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NO. 85788-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GREGORIO ORTEGA,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITIONER'S SUPPLEMENTAL BRIEF

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ORIGINAL

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A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED.

In Washington, a police officer must observe a misdemeanor offense in order to have the authority of law to arrest the suspected perpetrator without a warrant, unless a statutory exception applies. This rule is prescribed by the Legislature in RCW 10.13.100 and reflects longstanding common law.

Gregorio Ortega was arrested, handcuffed, and searched for the gross misdemeanor of drug traffic loitering. The arresting officer did not see Ortega commit any crime. He arrested Ortega because he had been told by another officer to arrest a person matching Ortega's description. No statute exempts drug traffic loitering from the requirement that the misdemeanor occur in the presence of the arresting officer. When the arresting officer did not personally witness any criminal conduct, did Ortega's arrest violate Washington's longstanding prohibition on an officer making a warrantless arrest for a misdemeanor offense he did not observe?

B. STATEMENT OF THE CASE.

Gregorio Ortega was arrested as he walked along a street in downtown Seattle in the middle of the day. RP 95, 97.[1] As soon as the arresting officer, David Hockett, "made contact" with Ortega, he "immediately" placed him "in custody" and handcuffed him. RP 97-98. He then did "a thorough search" of Ortega's "person and pockets," where he found crack cocaine and $780. RP 98-99, 114.

The reason Hockett arrested Ortega was because another officer, Chad McLaughlin, told him over his police radio that a person matching Ortega's description was "to be placed in custody." RP 97. Hockett was patrolling the area in a marked police car while McLaughlin was on an upper floor of a building watching the street "for any criminal activity." RP 17, 49, 96.

McLaughlin saw Ortega walking along the street with another person, Alphonso Cuevas. RP 16. Ortega paused on two occasions and "huddled" with three different people. RP 20, 22. Cuevas stood nearby and watched. RP 20, 25.

McLaughlin did not see anyone exchange money or any item that looked like drugs. RP 53-54, 77-78. He could not tell "if

they exchanged anything at all." RP 54. He did not think he had probable cause to arrest Ortega for selling drugs. RP 27, 57, 77, 86, 89.[2] McLaughlin had been told that if he saw someone make motions consistent with selling drugs three times but he did not see any items exchanged, he would have probable cause to arrest that person for drug traffic loitering. RP 43, 57. McLaughlin did not know the elements of drug traffic loitering. RP 57-58.[3] McLaughlin surmised he had enough evidence to arrest Ortega and Cuevas for drug traffic loitering, and he told Hockett and another officer also patrolling the area, Anthony Gaedcke, to arrest them. RP 96.

While Hockett arrested Ortega, and Gaedcke arrested Cuevas, McLaughlin "packed up" his gear from the building and left his vantage point. RP 28. He had been using a camera to record video of the street below. RP 30. After packing his equipment, McLaughlin met with the other officers on the street. RP 28.

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[1] The verbatim report of proceedings (RP) consists of four consecutively paginated volumes of transcripts. The suppression hearing is contained in Volume 1.

[2] In the Court of Appeals, the prosecution posited that McLaughlin could have arrested Ortega for a drug sale. The Court of Appeals correctly rejected this claim, and the factual weaknesses in this argument are further discussed in Appellant's Opening Brief, at 16-21; and Appellant's Reply Brief, at 4-6.

[3] Drug traffic loitering is a gross misdemeanor defined under the Seattle Municipal Code. SMC 12A.20.050(E).

McLauglin confirmed that the other officers had arrested the correct suspects after the men had been arrested and searched. RP 28.

Based on drugs found in Ortega's pocket after his arrest, Ortega and Cuevas were charged with possession of a controlled substance with the intent to deliver. CP 7. Cuevas was alleged to be Ortega's accomplice. After a joint jury trial, the jury acquitted Cuevas but convicted Ortega of the charged crime. CP 39; RP 573. Neither man was charged with drug traffic loitering.

C. ARGUMENT.

A MISDEMEANOR OFFENSE MUST OCCUR IN THE PRESENCE OF THE ARRESTING OFFICER FOR A WARRANTLESS ARREST AND SEARCH TO COMPLY WITH WASHINGTON'S CONSTITUTION, STATUTES, AND COMMON LAW

1. Washington's constitution bars warrantless arrests unless permitted by an established and narrowly drawn exception to the warrant requirement. Article I, section 7 of the Washington Constitution "is a jealous protector of privacy." State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009).[4] It is "well-settled" that Article I, section 7, provides greater protection to individual privacy than the Fourth Amendment. State v. Rankin, 151 Wn.2d

[4] Article I, section 7 states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

689, 694, 76 P.3d 217 (2003).[5] While the Fourth Amendment bars searches and seizures that are "unreasonable" based on evolving norms, Article I, section 7 "prohibits any disturbance of an individual's private affairs 'without authority of law.'" Buelna Valdez, 167 Wn.2d at 772. This "creates 'an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions." Id.

Determining the lawfulness of a search and seizure under Washington constitutional law "begins with the presumption that a warrantless search is *per se* unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement." State v. Patton, 167 Wn.2d 379, 387, 219 P.3d 651 (2009). The protections afforded by Article I, section 7 are derived from the text of the constitution, the law at the time our constitution was adopted, and the existing doctrinal development of that law. Buelna Valdez, 167 Wn.2d at 772.

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[5] The Fourth Amendment provides,
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A search incident to arrest is one of the few recognized "jealously and carefully drawn guarded" exceptions to warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). However, no search is permitted unless the arrest is valid, and the burden rests with the prosecution to prove its validity. Id. at 70. The State must establish the exception to the warrant requirement by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

2. A valid arrest is a necessary predicate for a search incident to arrest. A search incident to a valid arrest must be predicated on a lawful arrest and the arrest must precede the search. State v. O'Neill, 148 Wn.2d 564, 585, 62 P.2d 489 (2003). "[A] valid custodial arrest is a condition precedent to a search incident to arrest as an exception to the warrant requirement under article I, section 7." Id.; see also State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999) (lawful custodial arrest is a "constitutionally required prerequisite to any search incident to arrest"); State v. Johnson, 71 Wn.2d 239, 242, 427 P.2d 705 (1967) (search "cannot be justified as incident to an unlawful arrest"); State v. Miles, 29 Wn.2d 921, 923, 190 P.2d 740 (1948)

("Having concluded that the arrests were unlawful, it follows that the search of the car was unlawful.").

Probable cause that a crime was committed is but one element of a valid arrest. "[T]he existence of probable cause, standing alone, does not justify a warrantless search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant." State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (emphasis in original); see also State v. Barker, 143 Wn.2d 915, 921, 25 P.3d 423 (2001) ("Contrary to the State's argument, probable cause alone does not establish authority of law for an officer outside his or her jurisdiction to effect a warrantless arrest.").

3. A valid arrest for a misdemeanor requires the arresting officer to personally observe the alleged offense. At common law, a police officer could not arrest a person for a misdemeanor without a warrant "unless the misdemeanor was committed in his presence." State ex. rel. McDonald v. Whatcom Co. Dst. Ct., 92 Wn.2d 35, 37, 593 P.2d 546 (1979). For a misdemeanor, "[t]he authority of police officers to make an arrest without a warrant is restricted to" occasions "where there has been a misdemeanor committed in the presence of an arresting officer." Cerney v.

Smith, 84 Wn.2d 59, 62, 524 P.2d 230 (1974) (quoting State v. Wilson, 70 Wn.2d 638, 641, 424 P.2d 650 (1967)).

RCW 10.31.100 codifies this common law. RCW 10.31.100 allows a warrantless arrest for a misdemeanor or gross misdemeanor "only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section." (emphasis added, full text in Appendix A).

RCW 10.31.100 enumerates certain "very specific" exemptions to the "in the presence" requirement that permit an officer to arrest a person for certain misdemeanor offenses with probable cause. Staats v. Brown, 139 Wn.2d 757, 738 n.3, 991 P.2d 615 (2000). These listed exceptions are "always strictly construed." McDonald, 92 Wn.2d at 37; see State v. Walker, 157 Wn.2d 307, 316, 138 P.3d 113 (2006); State v. Hornaday, 105 Wn.2d 120, 130, 713 P.2d 71 (1986) (Legislature authorizes officers "to arrest for misdemeanors not committed in their presence" only by express statutory exemption). The exceptions include crimes involving physical harm or threats of harm; the use or possession of cannabis; illegal firearm possession at an elementary or secondary school; and certain traffic offenses. RCW 10.31.100(1), (3), (4), (10). Absent an exception, the law "requires

the misdemeanor is committed in the presence of the officer making the arrest." Hornaday, 105 Wn.2d at 129-30.

An arrest is a "serious personal intrusion." United States v. Watson, 423 U.S. 411, 428, 96 S.Ct. 820, 835-836, 46 L.Ed.2d 598, 618 (1976) (Powell, J., concurring). When arrested, a person may be handcuffed, forcibly taken to an unfamiliar place, and required to forfeit control of his person and his movements. Id. at 446 (Marshall, J., dissenting).

"[I]n cases of minor violations, where no danger exists, and where there is no threat of destruction of the evidence," the State does not have a compelling need for a warrantless arrest. State v. Hatchie, 161 Wn.2d 390, 401 n.6, 166 P.3d 398 (2007). The warrant requirement serves an important purpose in overseeing police intrusions and minimizing the risk of abuse. State v. Reep, 161 Wn.2d 808, 818, 167 P.3d 1156 (2008) (J.M. Johnson, J., concurring). Requiring the police obtain a warrant where the activity does not occur in their presence, or where no exigent circumstances exist, is not particularly onerous. A warrant may be obtained via the telephone. See e.g., CrR 2.3(c). The police can quickly make their case for probable cause to a neutral and detached magistrate if necessary. Id.

"Police action that deviates from the narrow bounds of this authority [to arrest] has no authority of law." Hatchie, 161 Wn.2d at 400. The police cannot arrest a person "as a guise or pretext to otherwise conduct a speculative criminal investigation or a search," which is a risk presented by warrantless misdemeanor arrests. Id. at 401-02; see State v. Ladson, 138 Wn.2d 343, 353, 979 P.3d 833 (1999)). Because misdemeanor arrests involve a substantial intrusion on private affairs for relatively minor conduct, there is good reason to require stringent standards for warrantless arrests. Actual observation of the criminal conduct by an officer is an effective means of insuring that a warrantless arrest is based upon probable cause, and the legislature has carved exceptions when it finds the urgency of the offense requires such exceptions.

In Walker, a defendant charged with possession of marijuana claimed RCW 10.31.100(1) violated article I, section 7 by allowing an arrest for misdemeanor marijuana crimes without either a warrant or requiring the crime occur in the presence of the arresting officer. RCW 10.31.100(1) exempts any misdemeanor involving "use or possession of cannabis" from the requirement that the crime occur in the arresting officer's presence. The majority upheld the statute, noting that the Legislature had historically

delineated specific, limited instances in which an officer may arrest a person for a warrant based on probable cause alone. 157 Wn.2d at 315-17. If a legislatively enumerated exception was explicit and unambiguous, courts had permitted the legislature to expand an officer's authority to arrest. Id. In a concurring opinion, three justices cautioned that article I, section 7 only allows the legislature to deviate from the warrant requirement in the "rarest of circumstances." Id. at 324 (Chambers, J., concurring, quoting Ladson, 138 Wn.2d at 352). Statutory exceptions must be firmly rooted in the established common law principles recognized when the constitution was adopted. Id. at 325. The concurring justices would have held that marijuana possession should not be exempt from the warrant or "in the presence" requirements because it was not a serious felony and did not involve violence or the threat of violence as did most other exceptions. Id. at 327.

Unlike the exception for marijuana, RCW 10.31.100 does not authorize an officer to arrest a person for drug traffic loitering without a warrant, unless the officer witnesses the commission of the crime. Hockett did not arrest Ortega under a statutorily recognized exception to the "in the presence" requirement.

a. Absent an exception, the arresting officer must observe the commission of the misdemeanor. RCW 10.31.100 is a "very specific" statute. Staats, 139 Wn.2d at 768 n.3. The "enumerated statutory exceptions to the warrant requirement are exclusive" and no arrest may occur for violations of the law that are not listed if they were not committed in the presence of the arresting officer. Id. Any ambiguity in the statute must be construed in the light most favorable to the defendant. Id. at 769 (citing McDonald, 92 Wn.2d at 38). By its terms, a police officer "even with probable cause, may not arrest a person for a misdemeanor committed outside the presence of the officer, unless the officer has a warrant." Hornaday, 105 Wn.2d at 123 (emphasis in original).

The plain language of RCW 10.31.100 demonstrates that the offense must be "committed in the presence of the officer" to authorize a warrantless arrest. It is "the officer" who observed the commission of the crime who is authorized to make an arrest, not any police officer. See e.g., State v. Grande, 164 Wn.2d 135, 140, 187 P.3d 248 (2008) (strictly construing "the person" language in RCW 10.31.100(1) as permitting arrest only for the specific individual observed to commit the crime); State v. Roberts, 142

Wn.2d 471, 512-13, 14 P.3d 713 (2000) (construing accomplice liability statute's provision that aiding in "the crime" means the specific crime charged, not any crime).

RCW 10.31.100 specifically authorizes an officer to arrest a person at the request of a fellow officer in some circumstances. The statute provides that "[a]n officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed" to arrest or detain the suspected driver. RCW 10.31.100(6). For a traffic infraction committed in the presence of another officer, RCW 10.31.100(6) directs that "[t]he request by the witnessing officer shall give an officer the authority to take appropriate action under the laws of the state of Washington." Id.

By specifically providing for an officer to arrest a suspect based on a "request by the witnessing officer" in one circumstance, the Legislature demonstrated it did not intend that a "request by the witnessing officer" provided authority to arrest a suspect under other circumstances. See Staats, 139 Wn.2d at 768 n.3 ("the enumerated statutory exceptions to the warrant requirement are exclusive" under the doctrine *expressio unis est exclusion alterius*).

The "in the presence" requirement must be strictly construed and enforced by its terms, requiring that the commission of the

crime occur in the presence of the same officer who makes the arrest without a warrant.

b. A crime occurs "in the presence of the officer" when that officer personally observes the offense through her own senses. A crime is committed in an officer's presence when the officer observes the crime being committed by her own senses. Hornaday, 105 Wn.2d at 126; see e.g., Brock v. United States, 12 F.2d 370, 373 (8th Cir. 1926) (finding insufficient grounds for warrantless arrest when officers "did not see [defendant] commit any such misdemeanor, nor did any of their other four senses present to them any evidence of such a commission.").

In Hornaday, an officer noticed a strong odor of liquor on the breath of a young man who appeared intoxicated. 105 Wn.2d at 122. The defendant was too young to legally consume alcohol. Id. The officer arrested him without a warrant for the misdemeanor being a minor in possession of alcohol.

The court closely examined the requirement that a misdemeanor arrest be committed in the presence of the officer. Id. at 126-27. The arresting officer had evidence Hornaday had illegally consumed alcohol in the past, but he did not see the crime actually occur. His observations did not satisfy the "in the

presence" rule necessary to authorize the arrest, because "[e]vidence of present possession, not past possession, is needed to satisfy the 'in the presence' requirement." Id.

The Hornaday Court also considered the exceptions to the requirement that the arresting officer observe the actual commission of the crime. 105 Wn.2d at 128-29. For marijuana offenses, RCW 10.31.100(1) gives an officer authority to arrest a person if she has "probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor involving the use or possession of cannabis." Id. If an officer could otherwise arrest a person for a crime that had been committed, this language would be unnecessary. 105 Wn.2d at 129. The different statutory language shows that the arresting officer must observe a crime as it occurs to have authority to make an arrest absent a warrant. Id. In the case at bar, Hockett arrested Ortega without having seen him commit a crime in his presence.

c. The "fellow officer" rule does not provide authority of law to arrest a person for a misdemeanor under Washington law. Probable cause to arrest a person may be based on information gathered by a fellow officer. State v. Maesse, 29 Wn.App. 642, 647, 629 P.3d 1349, rev. denied, 96 Wn.2d 1009 (1981). Yet

probable cause does not alone constitute authority to arrest a person under article I, section 7. Tibbles, 169 Wn.2d at 369.

The fellow officer rule is a doctrine developed under the Fourth Amendment permitting courts to evaluate whether there is probable cause supporting an arrest based on the collective knowledge of the officers involved, even when the arresting officer did not know the substance of the information authorizing the arrest. Id. "The fellow officer rule was not available at common law." State v. Ortega, 159 Wn.App. 889, 898, 248 P.3d 1062, rev. granted, 171 Wn.2d 1031 (2011). The legislature has not adopted it and our courts have not used it to authorize misdemeanor arrests. Id.[6]

In Maesse, several officers at the scene of a burning house independently gathered information leading them to conclude the fire was set by arson and the suspect was a person watching the fire burn. 29 Wn.App. at 643-44. One officer directed another to arrest the defendant and the arresting officer did not know all of the information known to the officer ordering the arrest. The Court of

Appeals adopted the rule used in other jurisdictions and originating from Whitely v. Warden of Wyoming Penitentiary, 401 U.S. 560, 568, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971), permitting probable cause to rest on knowledge possessed by a fellow officer. Id. at 645-46. It held that probable cause to arrest may be based on information known to the officer who directed the arrest, even if the same information was not known the arresting officer. Id. at 647.

Maesse involved an arrest for a felony offense. It did not discuss the "in the presence" rule that governs misdemeanor arrests. The fellow officer rule has never been extended to misdemeanors in Washington, which has always treated misdemeanors differently than felonies for purpose of authorizing an arrest. Hornaday, 105 Wn.2d at 129-30 (in context of authority to arrest, there is a "recognized distinction between felonies and misdemeanors"); RCW 10.31.100 (authorizing officer to arrest a person without a warrant if the officer has "probable cause to believe that a person has committed or is committing a felony." (emphasis added.)).

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[6] The only published case discussing the fellow officer rule in the context of a misdemeanor arrest is Torrey v. City of Tukwila, 76 Wn.App. 32, 882 P.2d 799 (1994). But the issue in Torrey was whether an arrest violated the Fourth Amendment or federal law. Id. at 37, 40. The Court of Appeals correctly ruled

The "in the presence" limitation does not negate officers' ability to work in teams and share responsibilities even when investigating misdemeanor offenses. An officer who did not witness the misdemeanor may stop and detain a person reasonably suspected of criminal activity. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 20 L.Ed.2d 889 (1968). The "in the presence" requirement deprives an officer of authority of law to arrest, handcuff, thoroughly search, and take into custody a person suspected of committing a misdemeanor loitering offense when that officer did not witness the commission of the crime.

4. The officer who arrested Ortega for a misdemeanor loitering offense did not observe the commission of the crime. The Court of Appeals correctly explained that the prosecution was required to prove that the arresting officer observed the commission of the misdemeanor offense. Ortega, 159 Wn.App. at 896-98. But the Court of Appeals misapprehended the record in

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that Torrey was inapposite. Ortega, 159 Wn.App. at 898.

reaching its conclusion that McLaughlin actually participated in the arrest. Id. at 899. McLaughlin did not arrest Ortega.[7]

McLaughlin requested other officers custodially arrest two men suspected of unlawful loitering. RP 97. Hockett received McLaughlin's description, went to the location, and "immediately" arrested Ortega. RP 98. He put Ortega in handcuffs right away and searched Ortega's person and pockets, "looking for narcotics" and contraband. RP 98, 114. He did "a thorough search" because "this individual was in custody." RP 114.

The prosecutor asked McLaughlin how he let Hockett know that he arrested the correct suspect and McLauglin answered: "I packed up my gear and left my vantage point and went to where they had the two individuals stopped, and advised them they had the correct individuals." RP 28. Hockett agreed that it was after the arrest that McLaughlin confirmed Ortega was the person he thought he saw on the street, although Hockett was not sure if this confirmation occurred at the police precinct or on the street as the officers transported Ortega and Cuevas back to the precinct. RP

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[7] The trial court's findings of fact did not specify when McLaughlin told Hockett that he arrested the correct loitering suspects. Appellant's Opening Brief specifies the inadequacies in the trial court's written findings. See Opening Brief, at 1-2, 11-13, 20-22.

99-100. Hockett was the officer who arrested and searched Ortega, and he completed these actions before McLaughlin confirmed Ortega was the person suspected of drug traffic loitering.

The Court of Appeals decision offered a scenario involving Officers A and B. 159 Wn.App. at 899. In its example, Officers A and B are in the same car, and A witnesses a misdemeanor while B does not. Id. Without citing any authority, the court concluded that both officers would have authority to arrest the suspect. Id. This unexplained conclusion misstates the law and unwittingly creates a fellow officer rule even though the Court of Appeals simultaneously held that officers are prohibited from arresting suspects for misdemeanors unless they personally witnessed the offense occur or an existing exception to that rule applied.[8]

It has long been required and is expressly mandated by RCW 10.31.100 that the misdemeanor must occur "in the presence of the officer" making the arrest. When one officer observes an offense being committed, she may convey that information to

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[8] As Judge Grosse noted in his brief concurring opinion, the majority opinion elaborated upon the fellow officer rule in a manner that would eviscerate that rule, which was not what the Court intended. 159 Wn.App. at 899 (Grosse, J., concurring).

another officer. The second officer lacks authority of law to arrest the suspect, but may detain the suspect to investigate.

"It is for the legislature to extend the authority of law enforcement officers to arrest for misdemeanors not committed in their presence." McDonald, 92 Wn.2d at 38. If the legislature intends to extend an officer's authority to arrest a person, "it should do so with clear, unambiguous, and unequivocal language." Id. Any such extensions must comport with the constitution's and common law's entrenched respect for individual privacy and mindful of the few carefully drawn and rare exceptions to the warrant requirement permitted under article I, section 7.

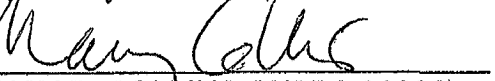
5. The fruits of the unlawful search and arrest must be suppressed. Ortega's arrest and search were conducted by an officer who lacked the authority of law and consequently violated Article I, section 7. "The evidence gathered during that search is therefore inadmissible." Buelna Valdez, 167 Wn.2d at 778; O'Neill, 148 Wn.2d at 585. Evidence of the cocaine found in Ortega's coat pocket and money in his pants pockets must therefore be suppressed.

D. CONCLUSION.

For the foregoing reasons, Gregorio Ortega respectfully requests this Court hold that he was arrest was invalid and the fruits of the invalid arrest should be suppressed.

DATED this 21st day of September 2011.

Respectfully submitted,



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APPENDIX A

RCW 10.31.100. Arrest without warrant

A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property or involving the use or possession of cannabis, or involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person.

(2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person; or

(b) A foreign protection order, as defined in RCW 26.52.010, has been issued of which the person under restraint has knowledge and the person under restraint has violated a provision of the foreign protection order prohibiting the person under restraint from contacting or communicating with another person, or excluding the person under restraint from a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime; or

(c) The person is sixteen years or older and within the preceding four hours has assaulted a family or household member as defined in RCW 10.99.020 and the officer believes: (i) A felonious assault has occurred; (ii)

an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence of each person involved, including whether the conduct was part of an ongoing pattern of abuse.

(3) Any police officer having probable cause to believe that a person has committed or is committing a violation of any of the following traffic laws shall have the authority to arrest the person:

(a) RCW 46.52.010, relating to duty on striking an unattended car or other property;

(b) RCW 46.52.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;

(c) RCW 46.61.500 or 46.61.530, relating to reckless driving or racing of vehicles;

(d) RCW 46.61.502 or 46.61.504, relating to persons under the influence of intoxicating liquor or drugs;

(e) RCW 46.20.342, relating to driving a motor vehicle while operator's license is suspended or revoked;

(f) RCW 46.61.5249, relating to operating a motor vehicle in a negligent manner.

(4) A law enforcement officer investigating at the scene of a motor vehicle accident may arrest the driver of a motor vehicle involved in the accident if the officer has probable cause to believe that the driver has committed in connection with the accident a violation of any traffic law or regulation.

(5) Any police officer having probable cause to believe that a person has committed or is committing a violation of RCW 79A.60.040 shall have the authority to arrest the person.

(6) An officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest, or issue a notice of traffic infraction to the driver who is believed to have committed the infraction. The request by the witnessing officer shall give an officer the authority to take appropriate action under the laws of the state of Washington.

(7) Any police officer having probable cause to believe that a person has committed or is committing any act of indecent exposure, as defined in RCW 9A.88.010, may arrest the person.

(8) A police officer may arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that an order has been issued of which the person has knowledge under chapter 10.14 RCW and the person has violated the terms of that order.

(9) Any police officer having probable cause to believe that a person has, within twenty-four hours of the alleged violation, committed a violation of RCW 9A.50.020 may arrest such person.

(10) A police officer having probable cause to believe that a person illegally possesses or illegally has possessed a firearm or other dangerous weapon on private or public elementary or secondary school premises shall have the authority to arrest the person.

For purposes of this subsection, the term "firearm" has the meaning defined in RCW 9.41.010 and the term "dangerous weapon" has the meaning defined in RCW 9.41.250 and 9.41.280(1) (c) through (e).

(11) Except as specifically provided in subsections (2), (3), (4), and (6) of this section, nothing in this section extends or otherwise affects the powers of arrest prescribed in Title 46 RCW.

(12) No police officer may be held criminally or civilly liable for making an arrest pursuant to subsection (2) or (8) of this section if the police officer acts in good faith and without malice.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GREGORIO ORTEGA, Petitioner.	)))))))))	NO. 85788-1

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MICHAEL PELLICCIOTTI, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF SEPTEMBER, 2011.

X_____

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