

66566-9

66566-9

No. 66566-9

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL EDWARD CONNER,

Appellant.

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**FILED**  
COURT OF APPEALS  
DIVISION ONE  
JUL 25 2011

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

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APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

A sheriff's deputy approached a car parked in an empty parking lot in the middle of the afternoon. Michael Conner was in the passenger seat and Salli Bosma was in the driver's seat. Suspicious that the couple was engaged in criminal activity, the deputy asked to search the car. Ms. Bosma exited the car carrying her purse and the deputy asked to search the purse. Inside he found a glass pipe containing apparent methamphetamine residue and a baggy containing a small amount of apparent methamphetamine. The deputy arrested Ms. Bosma.

The deputy then approached Mr. Conner and noticed a large bulge in his front pocket that the deputy thought could be a weapon. Mr. Conner said the object was a large amount of cash and after patting the pocket, the deputy determined the object was not a weapon. Nonetheless, the deputy further searched the pocket, retrieving a baggy containing apparent methamphetamine.

The trial court concluded that, once Ms. Bosma was arrested, Mr. Conner was also lawfully seized. But that conclusion is erroneous, because the deputy did not have a reasonable, articulable suspicion that Mr. Conner was engaged in criminal activity. In addition, once the officer discerned the object inside Mr.

Conner's pocket was not a weapon, he was not authorized to search the pocket further. The search was therefore unlawful and all evidence subsequently seized from Mr. Conner must be suppressed.

In the alternative, because Mr. Conner did not expressly waive on the record his constitutional right to a jury trial, his conviction must be reversed and remanded for a new trial.

#### B. ASSIGNMENTS OF ERROR

1. Mr. Conner was seized in violation of the Fourth Amendment and article I, section 7.

2. Mr. Conner was searched in violation of the Fourth Amendment and article I, section 7.

3. The trial court erred in finding Mr. Conner consented to the search of his pocket.

4. The court erred in denying the motion to suppress.

5. Mr. Conner's constitutional right to a jury trial was violated.

#### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In order to justify a warrantless seizure of a person, an officer must have an individualized, reasonable and articulable suspicion of criminal activity. Mere proximity to or association with

another individual for whom there is probable cause to arrest does not provide the individualized suspicion required. Did the arrest of Ms. Bosma for possession of methamphetamine justify the warrantless detention of Mr. Conner, where the officer relied only on Mr. Conner's proximity to and association with Ms. Bosma?

2. A "weapons frisk" must be justified at its inception and reasonably related in scope to the initial justification. Even if an officer has reasonable grounds to initiate a weapons frisk, once he determines the person is unarmed, he may not prolong the search. Was the search of Mr. Conner's pocket unlawful where the officer continued to search the pocket after determining Mr. Conner was unarmed?

3. Was Mr. Conner's "consent" to the search of his pocket invalidated by the officer's prior unlawful seizure of him where no intervening circumstances purged the taint?

4. A criminal defendant may waive his constitutional right to a jury trial. But for a waiver to be sufficient, the record must contain the defendant's personal expression of waiver; counsel's waiver on the defendant's behalf is not sufficient. Did Mr. Conner waive his constitutional right to a jury trial where the record does not contain his personal expression of waiver?

#### D. STATEMENT OF THE CASE

The State charged Michael Conner with one count of possession of methamphetamine, RCW 69.50.4013. CP 26. Prior to trial, a CrR 3.6 hearing was held to determine whether the methamphetamine should be suppressed.<sup>1</sup>

At the hearing, Whatcom County Sheriff Deputy Michael Taddonio testified he was on patrol at around 3 p.m. on February 26, 2010. 12/07/10RP 6. He was driving on Slater Road when he noticed two cars parked in a Department of Natural Resources parking lot. 12/07/10RP 6-8. A permit is required to park in that lot. 12/07/10RP 6. The lot is in a rural area and is used primarily by hikers and fishermen. 12/07/10RP 6-7.

Deputy Taddonio thought it was odd that the two cars would be parked there that day due to the intermittent rain, so he pulled into the lot in order to investigate. 12/07/10RP 8-9. No other cars were parked in the lot. 12/07/10RP 8. As the deputy pulled in, he noticed someone sitting in one of the cars. 12/07/10RP 9. This further aroused his suspicions, as people generally park their cars and leave them in the lot and do not remain in their vehicles. 12/07/10RP 9-10. The deputy also noticed that the ground under

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<sup>1</sup> Both Mr. Conner and his co-defendant Salli Bosma filed motions to suppress and a joint CrR 3.6 hearing was held.

the cars was dry, indicating the cars had been parked there for some time. 12/07/10RP 10. Neither of the cars displayed the required parking permit. 12/07/10RP 10.

Deputy Taddonio parked his car, exited and walked toward the occupied car. 12/07/10RP 10. The deputy was in full uniform, wearing a badge and holstered firearm. 12/07/10RP 45. As he approached the car, he noticed a woman sitting in the driver's seat and a man in the passenger seat. 12/07/10RP 10. The woman rolled down her window and the deputy engaged the two people in conversation. 12/07/10RP 10. He asked them what they were doing and why they did not have the required parking permits. 12/07/10RP 11. The woman said they were friends and just talking and had arranged to meet in the parking lot because her boyfriend did not like her talking to the man. 12/07/10RP 12, 40-41. They said the man had recently been at the nearby casino. 12/07/10RP 12. This further aroused the deputy's suspicions, as he thought the two could have simply arranged to meet at a restaurant in the casino rather than a deserted parking lot. 12/07/10RP 12.

Deputy Taddonio asked the woman for identification. 12/07/10RP 13. As she gave him her identification, the man handed over his identification as well, although the deputy did not

specifically ask for it. 12/07/10RP 13. The woman was Salli Bosma and the man was Michael Conner. 12/07/10RP 10-11. The deputy ran the identifications through dispatch on his portable radio while standing next to Ms. Bosma's car. 12/07/10RP 13-14. Neither Ms. Bosma nor Mr. Conner had a warrant. 12/07/10RP 30. The deputy immediately returned their identifications. 12/07/10RP 14.

The deputy asked if there were any drugs or drug paraphernalia in the car. 12/07/10RP 14, 29. The couple said there were not. 12/07/10RP 15, 29. At that point, Ms. Bosma appeared to become nervous and began looking around. 12/07/10RP 14-15. The deputy then asked if he could search the car. 12/07/10RP 15. They said he could. 12/07/10RP 15. The deputy asked them to exit the car so that he could search it. 12/07/10RP 19, 46. As Ms. Bosma exited the car, she held her purse tightly to her body. 12/07/10RP 15. The deputy found this suspicious. 12/07/10RP 16. He asked if he could search the purse. 12/07/10RP 16. Ms. Bosma gave him the purse and he searched it, finding a sunglass case inside. 12/07/10RP 16. Inside the sunglass case was a glass pipe containing what the deputy believed was methamphetamine residue and a plastic baggy

containing what looked like small flecks of methamphetamine.

12/07/10RP 16-17, 22. The deputy arrested Ms. Bosma, handcuffed her, and placed her inside his patrol car. 12/07/10RP 17-19. He then called for backup. 12/07/10RP 23.

As Deputy Taddonio placed Ms. Bosma in the patrol car, he noticed Mr. Conner walking back and forth behind Ms. Bosma's car with his hand in his pocket. 12/07/10RP 19. The deputy thought Mr. Conner might be engaged in using or selling drugs along with Ms. Bosma. 12/07/10RP 21. He approached Mr. Conner and "further inquire[d] about the presence of drugs." 12/07/10RP 21. As he approached, the deputy saw "a fairly large bulge" in Mr. Conner's right front pant pocket. 12/07/10RP 19-20. This concerned him, as he believed "a bulge of that size could be any number of weapons in a pocket." 12/07/10RP 20. The deputy asked Mr. Conner what was in the pocket and he said it was a large amount of cash. 12/07/10RP 20. The deputy asked Mr. Conner if he could pat him down and Mr. Conner said he could. 12/07/10RP 20. The deputy placed Mr. Conner's hands behind his head with his fingers laced together. 12/07/10RP 47. He then felt outside Mr. Conner's pocket and "was able to feel . . . a large . . . wad of money." 12/07/10RP 20.

The deputy testified that, at that point, he knew the object in the pocket was not a weapon. 12/07/10RP 47-48. Nonetheless, he asked Mr. Conner if there was anything else "illegal" inside the pocket and whether he could further search Mr. Conner "to verify that there wasn't anything illegal." 12/07/10RP 20. Mr. Conner said he could. 12/07/10RP 20. The deputy looked inside the pocket and saw "a plastic bag sticking out of the center of the money." 12/07/10RP 20-21. The bag contained apparent methamphetamine. 12/07/10RP 21-22. The deputy arrested Mr. Conner. 12/07/10RP 23.

By that point, Officer Johnson had arrived. 12/07/10RP 23. As Officer Johnson walked Mr. Conner to his car, a pipe fell out of Mr. Conner's pants and onto the ground. 12/07/10RP 23-24.

Deputy Taddonio advised Mr. Conner of his Miranda<sup>2</sup> rights and Mr. Conner agreed to speak to him. 12/07/10RP 23. Mr. Conner told the deputy that he and Ms. Bosma had smoked methamphetamine in the car in the parking lot. 12/07/10RP 24.

The trial court denied both Ms. Bosma's and Mr. Conner's motions to suppress.<sup>3</sup> The court found Ms. Bosma consented to

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

<sup>3</sup> A copy of the trial court's written findings of fact and conclusions of law is attached as an appendix. The findings and conclusions were filed after the

the search of her purse and her car and the deputy did not "progressively intrude" into her privacy. Sub #55 at 5.

Regarding Mr. Conner, the court found that once Deputy Taddonio searched Ms. Bosma's purse, he had a reasonable suspicion Mr. Conner was involved in a crime—either drug possession or sale—and therefore had a basis to detain Mr. Conner. Sub #55 at 5-6. Mr. Conner's "furtive movements" justified the search of his pocket. Id. The court found:

[O]nce the drugs were found in Ms. Bosma's purse there were reasonable grounds to detain Mr. Conner. He was detained. His furtive movements to his pockets justified the pat down of the bulge in his left front pocket. His further inquiry into verifying the identity of the bulge as currency was voluntary and resulted in the discovery of the drugs. Even if not voluntary, the further examination of the bulge was justified as part of the pat down search previously determined to be permissible.

Id.

The court concluded that all of the evidence seized from Mr. Conner—the contents of his pocket, the pipe that fell on the ground, and his custodial statements—was admissible. Sub #55 at 5-6.

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notice of appeal and a supplemental designation of clerk's papers has been filed for the document.

After a stipulated bench trial, the court found Mr. Conner guilty of possession of methamphetamine as charged.<sup>4</sup> CP 8-12.

E. ARGUMENT

1. ALL OF THE EVIDENCE SEIZED FROM MR. CONNER MUST BE SUPPRESSED BECAUSE IT WAS OBTAINED AS THE RESULT OF AN UNCONSTITUTIONAL SEARCH AND SEIZURE

a. Warrantless searches and seizures are per se unreasonable subject to a few narrow and carefully drawn exceptions. The Fourth Amendment guarantees "[the] right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Washington State Constitution goes further and requires actual authority of law before the State may disturb an individual's private affairs. State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007); Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law").

Warrantless searches and seizures are presumed unreasonable in violation of both the Fourth Amendment and article I, section 7. Day, 161 Wn.2d at 893. Courts have reserved a few "jealously and carefully drawn exceptions to the warrant

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<sup>4</sup> The court also found Ms. Bosma guilty of possession of methamphetamine. 12/07/10RP 164. Her appeal is currently pending in this Court, No. 66604-5.

requirement." State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the burden to show that the particular search or seizure falls within one of these exceptions. Id.

When reviewing the denial of a suppression motion, the Court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (citing State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. Garvin, 166 Wn.2d at 249 (citing State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). The Court reviews challenged conclusions of law de novo. Garvin, 166 Wn.2d at 249 (citing State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002)).

b. Mr. Conner was unlawfully seized. The trial court concluded that, once Deputy Taddonio found suspected methamphetamine in Ms. Bosma's purse, he had reasonable grounds to detain Mr. Conner and Mr. Conner was actually seized at that point. Sub #55 at 5. The court's conclusion is erroneous. Mr. Conner's proximity to and association with Ms. Bosma did not provide the deputy with the individualized suspicion required to

justify his warrantless seizure of Mr. Conner. Because the officer had no other reasonable articulable basis to believe Mr. Conner was involved in criminal activity, the seizure was unlawful.

One exception to the constitutional ban on warrantless searches and seizures is the "Terry" investigative stop. Day, 161 Wn.2d at 895; Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A Terry investigative stop authorizes police officers to detain a person briefly for questioning without grounds for arrest "if they reasonably suspect, based on 'specific, objective facts' that the person detained is engaged in criminal activity or a traffic violation." Day, 161 Wn.2d at 896 (citing Duncan, 146 Wn.2d at 172-74; Terry, 392 U.S. at 21). To justify a Terry stop, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21.

Under the Fourth Amendment, whether the officer had grounds for a Terry stop and search is tested against an objective standard. Day, 161 Wn.2d at 896. By contrast, under article I, section 7, the Court considers the totality of the circumstances, including the officer's subjective belief. Id. at 896-97. Our

constitution does not tolerate pretextual stops. Id. (citing State v. Ladson, 138 Wn.2d 343, 352, 979 P.2d 833 (1999)).

Both the Fourth Amendment and article I, section 7 require that the officer's suspicion be individualized. Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); State v. Rankin, 151 Wn.2d 689, 699, 92 P.3d 202 (2004); State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980); State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980). That is because "[t]he Constitution's protections against illegal search and seizure are 'possessed individually.'" State v. Grande, 164 Wn.2d 135, 144, 187 P.3d 248 (2008) (quoting Ybarra v. Illinois, 444 U.S. 85, 92, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979)). A person's mere proximity to or association with others independently suspected of criminal activity does not justify a Terry stop. Thompson, 93 Wn.2d at 841 (citing Ybarra, 444 U.S. 85; Larson, 93 Wn.2d 638).

In Thompson, while patrolling on Interstate 5, a State Patrol trooper received a radio report that an occupant of a northbound Cadillac was waving a handgun. Thompson, 93 Wn.2d at 839. Shortly thereafter, the trooper saw a car fitting the description exit the freeway and he followed it to the parking lot of a nearby shopping center. Id. The Cadillac stopped next to a green

Chrysler, which was parked in a spot "somewhat isolated" from other vehicles. Id. As the trooper parked next to the Cadillac and ordered the occupants out of the car, Thompson, who was sitting in the driver's seat of the nearby Chrysler, got out of his car and walked rapidly toward the shopping center. Id. at 839-40. The trooper stopped Thompson and subsequently arrested him on an outstanding warrant. Id. at 840.

The Washington Supreme Court reversed Thompson's conviction. The court held the facts known to the trooper did not create a reasonable suspicion that Thompson was involved in criminal conduct. Id. at 841. Because the pistol was brandished solely by the occupants of the Cadillac and not by Thompson, this fact was "irrelevant to any suspicion that Thompson had been involved in criminal activity." Id. Thompson's "mere proximity to others independently suspected of criminal activity" did not justify the stop. Id. The other facts known to the officer—that the Cadillac pulled up next to Thompson's car and that Thompson walked hurriedly away without looking back—did not create a reasonable suspicion that he was involved in criminal conduct. Id.

The facts known to the officer in this case were similarly insufficient to create a reasonable suspicion that Mr. Conner was

involved in criminal activity. Mr. Conner's mere proximity to Ms. Bosma did not justify the stop. Even if the deputy knew Ms. Bosma was carrying methamphetamine and a drug pipe in her purse, this fact was "irrelevant" to any suspicion that Mr. Conner was involved in criminal activity. Thompson, 93 Wn.2d at 841. The deputy was aware of no facts suggesting that Mr. Conner was also possessing, using, or selling drugs. The deputy did not see Mr. Conner engage in any behavior suggesting drug use. He did not detect any suspicious odors. A person's mere proximity to someone in possession of drugs cannot be sufficient to justify a warrantless seizure of that person.

The other facts known to the officer—that Mr. Conner and Ms. Bosma were sitting together in a parked car in an empty, rural parking lot without the required parking permits—were also insufficient to justify the stop of Mr. Conner. The Washington Supreme Court has refused to extend Terry to parking infractions. See Day, 161 Wn.2d at 897-98. Although officers may approach and speak with the occupants of a parked car, if they suspect only that a parking violation has been committed, there is no ground for a Terry stop. Id. at 898. For example, in Day, an officer observed Day sitting in a parked car in an "improved access facility" where

parking permits were required. Id. at 892. As the officer approached the car, he became suspicious it was associated with drug use, because it was cluttered with cigarette lighters and rubber gloves, among other things. Id. The officer seized Day when he saw an empty handgun case on the floor near Day's feet. Id. But the seizure was unlawful, because the officer had, at most, a reasonable, articulable suspicion that Day was committing a parking infraction. Id. at 898. That was insufficient to justify the Terry stop. Id.

Similarly, here, Deputy Taddonio had, at most, a reasonable, articulable suspicion that Mr. Conner was committing a parking infraction. That was insufficient to justify the Terry stop. Id. Mr. Conner's mere proximity to and association with Ms. Bosma did not create a reasonable, individualized suspicion that Mr. Conner himself was engaged in criminal conduct. Thompson, 93 Wn.2d at 841. Thus, the warrantless seizure of Mr. Conner was unlawful.

c. The search of Mr. Conner's pocket was unlawful.

The trial court concluded Mr. Conner's "furtive movements to his pockets" justified a pat-down search of his front pants pocket. Sub #55 at 5. The court concluded the deputy's further search of the pocket—in which he looked into the pocket and saw a baggy

containing apparent methamphetamine—was justified "as part of the pat down search previously determined to be permissible." Id. at 6. In the alternative, the court concluded the search of the pocket was justified by Mr. Conner's "voluntary" consent. Id.

The court's conclusions are erroneous. Even if the initial pat-down search of the pocket was justified on the basis of officer safety, the deputy was not permitted to search the pocket further once he determined it did not contain a weapon. In addition, Mr. Conner's "consent" to the search was not valid, because it was obtained through exploitation of the prior illegal search and seizure. Thus, the search of the pocket was unlawful.

i. The search of the pocket exceeded the proper scope of a pat-down frisk. Under both the Fourth Amendment and article I, section 7, when an officer stops a person, he or she may, under certain circumstances, frisk the person as a matter of self protection. State v. Kennedy, 107 Wn.2d 1, 11, 726 P.2d 445 (1986); Terry, 392 U.S. at 24. A "frisk" or pat-down search for weapons is "a serious intrusion upon the sanctity of the person" and may not be undertaken lightly. Terry, 392 U.S. at 17.

To justify a frisk without probable cause to arrest, the officer must have a reasonable belief, based on objective facts, that the

suspect is armed and presently dangerous. State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008); Terry, 392 U.S. at 21-24. The following are required for a valid frisk: (1) the initial stop is legitimate; (2) there is a reasonable safety concern justifying a protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes. Duncan, 146 Wn.2d 172 (citing State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)). Assuming, *arguendo*, the officer was justified in initiating a frisk based on officer safety concerns, the search was nonetheless unlawful because it was not limited in scope to the protective purposes.

The scope of a search incident to a Terry stop is "constitutionally limited to that 'sufficient to assure the officer's safety.'" State v. Larson, 88 Wn. App. 849, 855, 946 P.2d 1212 (1997) (quoting Kennedy, 107 Wn.2d at 12); see also Terry, 392 U.S. at 20. The officer may conduct only a limited search for weapons in order to protect himself or persons nearby from physical harm. Terry, 392 U.S. at 30. A frisk may not be used as a pretext to search for incriminating evidence when the officer has no reasonable grounds to believe the suspect is armed. Sibron v. New York, 392 U.S. 40, 64, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968).

"[A] Terry frisk for weapons must be brief and nonintrusive." State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). Once an officer determines there are no weapons, the permissible scope of the search ends and the officer needs probable cause to search further. Id. In Garvin, an officer stopped Garvin's car and patted him down for weapons. Id. at 245. As he patted Garvin's right front pants pocket, he felt something in the coin pocket that he recognized by feel as the type of plastic baggie used by drug users to package illegal drugs. Id. at 245-46. The officer did not feel any weapons or hard objects when he first felt the coin pocket but continued to squeeze the pocket in order to identify what was in it despite knowing it did not contain a weapon. Id. at 246-47. The Washington Supreme Court held the officer exceeded the permissible scope of a limited Terry frisk. Id. at 249. Because the officer immediately ascertained the object was not a weapon but continued to squeeze the contents, the search was unlawful and the contraband was suppressed. Id. at 254-55.

Garvin requires this Court similarly conclude Deputy Taddonio's search of Mr. Conner's pocket was unlawful. The question is whether the officer immediately recognized he was feeling contraband or whether he continued his search after

realizing there was no weapon. Id. at 252 (citing State v. Hudson, 124 Wn.2d 107, 119, 874 P.2d 160 (1994) ("Without probable cause or an exception, any additional search after determining the suspect is unarmed is 'constitutionally invalid'") (quoting Minnesota v. Dickerson, 508 U.S. 366, 379, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993))).

Deputy Taddonio testified that when he saw the "fairly large bulge" in Mr. Conner's pocket, he believed it "could be any number of weapons." 12/07/10RP 19-20. He asked Mr. Conner what it was and he said it was a large amount of cash. 12/07/10RP 20. When the deputy felt the outside of the pocket he "was able to feel . . . a large . . . wad of money." 12/07/10RP 20. The deputy testified that, at that point, he knew the object was not a weapon.

12/07/10RP 47-48. It was only after he looked inside the pocket that he discerned there was "a plastic bag sticking out of the center of the money." 12/07/10RP 20-21. Because the deputy did not immediately recognize he was feeling contraband but continued his search after realizing there was no weapon, the search exceeded the permissible scope of a Terry frisk. Garvin, 166 Wn.2d at 252.

ii. Mr. Conner's "consent" was vitiated by the deputy's unlawful search and seizure of him. After patting down the outside of Mr. Conner's pocket, Deputy Taddonio determined the object inside was not a weapon. 12/07/10RP 47-48. Nonetheless, the deputy asked if there was anything else "illegal" inside the pocket and whether he could search further "to verify that there wasn't anything illegal." 12/07/10RP 20. Mr. Conner said he could. 12/07/10RP 20. But Mr. Conner's "consent" to the search was not valid because it was obtained through exploitation of the illegal seizure.

When a detention is unlawful, any subsequent actions of police are invalid unless the defendant's consent purged the taint of the illegal detention. State v. Armenta, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997); State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991); State v. Jensen, 44 Wn. App. 485, 490, 723 P.2d 443 (1986) (even if consent to search is voluntary in due process sense, State must also demonstrate consent was not obtained by exploitation of prior illegal search or seizure); cf. Brown v. Illinois, 422 U.S. 590, 601-02, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975) (even if custodial statements obtained following an illegal arrest are "voluntary" for purposes of Fifth Amendment, statements must be

"sufficiently an act of free will to purge the primary taint") (quoting Wong Sun v. United States, 371 U.S. 471, 486, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

In evaluating the effect of the consent, the Court considers (1) the temporal proximity of the detention and subsequent consent; (2) the presence of significant intervening circumstances; (3) the purpose and flagrancy of the official's conduct; and (4) the giving of Miranda warnings. Brown, 422 U.S. at 603-04; Armenta, 134 Wn.2d at 17 (citing Taylor v. Alabama, 457 U.S. 687, 690, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982)); Jensen, 44 Wn. App. at 490. The question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Jensen, 44 Wn. App. at 490 (quoting Wong Sun, 371 U.S. at 487-88).

In Armenta, a police officer unlawfully seized Armenta without a reasonable articulable suspicion of criminal activity and then obtained his "consent" to search his vehicle. Armenta, 134 Wn.2d at 16. The question was whether the prior illegal detention vitiated that consent. Id. at 17. The court found significant that:

Armenta consented to the search immediately after he was unlawfully seized, with no intervening circumstances; he was not read his Miranda rights; and it was evident the officer was "fishing" for evidence of illegal drug trafficking. Id. In light of these circumstances, Armenta's consent, even if voluntary, was tainted by the prior illegal detention. Id.

Similarly, in Tijerina, officers stopped Tijerina's car for crossing a fog line but decided not to issue a citation. Tijerina, 61 Wn. App. at 628. Nonetheless, they prolonged the detention without a reasonable, articulable suspicion of criminal activity and obtained Tijerina's "consent" to search his vehicle. Id. at 628-29. The Court concluded the consent was invalid, because "there were no intervening circumstances between the illegal detention and the consent to search," and but for the illegal detention, the consent would not have been obtained. Id. at 630. The evidence seized from the car should have been suppressed. Id.

Courts in other jurisdictions agree that, where police officers unlawfully prolong a Terry stop in order to search for evidence of a crime, the detainee's "consent" to a search is vitiated by the unlawful detention. See, e.g., United States v. Washington, 490 F.3d 765, 777 (9th Cir. 2007) (consent fruit of illegal stop, as "no

time lapse," "no appreciable intervening circumstances," and police officer "was on a fishing expedition"); United States v. Perkins, 348 F.3d 965 (11th Cir. 2003) ("the continued detention of Perkins and Scott beyond the issuance of the traffic citation, during which Colston repeatedly asked if there were drugs in the car and called in a drug dog, was unlawful" and thus "Perkins' consent to the search of the car was the product of an unlawful detention"); United States v. Peters, 10 F.3d 1517 (10th Cir. 1993) (consent a fruit of unlawfully prolonged Terry stop); State v. Heath, 929 A.2d 390, 411 (Del. Super. 2006) (because of "lack of reasonable suspicion" to extend traffic stop, consent given during illegal portion of stop "is deemed tainted by that illegality"); State v. Smith, 286 Kan. 402, 184 P.3d 890 (2008) (law enforcement officers violate constitution by expanding scope of traffic stop to include search not related to purpose of stop, even if detainee has given permission for search); People v. Banks, 85 N.Y.2d 558, 562-63, 626 N.Y.S.2d 986, 650 N.Ed.2d 833 (1995) (consent fruit of illegally extended traffic stop, as delay in release was "for the specific purpose of effecting a search of the automobile"); State v. Robinette, 80 Ohio St. 3d 234, 685 N.E.2d 762 (1997) (consent fruit of illegal extension of traffic stop to question about drugs); Commonwealth v. Freeman, 563 Pa.

82, 757 A.2d 903 (2000) (consent fruit of illegal extension of traffic stop for very purpose of obtaining consent to search vehicle); State v. Parra, 941 A.2d 799, 805 (R.I. 2007) (consent fruit of prior unlawful continuation of passenger's detention after vehicle stop, as "[v]irtually no time had passed between defendant's detention and his consent, nor were there any intervening circumstances"); Harris v. Commonwealth, 266 Va. 28, 581 S.E.2d 206 (2003) (consent a fruit of illegal extension of traffic stop); Campbell v. State, 97 P.3d 781 (Wyo. 2004) (police officer exceeded lawful limits of traffic stop by questioning defendant about whether he had marijuana in his vehicle, making detention unlawful, and consent obtained thereafter tainted by such illegality).

Here, as discussed, Deputy Taddonio's initial seizure of Mr. Conner was unlawful, because he did not have a reasonable, articulable suspicion Mr. Conner was involved in criminal activity. Mr. Conner's "consent" to the search of his pocket was tainted by that illegality: he consented to the search immediately after he was detained, without any significant intervening circumstances; and the deputy did not give him Miranda warnings. Armenta, 134 Wn.2d at 17; Tijerina, 61 Wn. App. at 630.

In addition, the deputy's purpose in prolonging the stop was to search for evidence of a crime. After patting down the pocket and determining the object inside was not a weapon, the deputy asked Mr. Conner if there was anything else "illegal" in the pocket and whether he could further search it "to verify that there wasn't anything illegal." 12/07/10RP 20. Because the search was no longer justified as a frisk for weapons, the officer needed probable cause to conduct a further search of the pocket. See Garvin, 166 Wn.2d at 254; Terry, 392 U.S. at 21-24. The deputy's decision to prolong the stop without probable cause was unlawful, and Mr. Conner's "consent" to the search did not purge the taint of that illegality. Armenta, 134 Wn.2d at 17; Tijerina, 61 Wn. App. at 630. The consent was invalid.

d. All of the evidence seized from Mr. Conner must be suppressed. All evidence obtained, either directly or indirectly, as the result of an unlawful search or seizure must be suppressed. Wong-Sun, 371 U.S. at 484-85; Ladson, 138 Wn.2d at 359-60 (when a Terry stop is unlawful, a subsequent search and fruits of that search are inadmissible).

The extent to which evidence related to an illegal search or seizure may be suppressed depends on the extent to which the

evidence derives from exploitation of the illegality. Wong Sun, 371 U.S. at 488. If a defendant's custodial statements are obtained as a result of being in custody after an unlawful seizure and being confronted with evidence seized in an unlawful search pursuant to that seizure, the statements are inadmissible even if they are voluntary. State v. Byers, 88 Wn.2d 1, 10, 559 P.2d 1334 (1977), overruled on other grounds by State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984).

Here, all of the evidence seized from Mr. Conner was obtained as a direct result of the unlawful search and seizure of him. The evidence seized from Mr. Conner's pocket was obtained as a direct result of Deputy Taddonio's unlawful detention of Mr. Conner and his unlawful search of the pocket. Mr. Conner's arrest was a direct result of the evidence unlawfully seized from the pocket. After Mr. Conner was arrested and as he was being led to the patrol car, a pipe fell out of his pants and onto the ground. 12/07/10RP 23-24. That evidence was therefore obtained as a direct result of the unlawful arrest. Finally, Mr. Conner admitted to the officers that he smoked methamphetamine after he was unlawfully arrested and confronted with evidence seized during the unlawful search and seizure. 12/07/10RP 23-24. Therefore, the

confession is also fruit of the poisonous tree. Byers, 88 Wn.2d at 10. Because all of the evidence was "fruit of the poisonous tree" it must be suppressed. Wong Sun, 371 U.S. at 488.

2. MR. CONNER'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS VIOLATED WHERE THE RECORD DOES NOT CONTAIN HIS PERSONAL EXPRESSION OF WAIVER

a. A criminal defendant's waiver of his constitutional right to a jury trial is not valid unless the record contains his personal expression of waiver. The United States and Washington Constitutions guarantee the right to a jury trial in a criminal case. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."); Const. art. I, § 21 ("The right of a trial by jury shall remain inviolate."); Const. art. I, § 22 ("In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury.").

A criminal defendant may waive his constitutional right to a jury trial, as long as the waiver is voluntary, knowing, and intelligent. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). The State bears the burden of establishing the validity of a defendant's jury trial waiver, and the Court must indulge every reasonable presumption against waiver. State v. Wicke, 91

Wn.2d 638, 645, 591 P.2d 452 (1979). The Court reviews the validity of a defendant's jury trial waiver de novo. State v. Ramirez-Dominguez, 140 Wn. App. 233, 239, 165 P.3d 391 (2007).

The right to trial by jury in a criminal case is a personal right that cannot be waived by a person's attorney. State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994). Although it is not necessary to engage in a full colloquy as to the consequences of a waiver, such as is required when a person pleads guilty to a crime, the defendant must still utter a personal expression of waiver. Id. at 725 (citing Acrey, 103 Wn.2d at 207-08; Wicke, 91 Wn.2d 638; State v. Brand, 55 Wn. App. 780, 785 n.5, 780 P.2d 894 (1989)). In Wicke, an attorney's oral stipulation as the defendant stood beside him in open court was not sufficient to establish waiver. Wicke, 91 Wn.2d at 645. The Supreme Court has refused to infer a waiver when the record shows less than an affirmative, unequivocal waiver by defendant. Acrey, 103 Wn.2d at 207. Even where the defendant is fully aware of the right to a jury trial, such knowledge alone is insufficient; the record must show the defendant expressly waived that right. Id.

In State v. Hos, 154 Wn. App. 238, 244, 225 P.3d 389, rev. denied, 169 Wn.2d 1008, 225 P.3d 389 (2010), following the denial

of a motion to suppress, Hos's attorney explained Hos's intent was to proceed with a stipulated facts bench trial. Hos did not sign a jury trial waiver and none was included in the record on appeal. Id. The judge did not inquire of Hos on the record whether she had discussed waiving a jury with her attorney or whether she understood and agreed with defense counsel's intent to proceed with a stipulated facts bench trial. Id. Hos was tried by a judge without a jury and convicted of possession of controlled substances. Id.

This Court reversed Hos's conviction and remanded for a new trial. Id. at 252. Although Hos's attorney informed the court, in Hos's presence, that Hos intended to proceed to a bench trial on stipulated facts, the record did not contain Hos's personal expression waiving her jury trial right. Id. at 251. Thus, her constitutional right to a jury trial was violated. Id. at 252.

b. The record does not contain Mr. Conner's personal expression of waiver. As in Hos, the record in this case does not contain Mr. Conner's personal expression of his intent to waive his jury trial right. The record contains no written jury trial waiver signed by Mr. Conner. Also, the judge did not inquire of Mr. Conner on the record whether he had discussed waiving a jury with his

attorney or whether he understood and agreed with defense counsel's intent to proceed with a stipulated facts bench trial.

At the commencement of the suppression hearing, Ms. Bosma's attorney informed the court that if the suppression motion were denied, Ms. Bosma intended to proceed with a bench trial.<sup>5</sup> 12/07/10RP 3. There was no exchange at that time between the court and Mr. Conner's attorney and no expression at all from Mr. Conner himself. Id.

After the suppression motion was denied, the trial court inquired whether the parties were ready to proceed to trial.

12/07/10RP 126. Mr. Conner's attorney responded:

MS. PAIGE: I would be prepared to go forward, and I explained to Mr. Chambers [the deputy prosecutor] on the lunch recess, on the behalf of Mr. Conner, we would be prepared to proceed to a stipulated bench trial preserving the issues that the court has just ruled on here, but allowing the state to proceed on whatever is in the evidence that's in the report, so --

12/07/10RP 126. Ms. Bosma's attorney, in turn, responded that she intended to call additional witnesses and therefore wished to

---

<sup>5</sup> The following exchange occurred between the court and Ms. Bosma's attorney Hillary Smith:

THE COURT: Counsel, my understanding is we're going to do the 3.6 hearing. If the Court suppresses, then the case goes away. Then if the case doesn't go away, are you intending to have a stipulated trial?

MS. SMITH: Not a stipulated trial, a bench trial.

12/07/10RP 3.

proceed with an ordinary bench trial. Id. But the court did not inquire of Mr. Conner whether he agreed with his attorney's decision to proceed with a bench trial on stipulated facts. Mr. Conner made no statements at all regarding his jury trial right. The court found Mr. Conner guilty of possession of methamphetamine as charged. 12/07/10RP 162; CP 8-12.

c. The conviction must be reversed. Because the record does not contain Mr. Conner's personal expression of waiver of his jury trial right, the conviction must be reversed. Hos, 154 Wn. App. at 252.

#### F. CONCLUSION

Mr. Conner was unlawfully seized and searched, requiring suppression of all of the evidence obtained. In the alternative, because the record does not contain his personal expression of waiver of his jury trial right, the conviction must be reversed and remanded for a new trial.

Respectfully submitted this 25th day of July 2011.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

# APPENDIX

SCANNED 6

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY**

**THE STATE OF WASHINGTON,**

**Plaintiff.**

**vs.**

**SALLI SUZANNE BOSMA,  
MICHAEL CONNER**

**Defendants.**

)  
) **No.: 10-1-00275-1**  
) **No: 10-1-00274-2** ✓  
)  
) **FINDINGS OF FACT AND**  
) **CONCLUSIONS OF LAW**  
) **RE:SUPPRESSION AND CONFESSION**  
)  
)

ORIGINAL

This matter having come regularly before the Honorable Charles R.Snyder on the  
December 7, 2010 and the court having heard the testimony of Deputy Taddonio and Salli  
Bosma and the argument of counsel, makes the following:

**I. FINDINGS OF FACT**

1. On the afternoon of February 26, 2010, Deputy Taddonio was on patrol in Slater Road  
area of Whatcom County. He observed two vehicles, red and white Hondas, parked in  
the Department of Natural Resources parking lot. Parking in this lot is restricted and  
requires a permit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE:SUPPRESSION

55  
Whatcom County Prosecuting Attorney  
311 Grand Avenue, Suite #201  
Bellingham, WA 98225  
(360) 676-6784  
(360) 738-2532 Fax

- 1 2. The deputy parked his marked patrol unit at least fifteen feet from either parked car and  
3 did not impede or block either vehicle from backing up and leaving. Neither vehicle  
5 displayed the required parking permit. The white Honda was registered in Ms.  
7 Bosma's name and the red Prelude was registered to Nancy Conner. The deputy could  
9 observe that the ground beneath the vehicles was dry. This indicated to him that they  
11 had been parked for a significant time as off and on rain had been falling all afternoon.  
13 There were no other vehicles in the parking lot.
- 15 3. The deputy was wearing his uniform and his holstered gun was visible. As he walked  
17 towards the white Honda, Ms. Bosma rolled down the driver's window. Mr. Conner  
19 was seated in the passenger's seat. The deputy asked defendants as to why they were  
21 in the lot and if they had parking permit. They discussed that Mr. Conner had just left  
23 from the Lummi Casino and that Ms. Bosma had driven from Everson to meet Mr.  
25 Conner for a conversation. When asked about why they would meet in this location,  
27 Ms. Bosma explained that her current boyfriend did not approve of her having contact  
29 with Mr. Conner. Following this brief conversation, the deputy asked Ms. Bosma for  
31 her identification and Mr. Conner handed his over to the deputy as well. Deputy  
33 Taddonio stood by the driver's door and called in warrants checks to dispatch over the  
35 radio he was wearing. After contacting dispatch the deputy promptly returned the  
37 identification. Neither defendant had a warrant.

41 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION

1 4. As the explanation given by defendants as to why they would travel such a distance to  
3 meet in such an isolated and inhospitable location did not make sense, the deputy  
5 asked if there were any drugs or drug paraphernalia in the vehicle. When asked this  
7 question, Ms. Bosma began looking nervously around the interior of her car and  
9 reached for the center console. Her actions were consistent with someone wondering if  
11 some presumably hidden object might be visible. The defendants denied they had any  
13 drugs or paraphernalia.

15 5. The deputy then asked if he could search the vehicle to verify the absence of any drugs.  
17 Ms Bosma stated that the deputy could search the car and exited clutching her purse  
19 tightly. The deputy asked if he could search the purse. Ms Bosma stated yes. She then  
21 opened and handed the purse to the deputy. Within the purse, Deputy Taddonio  
23 located a sunglass case. Inside this case, he immediately observed a glass pipe  
25 containing what appeared to the trained and experienced officer to be  
27 methamphetamine residue. At this point Deputy Taddonio contacted dispatch and  
29 requested a cover officer.

31 6. Ms Bosma was placed under arrest and properly advised of her Miranda rights. Ms  
33 Bosma chose to waive these rights and make statements and respond to questions. Ms  
35 Bosma was handcuffed and placed in the back of the patrol car.

37 7. Deputy Taddonio then approached Mr. Conner who was pacing near the Bosma vehicle.  
39 He was observed placing his hands in his pants pocket on several occasions. The

41 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION

1 deputy noticed a large bulge in his left front pants pocket which Mr. Conner touched  
3 several times. The bulge was large enough to be a weapon. Deputy Taddonio asked  
5 Mr. Conner if he could pat him down for weapons. Mr. Conner stated yes.

7 8. The deputy determined that the bulge in the pants pocket was fairly firm, but not of the  
9 degree associated with a weapon. The deputy inquired into the identity of the object.  
11 Mr. Conner stated it was a large amount of currency. This explanation was consistent  
13 with the feel of the object from the pat-down. The deputy asked if he could look in the  
15 pocket and verify there was only currency inside. Mr. Conner granted permission.

17 9. When the deputy looked further into the pocket he saw a plastic bag commonly used to  
19 contain drugs. The deputy saw that the bag contained several small "shards" that he  
21 immediately from his training and experience as methamphetamine. Mr. Conner was  
23 then arrested and properly advised of his Miranda rights. At this point in time, Officer  
25 Johnson of the Ferndale Police Department arrived as a cover officer. After Mr.  
27 Conner was being escorted to a patrol car, he called the deputy back to his presence as  
29 a methamphetamine pipe fell from his pants leg onto the ground. The pipe had a  
31 coating of residue recognized by the officer as methamphetamine.

33  
35 10. Mr. Conner then gave a statement that he and Ms. Bosma had smoked methamphetamine  
37 in the parking lot earlier that day, but just had been talking at the time the deputy  
39 arrived. Ms. Bosma gave multiple statements regarding her possession of the pipe.

41 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION

1 These were conflicting accounts and she become upset when they were not believed  
3 and she was taken to jail.

5 II. DISPUTED FACTS AND RESOLUTIONS THEREOF:

- 7 1. Were multiple officers present when Deputy Taddonio asked Ms. Bosma for  
9 permission to search her purse as testified to by Ms. Bosma? The court finds that  
11 there were not multiple officers present. The court finds it unlikely that the deputy  
13 would have summoned other officers prior to the discovery of the drug pipe as he was  
15 until then only involved with a parking investigation.

17 From the foregoing FINDINGS OF FACT the court makes the following:

19 III. CONCLUSIONS OF LAW

- 21 1. Defendants' Motion to Suppress will be denied. Prior to the discovery of the drug  
23 pipe in Ms. Bosma's purse the interaction was a consensual citizen encounter. Ms.  
25 Bosma's consent to the search of her purse and car was voluntary. In this regard, the  
27 court notes the absence of a progressive intrusion into Ms. Bosma's privacy as in the  
29 cases she cites as authority for suppression.
- 31 2. Mr. Conner's motion to suppress will be denied as well. The basis just related  
33 regarding the denial of the Bosma motion applies equally herein. In addition, once the  
35 drugs were found in Ms. Bosma's purse there were reasonable grounds to detain Mr.  
37 Conner. He was detained. His furtive movements to his pockets justified the pat down  
39 of the bulge in his left front pocket. His further inquiry into verifying the identity of

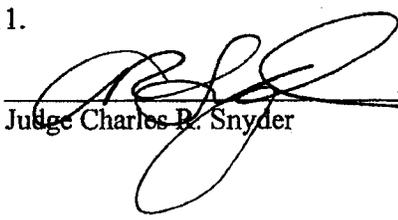
41 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION

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this bulge as currency was voluntary and resulted in the discovery of the drugs. Even if not voluntary, the further examination of the bulge was justified as part of the pat down search previously determined to be permissible.

- 3. There was no pre-textual stop per State v. Ladson as the contact prior to the discovery of the pipe in Ms. Bosma's purse constitutes a consensual officer/citizen encounter.
- 4. The statements of defendants are admissible pursuant to CrR 3.5. Either the statements were made prior to the defendant being placed into custody or after being properly advised of Miranda rights following their arrest.

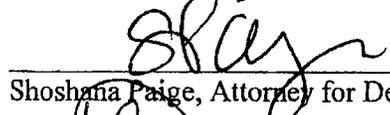
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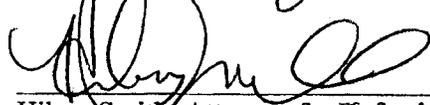
  
\_\_\_\_\_  
Judge Charles R. Snyder

Presented by:

  
\_\_\_\_\_  
CRAIG D. CHAMBERS, WSBA #11771  
Deputy Prosecuting Attorney

Copy Received, Approved as to Form,  
Notice of Presentation Waived:

  
\_\_\_\_\_  
Shoshana Paige, Attorney for Defendant Conner

  
\_\_\_\_\_  
Hilary Smith, Attorney for Defendant Bosma  
WSBA #9001

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

---

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 66566-9-I
	)	
MICHAEL CONNER,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF JULY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |                                     |                                    |                                     |               |
|-------------------------------------|------------------------------------|-------------------------------------|---------------|
| <input checked="" type="checkbox"/> | CRAIG CHAMBERS, DPA                | <input checked="" type="checkbox"/> | U.S. MAIL     |
|                                     | WHATCOM COUNTY PROSECUTOR'S OFFICE | <input type="checkbox"/>            | HAND DELIVERY |
|                                     | 311 GRAND AVENUE                   | <input type="checkbox"/>            | _____         |
|                                     | BELLINGHAM, WA 98225               |                                     |               |
| <br>                                |                                    |                                     |               |
| <input checked="" type="checkbox"/> | MICHAEL CONNER                     | <input checked="" type="checkbox"/> | U.S. MAIL     |
|                                     | 4050 MORGAN RD                     | <input type="checkbox"/>            | HAND DELIVERY |
|                                     | SUMAS, WA 98295                    | <input type="checkbox"/>            | _____         |

**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF JULY, 2011.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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