant in leaving the property has relinquished [his or her] reasonable expectation of privacy so that the search and seizure is valid.’” Id., quoting United States v. Hoey, 983 F.2d 890, 892-893 (8th Cir. 1993).

Property discarded during an encounter with the police is generally considered to be voluntarily abandoned. See State v. Whitaker, 58 Wn.App 851, 795 P.2d 182 (1990) (defendant voluntarily abandoned a bottle containing cocaine when he dropped it on the ground in a park as he was being approached by police); State v. Young, 86 Wn.App 194, 935 P.2d 1372 (1997) (defendant voluntarily abandoned contraband when he tossed it behind a tree as he was being pursued by law enforcement); Reynolds, 144 Wn.2d 282, 27 P.3d 200 (2001) (a passenger in a car voluntarily

abandoned his coat, which contained contraband, when he stuffed it underneath the car after being contacted by law enforcement.)

Furthermore, when one engages in an analysis of whether or not a privacy interest has been abandoned, the status of the area searched is critical. Evans, 159 Wn.2d at 409. Courts do not ordinarily find abandonment if the defendant had a privacy interest in the searched area. Id. The opposite generally holds true if the search is conducted in an area where the defendant does not have a privacy interest. Id. at 409-410.

Mr. Maltos argues that rather than abandoning the duffel bag, he entrusted it to the clerks at the Pik-A-Pop; however, such did not preserve his privacy interest in the bag, because Mr. Maltos discarded the duffel bag behind the counter to keep it from the police. See Whitaker, Young, and Reynolds, *supra*. Moreover, there is no evidence that the Pik-A-Pop clerks ever agreed to take custody of the duffel bag for Mr. Maltos or to hold it for him until such time as he might return for it.

Furthermore, Mr. Maltos left the duffel bag in an area in which he held no privacy interest, the Pik-A-Pop. Therefore, under Evans, *supra*, he abandoned his expectation of privacy in the bag, and thus Deputy Erickson needed no warrant to search the bag.

In sum, Mr. Maltos voluntarily and intentionally discarded the duffel bag behind the counter of the Pik-A-Pop after being contacted by Deputy Erickson. He made no attempt to reclaim or retrieve the bag as he left the store; nor did he inform Deputy Erickson that he had left anything in the store. He held no privacy interest whatsoever in the area in which he left the duffel bag, and he forfeited any privacy interest he may have previously held in the duffel bag itself when he voluntarily abandoned it behind the Pik-A-Pop counter in an attempt to prevent law enforcement from catching him with it. Therefore, Deputy Erickson's search of the duffel bag was lawful, and the trial court's ruling on this issue should be affirmed.

B. The trial court substantially complied with the requirements of RCW 9.94A.760.

As Mr. Maltos points out, RCW 9.94A.760(1) requires the following:

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 the amount among the separate assessments made for restitution, costs, fines, and other assessments required by law. ...

RCW 9.94A.760(1).

Furthermore, the court must also “set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligation.” RCW 9.94A.760(1).

In this case, the trial court listed in the judgment and sentence each fine, cost, and other monetary amount owed by Mr. Maltos in connection with his case, separating each of the seven total assessments out individually as required by RCW 9.94A.760(1). (CP 48.) It also listed the statutory authority for each assessment, and provided that Mr. Maltos is to make monthly payments, of at least fifty dollars each, on his legal financial obligation. (CP 48-49.) Furthermore, Mr. Maltos signed a payment agreement for his legal financial obligation, which sets forth the total amount owed. (CP 65.) This total amount corresponds to the individual assessments set forth in the judgment and sentence, and the payment agreement was signed by Mr. Maltos on the same day the judgment and sentence was entered. (CP 65.)

The seven individual amounts listed by the trial court in the judgment and sentence constitute the total legal financial obligation owed by Mr. Maltos, as nothing further has been ordered by the court, and that total, although not explicitly set forth in the judgment

and sentence, was provided in an accompanying payment agreement which was signed by Mr. Maltos.

Mr. Maltos may argue that one purpose of RCW 9.94A.760 is to inform a defendant of the total amount he owes in connection with his case. However, Mr. Maltos was certainly put on notice, via the list of assessments in the judgment and sentence, and the grand total stated in the payment agreement, of the total amount of his legal financial obligation, and to argue otherwise is to elevate form over substance. Accordingly, the State asks this Court to find that the trial court complied with the requirements of RCW 9.94A.760.

C. The trial court may have lacked the authority to order Mr. Maltos not to own, use, or possess ammunition.

As a condition of his sentence, Mr. Maltos was ordered by the trial court to “not own, use, or possess any firearm or ammunition.” (CP 55; RP 239.) The prohibition of firearm possession is proper, as Mr. Maltos was convicted of a felony. RCW 9.41.040(2). However, it does not appear that the trial court had any explicit statutory authority to prohibit the ownership, use, or possession of ammunition in this case.

Under RCW 9.94A.505, a court may impose and enforce “crime-related prohibitions and affirmative conditions” as part of a

sentence. RCW 9.94A.505(8). A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. . .” RCW 9.94A.030(10).

Here, it does not appear that the trial court's prohibition on ammunition possession is directly related to the crime of possession of marijuana over forty grams. However, it would seem to be a logical extension of the unchallenged prohibition on possessing a firearm for the trial court to also prohibit the possession of ammunition. Furthermore, the judgment and sentence at issue, which contains the standard language approved by Washington's Administrative Office of the Courts, provides in its general “Notices and Signatures” section that the convicted defendant “may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court . . .” (CP 50.) It would appear from this language that Mr. Maltos is precluded under federal law from possessing ammunition, and thus it seems reasonable for the trial court in this case to advise of and impose this prohibition. However, it is the State's position that this Court should conduct an independent review of the issue and make a determination as to

