

Court of Appeals No. 81068-1
Skagit County Superior Court No. 06-1-00654-1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

JEREMY GRANDE,
Defendant/Appellant,

v.

STATE OF WASHINGTON,
Plaintiff/Appellee.

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF MOVING PARTY

Appellant Jeremy Grande, through his attorney David B. Zuckerman, asks this Court to accept review of the decision designated in Part II of this motion.

II. DECISION

On March 20, 2007, the Skagit County Superior Court issued an Order For Remand ("Order"). App. E. The Order reverses a district court decision suppressing marijuana and a pipe seized from the defendant during a search incident to arrest.

III. ISSUE PRESENTED FOR REVIEW

Does the moderate smell of marijuana in a vehicle, without more, create probable cause to arrest all occupants of the vehicle?

IV. STATEMENT OF THE CASE

On April 6, 2006, Jeremy Grande was charged by citation in Skagit County District Court with possession of less than 40 grams of marijuana and possession of drug paraphernalia. App. A. On June 19, 2006, the Honorable David Svaren held a suppression hearing under CrRLJ 3.6.

The only testimony at the suppression hearing came from Washington State Patrol Trooper Brent Hanger. App. B (transcript of testimony). He testified that he was familiar through experience and training with the odor of burning marijuana. App. B at 2.

On April 6, 2006, Trooper Hanger stopped a car for improper window tint. App. B at 2-3. He had observed the car for only a short time

before stopping it. RP 5-6. The driver was a “Ms. Hurley” and the passenger was Jeremy Grande. App. B at 3. Upon contact, Hanger noted an odor of marijuana coming from the car. Id. He described the strength of the odor as “Kind of moderately [sic].” He could not determine where in the car it was coming from. App. B at 4. He immediately arrested both occupants. Id. Another trooper then searched Grande incident to arrest and found in his pocket a marijuana pipe containing a small amount of marijuana. Id. Trooper Hanger conceded that did not know how long Grande had been in the car before he stopped it. App. B at 6.

In a written order dated July 12, 2006, the district court found the search of Mr. Grande to be unlawful and suppressed the evidence. App. C.

There was no evidence other than the odor, prior to the arrest, that would lead the officer to his probable cause conclusion. The officer conducted no investigation and made no particular observations of the defendant that would confirm or dispel the conclusion of probable cause. Instead, the officer made an arrest and proceeded to search defendant. While the officer may have been justified in concluding that someone had smoked some marijuana, this does not justify a finding of probable cause specific to defendant.

Id.

On July 17, 2006, the district court found that suppression had the practical effect of terminating the cause and dismissed the charges. App.

D. On the State’s appeal to the Skagit County Superior Court, the Honorable Dave Needy reversed. App. E. Judge Needy believed himself to be bound by State v. Hammond, 24 Wn. App. 596, 603 P.2d 377

(1979), in which Division Two held that the smell of marijuana justified the arrest of all occupants of a vehicle.

V. ARGUMENT

A. RAP 2.3(D) FAVORS REVIEW

RAP 2.3(d) states in part:

(d) Discretionary Review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be determined by an appellate court . . .

First, although the superior court's decision is consistent with the decision of Division Two of the Court of Appeals in State v. Hammond, 24 Wn. App. 596, 603 P.2d 377 (1979), it conflicts with a subsequent decision by the United States Supreme Court in Ybarra v. Illinois, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), which requires individualized suspicion for a frisk or arrest. See section (B), below.

Second, the case presents a significant question of law under the Washington and United States Constitutions. This Division has never addressed whether the mere smell of a drug in a vehicle gives rise to probable cause to arrest all occupants. Although Division Two did address

the issue in Hammond, it did not explain whether it was relying on the federal or state constitution. Further, an evolving body of law from the United States and Washington Supreme Courts puts the issue in a very different light today. See sections B and C, below.

Third, the superior court's decision involves a matter of considerable public interest. Police officers, sometimes aided by their dogs, have become increasingly adept at detecting the smell of illegal drugs. Presumably, many cars on our roads contain a detectable smell of drugs because someone, at some point, ingested drugs within the car. Should every person who enters such a car as a passenger be subject to a custodial arrest and a search incident to that arrest? Here, of course, Mr. Grande did possess a small amount of marijuana on his person. But police practices like those in this case undoubtedly result in the arrest and search of numerous citizens who are guilty of nothing more than associating with someone who has permitted drugs to be used in her car.

B. THE ARREST AND SEARCH OF MR. GRANDE VIOLATED THE FOURTH AMENDMENT

This case turns on whether Trooper Hanger had probable cause to arrest Mr. Grande based solely on the odor of marijuana in the car. If so, then the troopers could lawfully perform a search incident to arrest. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). There was no probable cause here, however, because Trooper Hanger had no individualized basis for believing that Mr. Grande had committed a crime.

“[A] person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.” Ybarra v. Illinois, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91.

In this case, the moderate smell of marijuana in a car driven by Ms. Hurley cannot provide particularized probable cause to arrest her passenger. Trooper Hanger never claimed that an odor of marijuana specifically emanated from Mr. Grande, or that Mr. Grande acted suspiciously in any other way.

Grande does not dispute that marijuana has a distinctive and powerful odor. Certainly, the odor of marijuana in the car was sufficient to conclude that *someone* had probably smoked marijuana in the car *at some time*. Because the odor was only “moderate,” however, there was no basis to believe that the smoking had occurred very recently. The smell may have lingered for hours, days, or even weeks, just as the smell of tobacco smoke lingers in a car long after the last cigarette was smoked. Because Trooper Hanger had no idea when Mr. Grande entered the car as a passenger, he had no basis to believe even that the smoking took place

while Grande was in the car. It is not illegal to enter a car in which marijuana has been smoked. Nor, for that matter, is it illegal to remain in a car while the driver smokes marijuana. Trooper Hanger simply had no basis to believe that Mr. Grande had any involvement in creating the odor that Hanger detected.

The superior court believed itself to be bound by State v. Hammond, 24 Wn. App. 596, 603 P.2d 377 (1979). In that case, Division Two did indeed hold that the smell of marijuana in a car justifies arresting and searching all the occupants. Its ruling was not based, however, on any controlling Washington or federal authority. Further, the Hammond court did not have the benefit of Ybarra, which was decided a few weeks later. This Court should conclude that Hammond was incorrectly decided because it fails to acknowledge the requirement that probable cause must be specific to the person arrested.

The Wisconsin Supreme Court applied the correct analysis to this setting in Wisconsin v. Secrist, 224 Wis. 2d 201, 589 N.W. 2d 387, cert. denied, 526 U.S. 1140, 119 S. Ct. 1799, 143 L. Ed. 2d 1025 (1999). It found that the odor of marijuana in a vehicle could support probable cause for an arrest only if the officer could “link the unmistakable odor of marijuana or some other controlled substance to a specific person or persons.” Id. at 216-17. “The link must be reasonable and capable of articulation.” Id. at 217. In Secrist itself, the “strong” odor of marijuana provided probable cause to arrest the “driver and sole occupant of the vehicle.” Id. at 218. On the other hand, “[t]he probability diminishes if

the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor.” Id. The court noted that the odor coupled with a passenger’s suspicious behavior could be sufficient. Id. at 216, citing Colorado v. Olson, 175 Colo. 140, 485 P.2d 891 (1971) and State v. Huff, 64 Wn. App. 641, 826 P.2d 698 (1992).¹ Here, of course, the odor of marijuana was not strong, and there was nothing to link the smell to Grande.

The State may rely on Maryland v. Pringle, 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003), but that case is distinguishable. In Pringle, a police officer stopped for speeding a car occupied by three men. Id. at 367. Upon searching the car by consent, the officer “seized \$763 of rolled-up cash from the glove compartment and 5 glassine baggies of cocaine from between the back-seat armrest and the back seat.” Id. at 368. When all three men denied ownership of the cocaine and money, the officer arrested them all. Id. The Court upheld the arrest based on the following reasoning:

Here we think it was reasonable for the officer to infer a common enterprise among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.

¹ As the Secrist court noted, the arrest of a passenger in Huff was based not only on the smell of marijuana in the car, but also on the passenger’s furtive behavior and lying to the police. See Secrist at 217 n. 10.

Id. at 373.

This rationale does not apply to Mr. Grande for at least three reasons. First, in Pringle, the police actually found drugs and other evidence of drug dealing in the car before arresting the defendant. There was no question that the defendant was present in the car at the time of the illegal activity. Here, on the other hand, there was no evidence that Mr. Grande was even present in the car when a crime was committed. The driver could have finished smoking marijuana long before picking up Mr. Grande.

Second, the crime involved in Pringle was quite serious. Mr. Pringle, after all, received ten years without the possibility of parole for his involvement in cocaine dealing. Pringle, 540 U.S. at 369. On such facts it may be reasonable to assume that no occupant would permit an innocent person to ride in the car as a potential witness. Possession of small quantities of marijuana, by contrast, is not a terribly serious crime in Washington, so an offender would not have the same fear of prosecution. Further, many citizens are tolerant of marijuana smoking even if they do not engage in it themselves, and would not be inclined to report the conduct to the police. For these reasons, many drivers would be willing to pick up an innocent passenger even though the car smelled of marijuana. In fact, many drivers would light up in front of a passenger.

Third, in Pringle the contraband was quite valuable. The car contained over \$700 in drug proceeds and the remaining five baggies of cocaine would presumably have fetched considerably more money. A

drug dealer would not likely let anyone else within reach of such valuables unless that person was a buyer or an accomplice to the selling. Here, there was no suggestion that the car contained anything so valuable that the driver would be worried about theft.

Other courts have distinguished Pringle on similar grounds. In In re T.H., 898 A.2d 908 (D. C. Ct. App. 2006), a police officer observed fireworks in the back compartment of a car behind the rear passenger's seat. Id. at 910. The officer then arrested T. H., who was sitting in the rear passenger's seat, as well as the passenger in the front seat. In a search incident to the arrest the officer found a handgun in T. H.'s pocket. Id. The court found the search illegal because there was no probable cause to arrest T. H. The court distinguished Pringle in part because the presence of fireworks in a vehicle is not so "obviously criminal" as to make the driver of the car "unlikely to admit an innocent person with the potential to furnish evidence against him." Id. at 914, quoting Pringle, at 373.

In Idaho v. Gibson, 141 Idaho 277, 108 P.3d 424 (2005), the officers brought in a drug-sniffing dog after a traffic stop. The dog alerted to the smell of illegal drugs. The police then arrested the driver (Gibson) and found methamphetamine in his wallet. Id. at 280. The court suppressed the evidence because there was no probable cause to believe that Gibson possessed drugs. The court distinguished Pringle because in that case drugs were actually found in the car. In Gibson, on the other hand, the dog's sensitive nose proved only that drugs had once been in the car. Id. at 284.

Thus, under Fourth Amendment jurisprudence, the arrest and search of Mr. Grande was unconstitutional.

C. THE ARREST AND SEARCH VIOLATED ARTICLE I, SECTION 7

Even if the arrest and search of Mr. Grande did not violate the Fourth Amendment, it violated article I, section 7 of the Washington Constitution. Under this provision, the Washington Supreme Court has found enhanced protection for automobile passengers as well as an enhanced requirement of individualized suspicion of illegal activity.

Article I, section 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision differs from the Fourth Amendment in that article I, section 7 “clearly recognizes an individual's right to privacy with no express limitations.” State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). See also State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998).² Beginning at least 85 years ago, the Washington Supreme Court has frequently applied the phrase “private affairs” to riding in an automobile. See, e.g., State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999); State v. Mendez, 137 Wn.2d 208, 217-19, 970 P.2d 722 (1999); State v. Hendrickson, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996) (citing cases);

² There is no need for an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), because the Washington Supreme Court has already established that article I, section 7 provides greater protection than does the Fourth Amendment. See State v. Parker, 139 Wn.2d 486, 493 n.2, 987 P.2d 73 (1999). In fact, as discussed below, the Supreme Court has already decided that this provision specifically provides greater protection to passengers in cars.

City of Seattle v. Mesiani, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988) (citing cases); State v. Kennedy, 107 Wn.2d 1, 4-5, 726 P.2d 445 (1986); State v. Gibbons, 118 Wn. 171, 187-88, 203 P. 390 (1922).

Specifically, the Washington Supreme Court has held that article I, section 7 “affords law enforcement officers more limited authority over vehicle passengers” than does the Fourth Amendment. See State v. Mendez, 137 Wn.2d at 218, citing State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980) (“[A] stop based on a parking violation committed by the driver does not reasonably provide an officer with grounds to require identification of individuals in the car other than the driver, unless other circumstances give the police independent cause to question passengers.”) The Mendez Court noted that the U.S. Supreme Court “has developed a strong policy in its Fourth Amendment jurisprudence conferring considerable authority upon police officers at the scene of a traffic stop.” Id. at 214-15. In particular, the U.S. Supreme Court held that the Fourth Amendment permitted an officer to order all passengers out of a car after lawfully stopping the vehicle. Id. at 216, citing Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997). The Mendez Court, however, found that article I, section 7 prohibited an officer from ordering a passenger to exit or remain in a car when the officer had only probable cause to detain the driver for an infraction. Mendez at 211. Officers must articulate an “objective rationale” to support their actions with regard to a passenger in order to prevent “groundless police intrusions on passenger privacy.” Id. at 220.

Similarly, in State v. Parker, *supra*, the Washington Supreme Court held that article I, section 7 prohibits the police from automatically searching the possessions of non-arrested passengers incident to the arrest of the driver. It based this holding in part on article I section 7's "*greater protection for passengers* than the Fourth Amendment." Id. at 495, quoting Mendez, 137 Wn.2d at 219 (emphasis in Parker).

Parker was based not only on Washington's enhanced protection for vehicle passengers, but also on its enhanced requirement of individualized suspicion of illegal activity.

Under article I, section 7, we have specifically recognized that "[r]egardless of the setting ... 'constitutional protections [are] possessed *individually*.'" State v. Broadnax, 98 Wash.2d 289, 296, 654 P.2d 96 (1982) (quoting Ybarra v. Illinois, 444 U.S. 85, 92, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979)) (second alteration in original). Accordingly, a person's "mere presence" in a place validly to be searched does not justify a search of that person. Broadnax, 98 Wash.2d at 295, 301, 654 P.2d 96; see State v. Worth, 37 Wash.App. 889, 892, 683 P.2d 622 (1984). Merely associating with a person suspected of criminal activity "does not strip away" individual constitutional protections. Broadnax, 98 Wash.2d at 296, 654 P.2d 96. Thus, where officers do not have articulable suspicion that an individual is armed or dangerous and have nothing to *independently* connect such person to illegal activity, a search of the person is invalid under article I, section 7. See Broadnax, 98 Wash.2d at 296, 654 P.2d 96.

State v. Parker, 139 Wn.2d at 497-98 (emphasis in Parker). Although Broadnax relied in part on federal precedent, its holding was also based on

article I, section 7. See Parker, 139 Wn.2d at 498 n.4, citing Broadnax, 98 Wn.2d at 304.³

Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988), which invalidated random stops at “sobriety checkpoints” was also based on article I, section 7’s requirement of individualized suspicion. The Court recognized that such stops might be permissible under the Fourth Amendment in view of Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

State v. Hammond, the sole Washington case supporting the State’s position, did not address article I, section 7 at all. The result in that case cannot be squared with the Washington Supreme Court’s analysis of the Washington Constitution, discussed above, that has evolved since Hammond was decided.

Thus, whether or not this Court finds that the arrest and search of Mr. Grande violated the Fourth Amendment, it should find that it violated article I, section 7.

³ Broadnax was abrogated on other grounds by Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993).

VI. CONCLUSION

This Court should grant review, reverse the superior court, and uphold the district court decision suppressing evidence.

DATED this 22nd day of March, 2007.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Jeremy Grande

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing Motion for Discretionary Review and accompanying Appendix on the following:

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Skagit County Prosecutor's Office
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Mount Vernon, WA 98273

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MARCH 22, 2007
Date

Christina Alburas
Christina Alburas

Court of Appeals No. _____
Skagit County Superior Court No. 06-1-00654-1

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DIVISION ONE

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APPENDIX TO MOTION FOR DISCRETIONARY REVIEW

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- E. Order for Remand, State v. Jeremy Grande, Skagit County Superior Court No. 06-1-00654-1, March 20, 2007

A. Citation for Possession of Marijuana and Possession of Drug Paraphernalia,
Skagit County District Court No. C626563, April 6, 2006

CRIMINAL **TRAFFIC** **NON-TRAFFIC** **C 0626563**

IN THE DISTRICT MUNICIPAL COURT OF WASHINGTON

STATE OF WASHINGTON, PLAINTIFF VS. NAMED DEFENDANT

COUNTY OF **SKALAWIT**

CITY/TOWN OF

L.E.A. ORI #: **WAWSP 076 00** COURT ORI #:

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVER'S LICENSE NO. **LAANDJD 24206** STATE **WA** EXPIRES **08** PHOTO I.D. ON PERSON YES NO

NAME - LAST **LAANDE** FIRST **JEREMY** MIDDLE **D**

ADDRESS **1320 FRANCES 9571 JENNY LN.** IF NEW ADDRESS

CITY **SENO WOODLEY WA** STATE **WA** ZIP CODE **98284** EMPLOYER LOCATION

DATE OF BIRTH **9-25-76** RACE **W** SEX **M** HEIGHT **604** WEIGHT **260** EYES **BLU** HAIR **BLU**

RESIDENTIAL PHONE NO. CELL/PAGER NO. WORK PHONE NO.

VIOLATION DATE MONTH **7** DAY **16** YEAR **06** TIME **22:13** INTERPRETER NEEDED LANG.

AT LOCATION **WEST STATE ST. 4 SR 20 SKALAWIT** M.P. CITY/COUNTY OF

PASS DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

VEHICLE LICENSE NO. **130 J WT WA** STATE **WA** EXPIRES **06** VEH. YR. **93** MAKE **Bmw** MODEL **325i** STYLE **CP** COLOR **10LK**

TRAILER #1 LICENSE NO. STATE EXPIRES TR. YR. TRAILER #2 LICENSE NO. STATE EXPIRES TR. YR.

OWNER/COMPANY IF OTHER THAN DRIVER

ADDRESS CITY STATE ZIP CODE

ACCIDENT NO. NR. R. I. F. BAG READING COMMERCIAL VEHICLE YES NO HAZARD PLACARD YES NO EXEMPT VEHICLE FARM R.V. FIRE OTHER

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES

#1 VIOLATION/STATUTE CODE **KCW 9A.50.401** DV **POSSESSION OF MARIJUANA**

#2 VIOLATION/STATUTE CODE **KCW 9A.50.412** DV **POSSESSION OF DRUG PARAPHERNALIA**

MANDATORY COURT APPEARANCE OR **BAIL FORFEITURE IN U.S. \$**

APPEARANCE DATE **4 25 06** MO. DY. YR. TIME **1300** A.M. RELATED # **C0626563** DATE ISSUED **6 06**

WITHOUT ADMITTING HAVING COMMITTED EACH OF THE ABOVE OFFENSE(S), I PROMISE TO APPEAR AS DIRECTED ON THIS NOTICE.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT I HAVE ISSUED THIS ON THE DATE AND AT THE LOCATION ABOVE, THAT I HAVE PROBABLE CAUSE TO BELIEVE THE ABOVE NAMED PERSON COMMITTED THE ABOVE OFFENSE(S), AND MY REPORT WRITTEN ON THE BACK OF THIS DOCUMENT OR ATTACHED, TO IS TRUE AND CORRECT.

DEFENDANT'S SIGNATURE *[Signature]* OFFICER *[Signature]* # **938**

COMPLAINT / CITATION

CRG	PLEA	CNG	FINDINGS	FINE	SUSPENDED	SUB-TOTAL	FIND/JUDG DATE
1	G	NG	G NG D BF	\$	\$	\$	ABS. MLD TO OLY
2	G	NG	G NG D BF	\$	\$	\$	TO SERVE
OTHER COSTS \$							WITH DAYS SUP.
RECOMMENDED NONEXTENSION OF SUSPENSION <input type="checkbox"/>				LICENSE SUR-RENDER DATE	TOTAL COSTS \$	CREDIT / TIME SVT	

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B. Verbatim Report of Proceedings, 3.6 Motion Hearing, State v. Jeremy Grande,
Skagit County Superior Court No. 06-1-00654-1/Skagit County District Court
No. C626563, June 19, 2006

State v. Jeremy Grande
06-1-00654-1 / C626563
June 19, 2006

Participants:

Judge David Svaren
Roy Howson, Attorney for Defendant
Toni Guzzo, Attorney for the State
Trooper Brent Hanger, Witness

Judge David Svaren: (gavel) – on for two different motions. One is State's motion to correct what is said to be a scrivener's error and second is for a motion under Rule 3.6. Is there any objection to the State's motion, first of all, Mr. Howson?

Roy Howson: No, Your Honor.

Judge Svaren: Okay, that'll be granted, then. The State may call its first witness as to the 3.6 motion.

Toni Guzzo: Thank you, Your Honor. The State at this time calls Trooper Brent Hanger.

Judge Svaren: Okay, Trooper Hanger, would you raise your right hand? Do you solemnly swear or affirm any testimony you give in connection with today's proceeding will be the truth?

Trooper Brent Hanger: Yes, sir, I do.

Judge Svaren: Okay, thanks. Please have a seat. Make yourself comfortable. Thank you. Your witness, Ms. Guzzo.

Ms. Guzzo: Thank you, Your Honor. For the record, please state your name, spelling the last.

Trooper Hanger: It's Brent Hanger, H-A-N-G-E-R.

Ms. Guzzo: And with whom are you employed?

Trooper Hanger: I am a trooper with the Washington State Patrol.

Ms. Guzzo: For how long?

Trooper Hanger: Since July of 1998.

COPY

Ms. Guzzo: And do you enforce traffic laws in the State of Washington?

Trooper Hanger: Yes, I do.

Ms. Guzzo: And, Trooper Hanger, what training have you had with the Washington State Patrol in law enforcement in general?

Trooper Hanger: Well, it's very extensive: the State Patrol Academy is twenty-six weeks long (inaudible). The training is anywhere from first aid, ground fighting, weapons, (inaudible), collision investigations, (inaudible). It's very extensive.

Ms. Guzzo: Okay, and have you had any training specifically related to the detection of drugs – how to determine if a substance is a controlled substance?

Trooper Hanger: Yes, I have.

Ms. Guzzo: And what is that training?

Trooper Hanger: I have training as various types of illegal, controlled substances are presented to us for display as well as for —marijuana is — a small amount is lit and (inaudible) burn.

Ms. Guzzo: Okay. And have you had any practical experience or work-related experience in detecting marijuana or whether or not an odor is burnt marijuana?

Trooper Hanger: Yes, I have. I've been involved in several marijuana arrests, ranging from a small little amount you can hold in your hand up to as much as over 1800 pounds.

Ms. Guzzo: Okay, and how many stops, would you say, or arrests have you conducted based on the odor of marijuana?

Trooper Hanger: Oh, I'd hazard a guess – probably in the low hundreds.

Ms. Guzzo: Okay, and, Trooper Hanger, were you working on April 6, 2006?

Trooper Hanger: Yes, I was.

Ms. Guzzo: And on that date, did you come into contact with a person now known to you as Jeremy Grande or Grande?

Trooper Hanger: Yes, I did.

Ms. Guzzo: And what was the nature of that contact? What drew you to Mr. Grande?

Trooper Hanger: He was a passenger in a vehicle I stopped for illegal window tint.

Ms. Guzzo: Okay, and what training have you had to recognize whether or not windows are tinted illegally?

Trooper Hanger: It's mostly practical experience, as well as repeated tests with a tint meter.

Ms. Guzzo: Okay, and what is a tint meter?

Trooper Hanger: A tint meter is a tool that I have that transmits light through one side of the glass and it has another side that picks up how much light goes through that glass.

Ms. Guzzo: Okay, and have you ever checked your observations of a window's tint with the tint meter to check for accuracy?

Trooper Hanger: Numerous times.

Ms. Guzzo: And have they been accurate?

Trooper Hanger: Yes.

Ms. Guzzo: Okay. So when you say that you – that Mr. Grande was a passenger in a vehicle that you stopped – the basis of the stop was the tinted windows?

Trooper Hanger: Yes.

Ms. Guzzo: And was that based on your observations?

Trooper Hanger: Yes, it was.

Ms. Guzzo: Okay, and what happened upon stopping the vehicle?

Trooper Hanger: Well, upon contact (inaudible) Mr. Grande said oh, it's you again, and then the driver, Ms. Hurley, she got very agitated. We had had contact before.

Ms. Guzzo: Okay, and what happened after that?

Trooper Hanger: Well, actually, Mr. Grande calmed her down although she probably would have calmed down on her own. I observed the odor of marijuana coming from the vehicle.

Ms. Guzzo: Okay, and how strong would you say this odor was?

Trooper Hanger: Kind of moderately.

Ms. Guzzo: And was it just coming from – did you determine where in the vehicle it was coming from?

Trooper Hanger: No.

Ms. Guzzo: Okay, and what did you do once you detected the odor of marijuana in the vehicle?

Trooper Hanger: I advised them they were both under arrest and they were both arrested.

Ms. Guzzo: Okay, and did you at any time check the window tint by using your tint meter?

Trooper Hanger: Yes, I did.

Ms. Guzzo: And what did it come up with?

Trooper Hanger: It came up to 5(?)%.

Ms. Guzzo: And what did you do after Mr. Grande was arrested?

Trooper Hanger: Trooper ___ actually handcuffed Mr. Grande and pointed out there was something in his pocket, which happened to be a glass marijuana smoking pipe with marijuana (inaudible) it, and fresh marijuana in it.

Ms. Guzzo: And did you at any time ___-test or do any other kind of test, to determine what the substance was?

Trooper Hanger: Yes, I did, and it did back positive for marijuana.

Ms. Guzzo: Your Honor, I have no further questions at this time.

Judge Svaren: Okay. Mr. Howson?

Mr. Howson: Trooper, the training that you mentioned – this was training that you received at the academy?

Trooper Hanger: Yes.

Mr. Howson: When was that?

Trooper Hanger: July of 1998.

Mr. Howson: And was there any subsequent training along those same lines?

Trooper Hanger: There's – yes, every trimester we have refresher training as well as every year we return to the academy for three days of training.

Mr. Howson: When was the last time that you had any refresher training with respect to the recognition of marijuana?

Trooper Hanger: I don't believe there's been any refresher training as to the odor of marijuana.

Mr. Howson: So your original training that you received in terms of the odor of marijuana and how to detect it was in 1998.

Trooper Hanger: The training – yes.

Mr. Howson: And no refresher courses since that time.

Trooper Hanger: No.

Mr. Howson: And may I assume that what was done in order for training was that you were told what the substance was, it was – some amount of it was burned, you smelled it, and that's pretty much how it was?

Trooper Hanger: That's the training – yes.

Mr. Howson: Is there anything else?

Trooper Hanger: Experience.

Mr. Howson: Anything else as part of the training?

Trooper Hanger: Not in regards to marijuana.

Mr. Howson: All right. How long did you follow the car that Mr. Grande was in?

Trooper Hanger: Before I decided I was going to stop them, about a block.

Mr. Howson: Okay, so you – was the car traveling in the same direction you were at the time you first saw it?

Trooper Hanger: No.

Mr. Howson: Traveling in a different direction?

Trooper Hanger: Correct.

Mr. Howson: And you turned around and a block later stopped it?

Trooper Hanger: Correct.

Mr. Howson: All right. And I take it you don't know how long Mr. Grande had been in the car?

Trooper Hanger: I have no idea how long he had been in the car.

Mr. Howson: You didn't see him get into the car?

Trooper Hanger: No.

Mr. Howson: You don't know where he got into the car?

Trooper Hanger: No, I don't.

Mr. Howson: And you don't know, of course, how long he had been in the car?

Trooper Hanger: No, I don't.

Mr. Howson: All right, thank you. That's all:

Judge Svaren: Thank you. Ms. Guzzo, do you have any further questions?

Ms. Guzzo: Yes, Your Honor. Trooper Hanger, with the experience that you had on duty as a Washington State Patrolman, have you ever in the arrests that you've made involving marijuana – have you ever checked your observation with the substance marijuana with any test results?

Trooper Hanger: Yes, I have.

Ms. Guzzo: And what were those results?

Trooper Hanger: 100% have always come back positive being tested as marijuana.

Ms. Guzzo: Thank you. No further questions, Your Honor.

Mr. Howson: No questions, Your Honor.

Judge Svaren: _____, please excuse the witness. Does the State have any additional witnesses?

Ms. Guzzo: Your Honor, the State does not.

Mr. Howson: We have no witnesses, Your Honor.

Judge Svaren: Thank you. Your motion will be heard.

Mr. Howson: Thank you. Your Honor, we have filed in this case a rather lengthy brief and the Prosecutor has, I believe, filed two responses. One was primarily because I had filed a brief which I believed was late and asked if they would like to have some time to respond. They indicated they would. We put it off for two weeks. But, unfortunately, I received their response last Friday and have not really had the opportunity to go through that particularly.

I mention that only because as to the second issue that I will argue, if the Court has some concerns that arise from the filing of the State's response brief, I would ask for opportunity to respond to that before any ruling, because I have not had that opportunity yet.

But let me begin with the first portion which we have briefed on both sides of this matter. We're discussing probable cause, Your Honor, and probable cause has for over two hundred years now been the line of freedom. It's been the line drawn in the sand between individuals and their government that allows them to call themselves free men. It's the very point at which we tell our government that I'm a free man and you cannot infringe upon my personal freedom until you have a good reason, grounded not in hunch or speculation, but in fact.

That line in our sand and our willingness to defend it is all that allows us to continue to call ourselves free people, but it's a line that's consistently under attack. The word "probable," as has been used by the courts, sounds every day more and more like the word "possible." Freedom defined by possible cause is not freedom. Anything is possible. Probable is much different, and it was probable that was used by the founders of this country to draw that line in the sand, that line that says this is where freedom begins and ends.

I think we can honestly say that all of us today are less free than we were forty years ago, based solely upon how the word "probable cause" has been used. And today, here in Mount Vernon, in this county, in this very case, at this moment we face the question of the erosion of our personal freedom. This case has the simplest of facts, as the court has just heard. The officer stopped the car, he smelled the odor of marijuana coming from the car – no particular location, just from the car. He arrested both the driver and the passenger immediately upon the detection of that odor simply coming from the car. He had no information whatsoever as to the passenger except that he was present in a car in which there was an odor of marijuana which had arrived there at some point in time which he did not know. It got there in some way that he did not know and had no

relation to the time in which Mr. Grande arrived, as far as his knowledge was concerned.

These facts present before this court a conflict between a decision and a body of law. There's a long body of law rising from the Fourth Amendment, but more importantly, rising independently also from Article 1, Section 7, of the Washington State Constitution, which has required individualized probable cause year after year after decade after decade. And there exists now another extremely small body of law in Washington appearing from Division 2 in the case of *Hammond* which would serve, if allowed, to overrule that humungous body of law that exists and has existed now for decades.

Both constitutions have required as a part of their history of the probable cause standard, I should say, for arrest that it be individualized – that no man should be required as a part – excuse me – no man should be arrested unless there exist facts that suggest then and there that he individually – that he personally has done something wrong. That's been the line in the sand and I have cited case after case after case and example after example contained within the briefs as to that body of law.

This is what we mean when we use the word "individual freedom." When you take the first word out of "individual freedom," you don't have freedom as we have traditionally thought of it in this country. It becomes meaningless.

I've mentioned that I've set forth a large body of cases. I picked up this morning and noticed another case on my desk – *State v. Penfield*, 2001, 106 Washington App. 157 – not directly on point, but, again, it comes up with the same exact thing: individualized probable cause. Whenever that issue's been put before the court in terms of an arrest, they have spoken of individualized probable cause. The only place that it does not appear and the place that *Hammond* seized upon it is when they talk generally in terms of probable cause and it gets confused between probable cause to arrest and probable cause to search.

We think that the beginning point of the analysis should be as that in *Seacrist*, which is cited on Page 7 of our brief. And the beginning point is this: under an analysis of probable cause to search – and that's where the confusion has arose for *Hammond* – the relevant inquiry is whether evidence of a crime will be found. For instance, in this particular case, the officer, upon smelling the odor of marijuana, had probable cause to search. He also, under traditional theory of constructive possession, could be said to have probable cause to arrest the driver because probable cause to search simply depends upon the indication that there exists somewhere within that car the contraband that he can, quite frankly, smell. But the *Seacrist* decision went on to say – and correctly so, in light of all the other cases – under an analysis of probable cause to arrest, the inquiry is whether the person to be arrested has committed a crime.

So what evidence is there that that individual has committed a crime at that point in time – at the point in time of arrest? This is one of those cases where you can very easily see that, had things gone a different way and the arrest – which we maintain is an illegal arrest – not been made, it could have very easily ended up at the same point. But the problem was the arrest was made. We believe that the principle stated in *Ybarra* remain the law of the land. That is, that the 4th and 14th Amendment protect persons – that's what it says – that a seizure of a person, must be supported by probable cause particularized to that person. Now those are the words of the United States Supreme Court – "particularized to that person."

The *Hammond* case – the case that said oh, if you smell the odor of marijuana you can arrest everyone in the car; that's actually what the *Hammond* case has said. The *Hammond* case and those that follow it cannot stand in the face of the settled law. The *Hammond* court didn't cite or discuss the area of particularized probable cause – individualized probable cause. They didn't distinguish it in any fashion from what they were doing and they did not overrule it or purport to overrule it. Quite frankly, they didn't see it. They never talked about it. They didn't discuss it, and yet there is this immense body of law directly contrary to that decision out of Division 2. It cannot stand. It cannot stand against that body of law.

So the question here now is shall we now change the line drawn in the sand? Shall we vote here for less freedom or for no freedom at all? Mr. Grande cannot leave here this morning having more freedom than he had when he walked through the door. We're asking for no expansion of any rule or any existing rule; we're asking that the rule that exists from the U.S. Supreme Court, from the State Supreme Court – throughout that body of law – simply be applied. A ruling for the State will leave us all in this room and throughout the county less freedom than we had this morning.

This is important. We ask the court in our decision to reaffirm the freedom of every person in this courtroom, because when you take away individualized freedom, you take away the meaning of freedom in this country.

There's a second reason we have moved for suppression – that is, that the arrest statute itself, 10.31.100, conflicts with Article 1, Section 7 – and there's a large portion of our brief devoted to that. I don't intend to reiterate the argument set forth in the brief this morning. Our Supreme Court has accepted review of this issue, though, and I think that's extremely important. This is a legitimate issue that the Supreme Court in *Walker* has before it right as we speak now. Essentially, 10.31.100 provides for arrest of misdemeanors not committed in the officer's presence. And this is a dramatic change from the common law applied in Washington from the beginning. And we might say, at first blush, but, ah, nothing's ever been said to the contrary and this statute has existed for a long time. But our Supreme Court has never had the opportunity to rule directly on

that point, but they have never at any point in any other cases said that the legislature has the authority to do what they did in this particular instance.

In *Ladson*, the court expressly stated the opposite – that it is the court's responsibility, not the legislature, to determine the constitutionality of such procedures. Remember, it is the courts that set forth the rules as to a great many things, including search and seizure. That's a procedural matter. How people are brought to court is a procedural matter. Arrest is something that falls directly within the framework of the judiciary, directly to the courts as a matter of rule-making. And that was made abundantly clear when the court rules took over from statute the area of search and seizure.

This is a statement of separation of powers. This is an argument that the court has already heard. It's reiterated here in this brief. The court has heard it because it came up in a DUI situation. And the issue of separation of powers, as I say, is a crucial issue in today's law. That is for certain. It is now before the Supreme Court in this particular instance and we will ultimately have a decision regarding 10.31.100. As it stands now, given what was said in *Ladson*, given the body of law that exists, we must say that this statute is unconstitutional.

Thank you very much.

Judge Svaren: Thank you. Ms. Guzzo?

Ms. Guzzo: Thank you, Your Honor. Regarding the stop of the vehicle in which Mr. Grande was a passenger, the State will rely on Mr. _____'s brief that was filed with the court – it looks like – on June 1st regarding the stop and the window tinting, the statute referenced, and also Trooper Hanger's testimony today regarding his training in recognizing a window tint that is too dark and checking that in the past with a tint meter.

Going on further, in regards to individualized PC, as the State points out in the response motion, the United States Supreme Court case of *Maryland v. Pringle*, the State feels is directly on point in that there are numerous individuals in a vehicle that's stopped where drugs are found, no one fesses up to ownership of the drugs. The court there found that there was enough probable cause to arrest every single person in the car. And in that case – if we're talking about individualized PC, the court would be saying that there was individualized PC for every single person in the car when there is – when there are drugs located within the car.

Pringle, in that case, was the front seat passenger. The drugs were found in kind of the back seat, shoved between the arm rest and the back seat. *Pringle* was probably the furthest person away from the drugs, and so not only did they find that the driver – possibly under constructive possession theory; I don't know – had – there was probable cause to arrest the driver for possession of those

drugs. The back seat passenger – there was probable cause to arrest that person, but there was also probable cause to arrest Pringle in that case. The officer in *Pringle* did ask all three occupants who the drugs belonged to. No one fessed up to it. They arrested all three and the arrest of Pringle was found valid.

It's the State's argument that this case is analogous to that Supreme Court case in that there are two occupants in the vehicle, an odor of marijuana is found – where the court has found the odor of marijuana within a vehicle is enough to arrest all occupants of the vehicle. There is a thought by Trooper Hanger that there is marijuana present within the vehicle, although he doesn't know which person – the driver or the passenger – off hand, in smelling the odor of marijuana, has that marijuana on his or her person or where it's located in the car. The court has ruled that there's authority to arrest all occupants of the vehicle.

Now if Trooper Hanger had asked the occupants of the vehicle whether or not there was marijuana present in the vehicle and those occupants say no or no, we don't have the marijuana, is he left to not arrest either one at that point because no one has fessed us to ownership of the marijuana? And the argument would be no, or the court in *Pringle* would have said that no, that the officer didn't have probable cause for all three occupants in the vehicle if that was the case, if someone had to fess up and say that they were the ones that owned the marijuana in the vehicle.

It's the State's argument that there – not only was there individualized probable cause to arrest Mr. Grande in the first place, but that the crime was also committed in his presence and that he smelled the odor of marijuana at that time. And so the thought is that the crime is being committed that instant when the odor of marijuana – that someone is having – has possession of the marijuana at that time.

Beyond that and going into the constitutional issue of the statute, the State isn't going to again reiterate what is in the brief. The State would just direct the court's attention to the argument that the State makes in their brief as to the constitutionality of the RCW. And the State would ask that the defense motion be denied and that this case be permitted to proceed to trial.

Judge Svaren: Thank you. Mr. Howson:

Mr. Howson: Thank you, Your Honor. Extremely briefly – I think the State's reliance on *Pringle* is not appropriate in this case. There's a vast difference in facts in the matters between what we had there and what we have here. There you had the drugs that were known to be in the car in a particular location, and the question becomes as to whose possession those drugs were in.

In this particular situation, we don't even have that. What we have is an odor – simply that, nothing more – an odor. An odor means that at some point in time – and we know not when – if the officer is correct, some marijuana was burnt either in the car or smoke from marijuana entered the car or was blown into the car or something of that sort. That's all that is known – simply that there has at some point in time been some drugs – which may or may not still be present, may have been completely consumed – all of that is unknown fact. The unknowns are gigantic in this particular case. There is simply one known and nothing more, and that is that there has been some burned marijuana at some point in time.

We don't know when the passenger got into the car, how long he's been in the car, what his knowledge of it is, and no questions were asked whatsoever. The officer simply smelled that and now we want to jump and say from that basis he has a reasonable basis to believe that the passenger of this vehicle has committed or is committing a crime. He simply has nothing of that sort. What he wants to do is say the passenger is present where a crime has been committed at some point in time. He's present there now. I could do something about the driver. I could arrest the driver. I can do some investigation. I can search the car. But I'm not going to do that. I'm going to arrest anybody who's present, anybody who's in that car, based solely – and nothing more – on the fact that I have a reason to believe that at sometime in the past that car has contained evidence of a crime.

That is a gigantic, gigantic leap in terms of what we do, in terms of protection of the individual. It says it doesn't matter whether the officer has any reason to believe that he's committed a crime or not. Your freedom is gone. Your freedom is gone the moment you associate with another individual who may have done something of that sort. And this is contrary to everything that we stand for in this country and we cannot allow this to continue to take away from our personal freedom. We must make a stand at some point. I maintain that stand is here today in this courtroom. The line is drawn and we must fight for it and this defendant.

Thank you.

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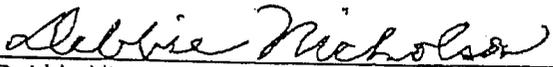
CERTIFICATION

I, Debbie Nicholson, declare as follows:

- 1. That I am over the age of 18 years, not a party to this action, and competent to be a witness herein.
- 2. That I am a Staff Assistant II for the Skagit County Prosecuting Attorney.
- 3. I certify that, to the best of my knowledge, the attached is a true and correct transcription of a recording of a hearing held on June 19, 2006, in Matter C626563, and transcribed by me on September 25 and 26, 2006.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Mount Vernon, Washington, this 26th day of September, 2006.


 Debbie Nicholson, Declarant

C. Order, State v. Jeremy Grande, Skagit County District Court No. C626563,
July 12, 2006

SKAGIT COUNTY DISTRICT & MUNICIPAL COURTS

State

Plaintiff

CASE NO. C6210563

ORDER ON

vs

Jeremy Grande

Defendant

- CIVIL MOTION(S)
- CRIMINAL MOTION(S)

THIS matter having come on for hearing this date on motion of the Plaintiff Defendant for certain relief, and the court having considered the records and files herein, the evidence offered, stipulations made, contents of memorandums or briefs furnished, and argument of counsel, and being advised, now finds, adjudges and decrees as follows:

RCW 10A.31.100(1) allows an arrest in the absence of a warrant by a "police officer having probable cause to believe that a person has committed or is committing a misdemeanor... involving the use or possession of cannabis." The defendant was a passenger in a car from which the odor of burnt marijuana emanated. Defendant was arrested when the officer smelled pot. There was no evidence other than the odor, prior to the arrest, that would lead the officer to his probable cause conclusion. The officer conducted no investigation and made no particular observations of defendant that would confirm or dispell the conclusion of probable cause. Instead, the officer ~~was~~ made an arrest and proceeded to search defendant. While the officer may have been justified in concluding that someone had smoked some marijuana, this does not justify a finding of probable cause specific to defendant. Motion to suppress is granted.

Dated this _____ day of 7/12, 2006

cc: PA ✓
DA ✓


JUDGE/COMMISSIONER

D. Agreed Order of Dismissal, State v. Jeremy Grande, Skagit County District
Court No. C626563, July 17, 2006

FILED

JUL 17 2006

Skagit Co. Dist Court

RECEIVED

JUL 25 2006

HOWSON LAW OFFICE

IN SKAGIT COUNTY DISTRICT COURT
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

JEREMY GRANDE,

Respondent

Case No.: C 626563

AGREED
ORDER OF DISMISSAL

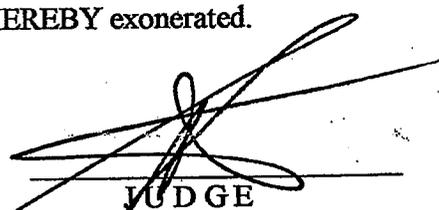
This matter having come on regularly before the undersigned judge of the above entitled court upon the motion of the defense for an order suppressing evidence pursuant to CrR 3.6 and the court having determined that the evidence must be suppressed, and having entered an order of suppression on July 12, 2006, and having further determined that such order has the practical affect of terminating the cause as contemplated by RAP 2.2 (b)(2) as indicated by the prosecutor's signature below,

NOW THEREFORE, the court makes and enters the following:

ORDER

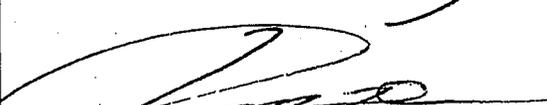
It is hereby ORDERED, AJUDGED, AND DECREED, that the above entitled cause be and hereby is DISMISSED, and any posted bail HEREBY exonerated.

Done this 17th day of July 2006.



JUDGE

Presented by,



Roy Howson, WSBA #3058
Attorney for Defendant

AGREED ORDER Copy received, notice of presentation waived



WSBA # 30927
Deputy Prosecuting Attorney

ORDER DISMISSING

- 1

HOWSON LAW OFFICE
Jenifer & Roy Howson & Jonathan Rands
415 Pine Street
Mount Vernon, WA 98273

cc: Pal Deputy ✓

E. Order for Remand, State v. Jeremy Grande, Skagit County Superior Court No.
.06-1-00654-1, March 20, 2007

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SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JEREMY GRANDE,

Defendant

) Case No.: 06-1-00654-1

) ORDER FOR REMAND

THIS MATTER having come on regularly before the undersigned judge of the above entitled court for appeal by Plaintiff State of Washington, from the Skagit County District Court upon that court's order to suppress evidence pursuant to RALJ 2.2 (c)(1), and the court having considered the records and files herein, the briefs of the parties and the oral arguments of counsel, and the court thereupon having determined that under the controlling precedent of State v. Hammond, 24 Wash. App. 596, 603 P.2d 377 (1979) the Skagit County District Court's order suppressing evidence must be reversed.

NOW THEREFORE :

ORDER

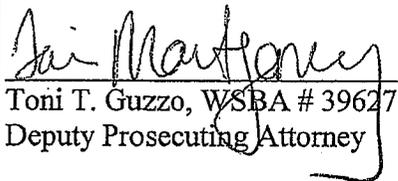
It is hereby Ordered, Adjudged, and Decreed that the previously entered order of the Skagit County District Court suppressing all evidence obtained as a result of the arrest of defendant be, and hereby is, REVERSED, and the matter is hereby REMANDED to the Skagit County District Court for further proceedings consistent with this order.

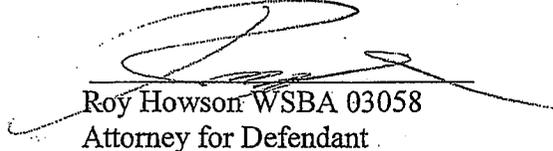
Done in open court this 20 day of March 2007.


JUDGE

Presented by,

Copy received, notice of presentation waived


Toni T. Guzzo, WSBA # 39627
Deputy Prosecuting Attorney


Roy Howson WSBA 03058
Attorney for Defendant

ORDER REMANDING

SKAGIT COUNTY PROSECUTING ATTORNEY
605 SO. 3rd ST. - COURTHOUSE ANNEX
MOUNT VERNON, WASHINGTON
PH: (360) 336-9460