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Court of Appeals  
Division III  
State of Washington

No. 34077-5-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Wendell Muse,**

Appellant.

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Franklin County Superior Court Cause No. 15-1-50380-3

The Honorable Judge Bruce Spanner

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Mr. Muse's suppression motion.
2. The items introduced at trial were fruits of unconstitutional searches and seizures.
3. Mr. Muse's statements were the fruits of unconstitutional searches and seizures.
4. The police violated Mr. Muse's Fourth and Fourteenth Amendment right to be free from unreasonable seizures by frisking him in the absence of a reasonable suspicion that he was armed and dangerous.
5. The officer invaded Mr. Muse's right to privacy under Wash. Const. art. I, §7 by frisking him in the absence of a reasonable suspicion that he was armed and dangerous.
6. The officer improperly searched Mr. Muse incident to an unlawful arrest.
7. The officer arrested Mr. Muse for "Unlawful Possession of Drug Paraphernalia," which is not a crime.
8. The officer arrested Mr. Muse for a misdemeanor that was committed outside his presence in violation of RCW 10.31.100.
9. The trial court erred by adopting Conclusion of Law No. 4.
10. The trial court erred by adopting Conclusion of Law No. 5.

**ISSUE 1:** An officer may only frisk a person for weapons based on specific and articulable facts, creating an objectively reasonable belief that the person is armed and presently dangerous. Were the circumstances insufficient to justify a frisk for weapons?

**ISSUE 2:** A search incident to arrest must be based on a lawful arrest. Did the officer improperly search Mr. Muse incident to an arrest for "Unlawful Possession of Drug Paraphernalia," which is not a crime?

**ISSUE 3:** With limited exceptions, an officer may arrest a person for a misdemeanor "only when the offense is committed in the presence of an officer." Was Mr. Muse searched

incident to an unlawful arrest for an alleged misdemeanor committed outside the officer's presence?

11. If any of Mr. Muse's suppression arguments are unavailable on review, he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
12. Defense counsel provided ineffective assistance by failing to advance the correct basis for suppression of the unlawfully seized evidence.

**ISSUE 4:** Defense counsel provides ineffective assistance by failing to research the law. Did defense counsel provide ineffective assistance by failing to raise the correct grounds for suppression of evidence, unconstitutionally seized, following a search incident to an unlawful arrest?

13. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

**ISSUE 5:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Muse is indigent, as noted in the Order of Indigency?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

While riding his bicycle in downtown Pasco, Mr. Muse was pulled over for an infraction by Detective Chad Pettijohn. RP (10/20/16) 5-6; CP 11-12. According to Pettijohn, he repeatedly instructed Mr. Muse to keep his hands on his bicycle. Pettijohn claimed Mr. Muse kept reaching one hand toward his waistband, or a pocket.<sup>1</sup> CP 12; RP (10/20/16) 6-8. There was no indication that Mr. Muse acted aggressively. Nor did police know him as someone prone to violence.

Pettijohn walked up, grabbed Mr. Muse, and frisked him.<sup>2</sup> RP (10/20/16) 8-9. Through Mr. Muse's clothing, Pettijohn felt something that he immediately determined to be a glass methamphetamine pipe. RP (10/20/16) 8-9. According to Pettijohn,

The instant I felt it I knew exactly what it was, because I've been a police officer over ten years. There was no question what it was. So I told him he was under arrest for this, and I put him into custody and then searched his person incident to arrest. RP (10/20/16) 9.

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<sup>1</sup> The dashcam video that recorded the encounter does not bear this out. Ex. 5, Supp. CP.

<sup>2</sup> The encounter was witnessed by another officer, who provided similar testimony. RP (10/20/16) 17-23.

In addition to the pipe, Pettijohn found a small digital scale, as well as two baggies and a cellophane wrapper containing small amounts of methamphetamine. RP (12/16/15) 10-12.

The state charged Mr. Muse with possession of methamphetamine, and he sought suppression of the evidence. CP 1-5. The trial court held a suppression hearing, heard testimony, watched a video of Mr. Muse's encounter with police, and entered written Findings of Fact and Conclusions of law. RP (10/20/16) 3-36; CP 11-13. These included the following finding:

Detective Pettijohn then frisked Mr. Muse for weapons and felt what he immediately identified as a drug pipe. Mr. Muse was then placed under arrest for Unlawful Possession of Drug Paraphernalia and Mr. Muse was searched incident to arrest. Methamphetamine was found amongst Mr. Muse's belongings.  
CP 12.

Mr. Muse was convicted following a jury trial, and he timely appealed. CP 60.

## **ARGUMENT**

### **I. THE ADMISSION OF EVIDENCE SEIZED WITHOUT A WARRANT VIOLATED MR. MUSE'S RIGHTS UNDER THE FOURTH AMENDMENT AND WASH. CONST. ART. I, §7.**

Detective Pettijohn lacked authority to frisk Mr. Muse. Pettijohn had no basis for an objectively reasonable belief that Mr. Muse was armed and presently dangerous.

In addition, the arrest was unlawful, invalidating the search incident to arrest. During the frisk, Pettijohn had no way to tell if the pipe had been used to ingest drugs, and thus he had no basis to arrest Mr. Muse for use of drug paraphernalia. RCW 69.50.412(1). Furthermore, any use of the pipe did not occur in Pettijohn's presence. RP (10/20/15) 3-36. He therefore lacked authority to arrest Mr. Muse for any prior use of the pipe. RCW 10.31.100.

The pipe, other items seized, and Mr. Muse's statements must be suppressed as fruit of the poisonous tree. *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008); *State v. Armenta*, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997). If any of these arguments are not available on review, then Mr. Muse was denied the effective assistance of counsel. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

A. The Court of Appeals must review the validity of these warrantless searches *de novo*.

The validity of a warrantless search is reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.*

The state bears the heavy burden of establishing an exception to the warrant requirement by clear and convincing evidence. *State v.*

*Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *Armenta*, 134 Wn.2d at 14.

Here, the state failed to present sufficient evidence to meet its heavy burden of proving an exception to the warrant requirement. *Garvin*, 166 Wn.2d at 250. Accordingly, the trial court should have suppressed the evidence.

B. The state failed to prove a lawful frisk or a lawful arrest, justifying a search.

Under both the Fourth Amendment<sup>3</sup> and Wash. Const. art. I, §7,<sup>4</sup> searches and seizures conducted without authority of a search warrant “are *per se* unreasonable...subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, 556 U.S. 332, 338, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) (quoting *Katz v. United States*,

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<sup>3</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

<sup>4</sup> It is “axiomatic” that art. I, §7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to art. I, §7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also Eisfeldt*, 163 Wn.2d at 634-635.

Furthermore, “[w]here evidence is obtained as a direct result of an unconstitutional search, that evidence must also be excluded as ‘fruit of the poisonous tree.’” *Eisfeldt*, 163 Wn.2d at 640 (some internal quotation marks omitted) (quoting *Wong Sun v. United States*, 371 U.S. 471, 487-488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). This same rule applies to statements that follow an unconstitutional search or seizure. *Armenta*, 134 Wn.2d at 17.

1. The state failed to produce specific articulable facts creating an objectively reasonable belief that Mr. Muse was “armed and presently dangerous.”

To justify a warrantless seizure, police must be able to point to specific and articulable facts giving rise to an objectively reasonable belief that the person seized “is armed and ‘presently’ dangerous.” *State v. Xiong*, 164 Wn.2d 506, 514, 191 P.3d 1278 (2008). A generalized concern for officer safety cannot justify a search. *State v. Parker*, 139 Wn.2d 486, 501, 987 P.2d 73 (1999).

Here, the state failed to prove that Pettijohn’s belief was objectively reasonable. Accordingly, the evidence must be suppressed. *Xiong*, 164 Wn.2d at 514.

The detective physically seized Mr. Muse for taking his hands off his bicycle. RP (10/20/15) 8. Although Mr. Muse did not strictly obey the detective's directions, he did not make any aggressive moves. The only concern Pettijohn had was Mr. Muse *may* have been reaching into his waistband or his pocket, and he *may* have had a weapon in one of those places.<sup>5</sup> RP (10/20/15) 7-8.

These two suppositions—that Mr. Muse may have reached for his pocket (or his waistband), and that he may have had a weapon—do not meet the test outlined in *Xiong*, even when considered in connection with the observed facts.

Mr. Muse was not a suspect in a crime; he was pulled over for a bicycle infraction. RP (10/20/15) 5-6. Pettijohn did not describe his movements as aggressive, and the dashcam video confirms that they were not. Ex. 5, Supp. CP. Pettijohn had no information suggesting that Mr. Muse had proved violent during past encounters with police.

The state's evidence was insufficient to suggest that Pettijohn's fears were objectively reasonable. *See, e.g., State v. Setterstrom*, 163

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<sup>5</sup> Pettijohn couldn't see what Mr. Muse actually did with his hand because his view was blocked. RP (10/20/15) 7. He speculated that Mr. Muse was intentionally trying to shield his actions from view with his body. RP (10/20/15) 7. However, he did not provide any specific or articulable facts justifying this conclusion about Mr. Muse's mental state. RP (10/20/15) 7. Accordingly, this testimony about Mr. Muse's intent cannot contribute to an objectively reasonable belief that Mr. Muse was armed and presently dangerous. *Xiong*, 164 Wn.2d at 514.

Wn.2d 621, 626-627, 183 P.3d 1075 (2008) (suspect's public intoxication, use of a false name, and nervous, fidgety behavior held insufficient to justify a frisk); *State v. Malbeck*, 15 Wn. App. 871, 873, 552 P.2d 1092 (1976) (furtive movement insufficient to conclude passenger armed and dangerous).

Because Pettijohn lacked a reasonable suspicion that Mr. Muse was armed and presently dangerous, the seizure violated the Fourth Amendment and Wash. Const. art I, §7. The items admitted at trial and Mr. Muse's statements must be suppressed as fruit of the poisonous tree. *Eisfeldt*, 163 Wn.2d at 640. The conviction must be reversed and the case dismissed with prejudice. *Id.*

2. The arrest was unlawful because Pettijohn lacked probable cause and had no authority to arrest Mr. Muse for a misdemeanor committed outside his presence.

Possession of drug paraphernalia is not a crime. *State v. O'Neill*, 148 Wn.2d 564, 584 n. 8, 62 P.3d 489 (2003); *see also State v. Neeley*, 113 Wn. App. 100, 107, 52 P.3d 539 (2002). Instead, Washington law criminalizes certain *use* of drug paraphernalia. RCW 69.50.412(1). When Pettijohn felt the glass pipe in Mr. Muse's pocket, he "knew exactly what it was." RP (10/20/16) 9. However, he did not claim that he could magically feel that the pipe had been used in contravention of RCW 69.50.412(1).

An arrest must be based on probable cause. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). Because Pettijohn knew only that Mr. Muse possessed paraphernalia, he lacked probable cause to arrest and search him. *O'Neill*, 148 Wn.2d at 584 n. 8. Despite this, Pettijohn “told [Mr. Muse] he was under arrest for this and I put him into custody and then searched his person incident to arrest.” RP (10/20/16) 9. The court found that Mr. Muse was “placed under arrest for Unlawful Possession of Drug Paraphernalia” and searched incident to that arrest. CP 12.

Because possession of paraphernalia is not a crime, Pettijohn lacked probable cause, and the arrest was unlawful. RCW 69.50.412(1); *O'Neill*, 148 Wn.2d at 584 n. 8.

Furthermore, even if Pettijohn had somehow realized that the pipe had been illegally used, this did not empower him to arrest Mr. Muse. An officer may arrest a person for a misdemeanor or gross misdemeanor “only when the offense is committed in the presence of an officer.” RCW 10.31.100. There are exceptions to this rule; however, the use of drug paraphernalia is not one of them. RCW 10.31.100(1)-(12).

The arrest was illegal. *O'Neill*, 148 Wn.2d at 584 n. 8. The search was conducted pursuant to the illegal arrest. CP 12. All items seized and statements obtained must be suppressed. *Eisfeldt*, 163 Wn.2d at 640. The conviction must be reversed and the case dismissed with prejudice. *Id.*

3. If any of Mr. Muse's arguments are unavailable on review, then he was denied the effective assistance of counsel.

**The error is preserved.** Where a defendant seeks suppression of the fruits of a warrantless search, the state "bears the burden of proof if it relies on an exception to the warrant requirement to justify a particular search." *State v. Budd*, 185 Wn.2d 566, 572–73, 374 P.3d 137 (2016). The defendant is not obligated to identify the proper exception for the state.

Mr. Muse asked the trial court "to suppress the fruits of the search of his person, in this case, based upon the following memorandum." CP 2. In his memorandum, he cited the state and federal constitutions and outlined the general rule that warrantless searches and seizures are presumed unconstitutional. CP 3-4. He listed the broad categories of exceptions available to the state, and noted that "[w]here the State asserts an exception, it bears the heavy burden of producing facts to support the exception." CP 4. Although he went on to focus on the protective frisk exception, this does not excuse the state from its obligation to prove all facts necessary to support admission of the evidence.

Mr. Muse's motion to suppress should be sufficient to preserve all suppression-related issues upon which the state bears the burden of proof.

**The error may be raised for the first time on review.** Even if the motion is inadequate, the introduction of the improperly seized evidence and statements may be raised for the first time on review as a manifest error affecting a constitutional right. RAP 2.5(a)(3).

To raise a manifest constitutional error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).<sup>6</sup> An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

The error here had practical and identifiable consequences. *Lamar*, 180 Wn.2d at 583. Without the improperly seized evidence, the state would not have been able to proceed to trial. Furthermore, the trial court could have corrected the error “given what [it] knew.” *O’Hara*, 167 Wn.2d at 100. At the suppression hearing, it was clear that the officer arrested Mr. Muse based on mere possession of drug paraphernalia. RCW (10/20/15) 8-9. There was no evidence that Mr. Muse used the paraphernalia in Pettijohn’s presence. Given what it knew, the trial court

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<sup>6</sup> The showing required under RAP 2.5 (a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

could have suppressed the evidence; accordingly, its erroneous admission was a manifest error affecting Mr. Muse's constitutional right to be free from unreasonable searches and seizures, and his state constitutional right to privacy under Wash. Const. art. I, §7.

**Mr. Muse was denied the effective assistance of counsel.** If the error is not preserved and cannot be raised under RAP 2.5(a)(3) then Mr. Muse was denied the effective assistance of counsel.

A conviction must be reversed for ineffective assistance if counsel's deficient performance prejudiced the accused. U.S. Const. Amend. VI, XIV; *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all the circumstances and (2) cannot be justified as a tactical decision.<sup>7</sup> U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

All of these factors are met here. Counsel sought suppression of the evidence; he had no conceivable legitimate tactic to allow its improper

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<sup>7</sup> Although courts apply "a strong presumption that defense counsel's conduct is not deficient," a defendant rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

admission. There is at least a reasonable probability that the evidence would have been suppressed had counsel pointed out (1) that possession of paraphernalia is not a crime, (2) that Pettijohn could not know the pipe had been used when he arrested and searched Mr. Muse, and (3) that the arrest was also unlawful because police may not effect a custodial arrest for use of drug paraphernalia. *O'Neill*, 148 Wn.2d 584 n. 8. Without the evidence, the state would not have been able to proceed.

If the arguments outlined above are not available on review, then Mr. Muse was denied the effective assistance of counsel. *Kyllo*, 166 Wn.2d at 862. His convictions must be reversed and the case dismissed.<sup>8</sup>

**II. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.**

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state, nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).

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<sup>8</sup> In the alternative, the case may be remanded for a new suppression hearing.

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Furthermore, “[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals’] obligation to exercise discretion when properly requested to do so.” *Sinclair*, 192 Wn.App. at 388.

Mr. Muse has been convicted of a felony. CP 45. The trial court determined that he is indigent for purposes of this appeal. CP 76. There is no reason to believe that status will change. The *Blazina* court indicated that courts should “seriously question” the ability of a person, who meets the GR 34 standard for indigency, to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

### **CONCLUSION**

For the foregoing reasons, Mr. Muse’s conviction must be reversed and the case dismissed with prejudice. If the state substantially prevails on review, the Court of Appeals should decline to impose appellate costs.

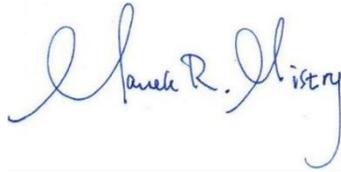
Respectfully submitted on November 23, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 23, 2016.



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