

69035-3

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NO. 69035-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA LEVINSON,

Appellant.

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

APPELLANT'S OPENING BRIEF



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A. ASSIGNMENTS OF ERROR.

1. The police violated Joshua Levinson's right to be free from unreasonable, unauthorized warrantless searches of his home as protected by the Fourth Amendment and article I, section 7 of the Washington Constitution.

2. The court's written findings of fact are not supported by substantial evidence to the extent they state the police saw that the pipe observed from outside of a motel room window contained methamphetamine. CP 43-44.¹

3. The court's written findings of fact are not supported by the record to the extent they state that Levinson admitted to the police before they searched his room that he possessed a pipe containing methamphetamine. CP 44.

4. The court's written findings of fact are not supported by substantial evidence to the extent they state that Levinson spoke with the police before the search only about whether the police would get a search warrant. CP 44.

¹ The court's written findings of fact and conclusions of law are unnumbered. They are attached as Appendix A and discussed in relevant detail in section (4) of the argument herein. CP 43-46.

5. The court's written findings of fact and conclusions of law incorrectly state that the police had probable cause to arrest Levinson or obtain a search warrant based on the observation of a pipe inside the motel room. CP 45.

6. The Snohomish County Code's codification of the crime of possession of drug paraphernalia is preempted by the drug paraphernalia offense contained in RCW 69.50.412 of the uniform controlled substances act.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Consent to search a person's home without a warrant is obtained validly and voluntarily only when the police do not misrepresent their legal authority to search the home. A police officer told Joshua Levinson he had authority to search his home because he saw a pipe inside the home, even though possession of a pipe alone is insufficient to show unlawful possession of drug paraphernalia. Did the police improperly coerce Levinson's consent to search his motel room by misrepresenting their authority to search his home without permission?

E. STATEMENT OF THE CASE.

Joshua Levinson was in a motel room with Donna Vine when police officer Lucas Robinson knocked on his door. 1RP 6-7.² Robinson, a deputy sheriff, was accompanied by officers from the Snohomish County Regional Drug Force and Lynnwood police. 1RP 4. Robinson told Levinson he was looking for a certain person. 1RP 7. At the later suppression hearing, Robinson claimed that he and the other officers were going door to door looking for this person but he did not know the name of the person. 1RP 18.

Before he knocked on Levinson's door, Robinson looked through a small gap in the window blinds. 1RP 19. By peering through a gap that was as little as six inches wide, and no more than 12 inches wide, Robinson saw what looked like a pipe of the type used for smoking methamphetamine sitting on the bed. 1RP 18-19. He did not see any people in the room when he looked through the small gap in the window blinds. 1RP 37.

Levinson opened the door in response to Robinson's request. 1RP 20. He said he did not know the person the police were looking

for. 1RP 7. Robinson told Levinson he saw a “meth pipe” in the room and asked for permission to retrieve it and any other evidence inside the room. 1RP 11. Levinson questioned Robinson about his authority to search and asked what he intended to do after the search. 1RP 13. He pressed Robinson to tell him whether he was required to let him enter. 1RP 13-14. The officer told Levinson he had authority to enter because he saw a pipe on the bed used for “meth” and he could go “write a search warrant” based on what he had already seen. 1RP 16. Levinson remained reluctant to agree to the search but did so “eventually.” 1RP 12. They had a “long conversation” before Levinson agreed to the search and Robinson gave verbal Ferrier³ warnings. 1RP 29. Although Robinson had written Ferrier warnings and consent to search forms in his car, he did not use those forms or give any written information to Levinson or Vine. 1RP 26.

At the suppression hearing, Levinson testified that Robinson claimed he could stop the search at any time, but when he stood up to stop Robinson during the search, Robinson told him to sit back down

² The verbatim report of proceedings (RP) consists of two volumes. 1RP refers to the hearing on June 14, 2012; and 2RP refers to the stipulated trial and sentencing on June 18, 2012.

and he continued searching. 1RP 30. Robinson claimed he never heard or did not recall Levinson trying to stop the search. 1RP 38. Levinson also testified that Robinson told him he did not have a choice to refuse the search because Robinson said he had the legal authority to search the room. 1RP 29. He described himself as “very hesitant” to permit the search, and “wasn’t going to grant consent.” 1RP 34. He did so only because the officer said “he was going to come in” and “he had the ability to do so” because of the pipe he had seen. 1RP 34-35. Levinson said “it wasn’t really up to me” to permit the officers to enter because they said they would do a “walkthrough” to look for the wanted suspect they were searching for. 1RP 35.

Inside a “little lockbox” in the motel room, Robinson found some heroin and “a little bit of meth.” 1RP 15. Levinson was charged with unlawful possession of heroin. CP 63. Following the court’s denial of his motion to suppress evidence, Levinson agreed to a stipulated bench trial. CP 27-29. The court found him guilty of possession of heroin as charged. CP 31.

³ Robinson told Levinson he had the right to refuse consent as required by State v. Ferrier, 136 Wn.2d 103, 118, 960 P.2d 927 (1998).

D. ARGUMENT.

The police lacked authority of law to search Levinson’s home when they obtained his consent by incorrectly claiming ready access to a search warrant

1. The right to privacy in one’s home bars the police from searching a home without a warrant or validly obtained consent.

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 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.

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

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.

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 best source of “authority of law” is a warrant. See State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). The purpose of the warrant requirement is to reduce the risk of erroneous searches “by interposing a neutral and detached magistrate between the citizen and the officer engaged in the ‘often competitive enterprise of ferreting out crime.’” State v. Chenoweth, 160 Wn.2d 454, 478, 158 P.3d 595 (2007) (quoting Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed.2d 436 (1948)).

Under our constitution, the home enjoys special protection. “[T]he closer officers come to intrusion into a dwelling, the greater the constitutional protection.” State v. Ferrier, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) (quoting State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994)).

A search authorized by validly obtained and voluntary consent 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, the burden rests with the prosecution to prove the validity of the consent. Id. at 70. Protection from searches without authority of law may be waived by meaningful, informed consent. When the State asserts that an exception authorizes its intrusion into private affairs, it bears the heavy burden of establishing that the exception applies. State v. Johnston, 107 Wn.App. 280, 284, 28 P.3d 775 (2001) (citing State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999)). 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).

To show consent, the prosecution bears the burden of proving that the defendant voluntarily consented, that the defendant had the authority to consent, and that the search did not exceed the scope of the consent. State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Whether consent is voluntary depends on the circumstances, including: “(1) whether Miranda warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of his right not to consent.” State v. Reichenbach, 153 Wn.2d 126, 132, 101 P.3d 80, 85

(2004) (citations omitted). The court also weighs “any express or implied claims of police authority to search,” the degree of cooperation from the accused, and deceptive practices used by the police. *Id.*

2. The police impermissibly obtained Levison’s consent by incorrectly asserting authority to obtain a search warrant.

“‘[C]onsent’ granted only ‘in submission to a claim of lawful authority’ is not given voluntarily.” *State v. O’Neill*, 148 Wn.2d 564, 589, 62 P.3d 489 (2003) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 233, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). When consent is obtained after an officer claims he has the authority to search even without consent, the officer has essentially informed the person that he has no right to refuse. *Id.*

In *O’Neill*, a police officer noticed a spoon with cocaine residue inside a car while questioning a man who was suspiciously present in the parking lot at night. 148 Wn.2d at 572. When the man refused to give the officer consent to search his car, the officer said he could search the car as part of his authority to arrest the man for possession of drug paraphernalia. *Id.* at 573. *O’Neill* eventually consented to the officer’s search of his car. *Id.*

The Supreme Court ruled that O’Neill did not voluntarily consent to the search despite his agreement to the search. Id. at 589. His consent was not voluntary because he initially resisted the search and agreed only after the officer explained he had the authority to search the car even without consent. Id.

A similar impropriety occurred in Levinson’s case. Levinson initially rebuffed the officer’s request for consent to search Levinson’s motel room. 1RP 22, 29. They had a long conversation in which the officer tried to convince Levinson to agree to the search. 1RP 29. Levinson consented only after the officer asserted that he had seen enough from observing a pipe on a bed to “write a search warrant.” 1RP16.

By pressuring Levinson to consent to the search in the absence of a warrant, based on the coercive and threatening claim that he could obtain a search warrant anyway, and in light of Levinson’s undisputed reluctance to consent to the search, the officer did not obtain Levinson’s valid and voluntary consent.

3. The police officer misrepresented his authority to search when he did not have probable cause to obtain a warrant based on the local regulation prohibiting possession of drug paraphernalia.

The officer told Levinson that he could obtain a warrant because he saw a glass pipe on the bed, and that pipe looked like an item used for consuming methamphetamine. The officer never alleged, and never saw, Levinson in possession of methamphetamine and did not see anyone using the pipe to ingest or inhale any controlled substance. The uniform controlled substance act (UCSA) criminalizes the “use” of “drug paraphernalia” and not its mere possession. RCW 69.50.412. The officer had not seen Levinson use drug paraphernalia and could not have arrested him or obtained a search warrant based on that offense.

The prosecution insisted that the officer could have obtained a warrant to search the motel room under the Snohomish County Code. SCC 10.48.020 makes it a misdemeanor of any person to “use, or to possess with intent to use, any item of drug paraphernalia to . . . conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.” (emphasis added). SCC 10.48.020 is broader than the state law that governs the possession of drug

paraphernalia. However, it is not an enforceable ordinance because it is preempted by state law.

- a. Article 11, section 11 prohibits local authorities from enacting laws that conflict with general laws.

Under article 11, section 11 of the Washington Constitution, counties, cities, towns, and townships may only enact and enforce “such local police, sanitary and other regulations as are not in conflict with general laws.” Const. art. 11, § 11. Interpreting this section, the Supreme Court has held:

In determining whether an ordinance is in ‘conflict’ with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. ... Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits.

City of Bellingham v. Schampera, 57 Wn.2d 106, 111, 356 P.2d 292 (1960).

“An ordinance must yield to a statute on the same subject ... if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two that cannot be harmonized.” City of Tacoma v. Luvane, 118 Wn.2d 826, 833, 827 P.2d 1374 (1992).

- b. SCC 10.48.020 is preempted by and conflicts with the UCSA.

RCW 69.50.608, entitled, “State Preemption,” states:

The state of Washington fully occupies and preempts the entire field of setting penalties for violations of the controlled substances act. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with this chapter. Such local ordinances shall have the same penalties as provided for by state law. Local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed, regardless of the nature of the code, charter, or home rule status of the city, town, county, or municipality.

RCW 69.50.608.

The Supreme Court construed this statute in Luvene and discerned a legislative intent to accord “some measure of concurrent jurisdiction to municipalities,” provided that local laws are consistent with the UCSA. 118 Wn.2d at 834. On this basis, the court declined to find Tacoma’s drug loitering ordinance, which prohibited the same conduct as state criminal statutes, was preempted by the UCSA. Id. at 835; cf. State v. Kirwin, 165 Wn.2d 818, 826-27, 203 P.3d 1044 (2009) (finding no violation of article 11, section 11 where local littering ordinance was “nearly identical” to state statute and Legislature did not express an intent to preempt the field).

In City of Seattle v. Williams, 128 Wn.2d 341, 908 P.2d 359 (1995), the Supreme Court struck down a Seattle DUI ordinance that permitted arrest and prosecution for a lower blood alcohol level than state law, finding the ordinance contravened the legislative directive that traffic laws be uniform statewide: “the offense as defined by the local jurisdiction’s ordinance is ... not uniformly applied throughout the state because that ordinance is applied only within the jurisdiction’s boundaries and not beyond its geographic limits.” 128 Wn.2d at 351.⁶ In so holding, the Williams Court appraised the “mischief” wrought upon a hypothetical driver who would be confronted with potentially different DUI standards in each jurisdiction. Id. The court noted, “[o]ne can easily imagine the problems that such balkanization of our traffic laws would cause motorists.” Id.

In State v. Fisher, 132 Wn.App. 26, 130 P.3d 382, review denied, 158 Wn.2d 1021 (2006), purporting to apply Luvене, the court concluded that Snohomish County’s provision criminalizing the possession of drug paraphernalia with intent to use, SCC 10.48.020,⁷

⁶ The court did not reach the article 11, section 11 challenge raised by Williams because the case was resolved on statutory grounds.

⁷ SCC 10.48.020 and RCW 69.50.412(1) are attached as Appendix B.

was not preempted by RCW 69.50.608. Id. at 31 (“RCW 69.50.608 preempts only the setting of penalties for acts that violate the Act”). The Fisher Court then reasoned that the ordinance was neither inconsistent with nor in conflict with RCW 69.50.412, asserting, “RCW 69.50.412(1) does not forbid possession of drug paraphernalia with intent to use, but it does not expressly or impliedly license such possession.” Id. at 32.

The court in Fisher glossed over the last three sentences of RCW 69.50.608, which prohibit the enactment of any law or ordinance that is not “consistent with” state law and require local drug-related ordinances to have the same penalties as prescribed by state law. This result runs counter to settled principles of statutory construction.

When construing a statute, the court does not read words in isolation. City of Auburn v. Gauntt, 174 Wn.2d 321, 330, 274 P.3d 1033 (2012). “[C]ourts should avoid a statutory construction which nullifies, voids, or renders meaningless or superfluous any section or words.” State ex rel. Gallwey v. Grimm, 146 Wn.2d 446, 464, 48 P.3d 274 (2002). The Fisher Court’s undue emphasis on the first sentence of the preemption statute renders the remainder of the statute superfluous. It also slights the maxim of “*expressio unius est exclusio alterius*,”

which is “the law in Washington, barring a clearly contrary legislative intent.”⁸ Mason v. Georgia-Pacific Corp., 166 Wn.App. 859, 865, 271 P.3d 381 (2012) (citation omitted).

The UCSA specifically defines “drug paraphernalia” and criminalizes its use only, RCW 69.50.412, thereby impliedly licensing conduct that does not fall within this proscription. In keeping with this statutory directive, the Supreme Court held that the mere possession of drug paraphernalia cannot support a valid arrest. O’Neill, 148 Wn.2d at 584 n.8. It is an exercise in the absurd to parse local ordinances that prohibit the possession of drug paraphernalia, such as SCC 10.48.020, from their punishments.⁹

Local ordinances criminalizing the possession of drug paraphernalia are not merely “inconsistent” with the UCSA; they are in direct conflict with it. A police officer would gain the authority to arrest

⁸ According to the principle of “*expressio unius est exclusio alterius*,” where a statute specifically designates the things or classes of things on which it operates, this Court infers that the omission of other things or classes of things was intentional. Mason, 166 Wn.App. at 864 (citing Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)).

⁹ A person convicted in Snohomish Municipal Court of possessing drug paraphernalia, with intent to use it, faces up to 90 days in jail and up to a \$1,000 fine. SCC 10.48.020.

a person for the same conduct in one county that he would lack in another.

It is particularly troubling to rest the authority to conduct a warrantless search based on the presence of a pipe when numerous court decisions have pronounced that simple possession of drug paraphernalia cannot support a valid custodial arrest. O'Neill, 148 Wn.2d at 584 n.8; State v. Neeley, 113 Wn.App. 100, 107, 52 P.3d 439 (2002); State v. McKenna, 91 Wn.App. 554, 563, 958 P.2d 1017 (1998). See State v. Brockob, 159 Wn.2d 311, 342 n.19, 150 P.3d 59 (2006) (“police officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is ‘so grossly and flagrantly unconstitutional’ by virtue of a prior dispositive judicial holding that it may not serve as the basis of a valid arrest”) (quoting State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1992) (emphasis added)).

While the UCSA does not have a uniformity requirement like the traffic code, Williams nevertheless illustrates the harms done by a local ordinance that criminalizes what is permitted under state law. Citizens encounter a “balkanization” of laws state-wide, and face detention, arrest, prosecution, and punishment in local jurisdictions that

could not occur in unincorporated parts of Washington. It is easy to imagine that under the dubious theory that such ordinances are “not inconsistent with” state law, local jurisdictions would be free to expand the definition of drug paraphernalia, or to criminalize the possession of valerian, nutmeg, or catnip, thereby expanding the authority of local police to arrest and obtain warrants, and local authorities to prosecute and punish.

This Court should conclude that in RCW 69.50.408, the Legislature preempted the field of setting penalties for drug offenses, and prohibited local authorities from enacting laws inconsistent with the UCSA. SCC 10.48.020 runs afoul of both proscriptions, and is unconstitutional. To the extent Levinson’s search was premised on this ordinance, it was invalid.

4. The unauthorized warrantless search of Levinson’s residence requires suppression of the illegally seized evidence.

The court ruled that Levinson’s consent was voluntarily given because Robinson accurately discussed with Levinson his authority to obtain a search warrant based on his observation of a glass pipe of the type used for smoking methamphetamine. CP 44. The court ruled that “it did not matter” whether Robinson would have sought a search

warrant. CP 44. The court concluded that the officer “would have had probable cause to either arrest the defendant and to get a search warrant simply based on his observation of the pipe, given the type of pipe that the Deputy recognized it as [,] coupled with his training and experience.” CP 45.

The court’s conclusion rests on a misapprehension of the law. First, as O’Neill explains, the police may not eliminate the requirement of a search warrant by insisting they have authority to search the property even without a warrant. 148 Wn.2d at 589. Obtaining acquiescence to a search based on the officer’s assertion that he has the right to search even without consent, is the equivalent of telling a person that he has no right to refuse. Id.

Second, the officer did not have probable cause to arrest Levinson or search the room based on his mere observation of a glass pipe “of the type” used to smoke methamphetamine. He had not seen Levinson or anyone else using the pipe and he did not believe Levinson was under the influence of methamphetamine. Actual use of drug paraphernalia is required to arrest a person for violating RCW 69.50.412, and the “intent to use” element of the SCC 10.48.020 is preempted by state law.

At the CrR 3.6 hearing, the court looked at the pipe and saw what it thought looked like residue. CP 44. This “residue” cannot provide a basis to search the room. Robinson never said that he saw residue in the pipe when he looked at it through the crack in the window blinds. Robinson did not claim to see any residue inside the pipe. 1RP 8. He believed it was a “meth pipe” based on its particular shape. 1RP 9-10. The court’s findings of fact state only that the court saw a residue at the hearing, not that the police saw it before claiming probable cause to search Levinson’s motel room, and the court’s observation cannot be used to justify the warrantless search. CP 44; cf. State v. Rose, 175 Wn.2d 10, 20, 282 P.3d 1087 (2012) (where officer testified to seeing “chalky white” residue before searching defendant, officer had probable cause to arrest for possession of controlled substance).

The court entered several findings of fact that are either misleading or not supported by substantial evidence. The court found that Robinson “observ[ed] that the pipe was used to smoked methamphetamine” based on his training and experience. CP 43-44. But Robinson testified that the pipe was the type used to smoke methamphetamine, not that he had a reason to believe it had been used

for that purpose. 1RP 8-10. To the extent this finding implies Robinson had a basis to infer Levinson had used the pipe to smoke methamphetamine, it is not supported by substantial evidence.

The court also entered the finding that Levinson “basically acknowledged that the meth pipe that the Deputy saw through the hotel window was in fact a meth pipe.” CP 44. This finding implies that Levinson told Robinson the pipe was a “meth pipe” but this implication is not supported by substantial evidence. Robinson said he initiated the conversation by telling Levinson “there’s a pipe on your bed” and “I’d like to retrieve it” as well as anything related to a “narcotics investigation.” 1RP 11-12. He also told Levinson he had enough information to get a search warrant. 1RP 16. In response, Levinson asked whether he would go to jail. At no time did Robinson claim that before the search, Levinson made any admissions of his culpability of any criminal conduct. 1RP 13-14, 16. The court construed Levinson’s silence in the face of an allegation that there was a pipe in his room as an admission of guilt, but his silence may not be the basis of inferring his criminal liability either before or after his arrest. U.S. Const. amend. 5; Const. art. I, § 9; see State v. Easter, 130 Wn.2d 228, 238, 922 P.2d

1285 (1996); State v. Evans, 133 Wn.App. 120, 127, 134 P.3d 1217 (2006).

The court also entered the finding that “[t]he discussion between the defendant and Deputy Robinson surrounding permission to search did not go beyond the officer’s ability to get a search warrant.” CP 44. This finding misrepresents the record. Robinson and Levinson had a “long” conversation, and Levinson “ended up” consenting to the search “eventually.” IRP 12, 14, 29. Neither Robinson nor Levinson recounted the conversation in detail. Robinson said “one of [Levinson’s] concerns” was whether he was going to be taken to jail. IRP 13. Robinson admitted, “I don’t remember exactly what was said” to obtain Levinson’s permission to search the room. IRP 12. Thus, to the extent this finding is supposed to represent the entirety of the conversation between Levinson and Robinson, it is erroneous.

Levinson “ended up” consenting to the search only after Robinson insisted that he could obtain a search warrant because he saw a pipe on the bed that was the type of pipe used to inhale methamphetamine. IRP 12. The officer’s claim of authority was wrong because the pipe alone did not provide a basis to arrest Levinson or search the motel room in which he was living. Rose, 175 Wn.2d at 19

(because the officer “did not see Rose use the glass pipe to smoke methamphetamine,” Rose “could not properly be arrested for possession of drug paraphernalia” under RCW 69.49.412(1)); O’Neill, 148 Wn.2d at 584 n.8 (“Possession of potential drug paraphernalia is not a crime” and cannot be the basis for an arrest).

The court’s incorrect determination that Levinson voluntarily consented to the search requires reversal of the court’s ruling and suppression of the evidence taken from the search of the room. “The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.” Buelna Valdez, 167 Wn.2d at 778 (quoting State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002)); Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The necessary remedy is to suppress the unlawfully obtained evidence.

E. CONCLUSION.

For the reasons stated above, Mr. Levinson respectfully asks this Court to order the improperly seized evidence be suppressed and his conviction reversed.

DATED this 16th day of November 2012.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

FILED

2012 JUN 18 PM 3: 11

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL15324122

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

LEVINSON, JOSHUA A.

Defendant.

No. 12-1-00773-4

CERTIFICATE PURSUANT TO
CrR 3.6 OF THE CRIMINAL RULES
FOR SUPPRESSION HEARING

On 6/14/12, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. I. UNDISPUTED FINDINGS OF FACT

On September 15, 2011 at approximately 9:40 pm, Deputy Lucas Robinson was at the Far West Motel located at 6030 Evergreen Way looking for a wanted person. Deputy Robinson knocked on Room #132 and the defendant, along with Laurie Vine answered the door. When Deputy Robinson was knocking on the door he could clearly see a glass smoking device. Deputy Robinson's observation that the pipe was used to

ORIGINAL

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smoke methamphetamine was grounded in his training and his experience. Additionally, the defendant ^{basically} acknowledged that the meth pipe that the Deputy saw through the hotel window was in fact a meth pipe and the Court found that there was residue visible in that pipe when the Court made a visual inspection of the pipe at the hearing. After confirming that neither the defendant nor Ms. Vine were familiar with the wanted subject, Deputy Robinson told them that he could see the meth pipe and asked for permission to search their room and gave the defendant and Ms. Vine Ferrier warnings as well.

During his search, the defendant was in the room and Ms. Vine was standing in or just outside the doorway. During the search, Deputy Robinson located multiple other items of drug paraphernalia, Methamphetamine, and Heroin.

II. DISPUTED FINDINGS OF FACT

The discussion between the defendant and Deputy Robinson surrounding permission to search did not go beyond the officer's ability to get a search warrant. Whether or not Deputy Robinson would have actually sought a search warrant is unclear and not at issue because the Court finds that the defendant and Ms. Vine did consent. The defendant's concern was fundamentally over going to jail. Deputy Robinson had no intention to take the defendant to jail and clearly made no promises either way; any statements made by Deputy Robinson regarding his intention not to arrest the defendant were made to dispel any undue influence or coercion. Deputy Robinson noted that Ms. Vine appeared as though she was under the influence of a controlled substance, but she was coherent enough to form adequate consent and

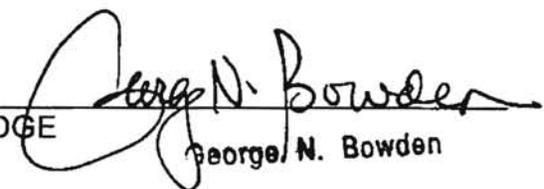
understand what was being asked of her. While the defendant testified that Deputy Robinson did a "walk-through" to look for the wanted subject and that he told Deputy Robinson to stop his search prior to Deputy Robinson concluding the search, the Court does not find this testimony credible or supported by the evidence. The defendant acknowledged that the circumstances surrounding that evening were difficult to remember.

III. CONCLUSIONS OF LAW

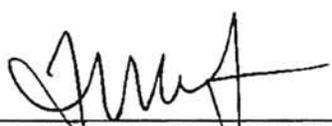
The Court has jurisdiction to hear this matter. The Court finds the issue to mainly be one of credibility. The Court did not find the defendant to be credible in his testimony and found no issues with Deputy Robinson's credibility. The Court concludes that the Deputy would have had probable cause to either arrest the defendant and to get a search warrant simply based on his observation of the pipe, given the type of pipe that the Deputy recognized it as coupled with his training and experience. The Court further finds that the defendant's and Ms. Vine's consent was freely, knowingly and voluntarily given after Deputy Robinson gave them Ferrier warnings and that neither sought to stop the search at any time prior to Deputy Robinson finding drug paraphernalia, methamphetamine, and heroin.

Given the aforementioned reasoning, the defendant's motion to suppress is therefore denied.

DONE IN OPEN COURT this 18th day of June, 2012

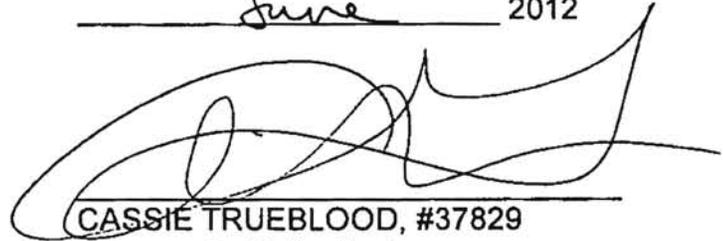

JUDGE George N. Bowden
George N. Bowden

Presented by:



TONI G. MONTGOMERY, #36927
Deputy Prosecuting Attorney

Copy received this 18 day of
June 2012



CASSIE TRUEBLOOD, #37829
Attorney for Defendant



JOSHUA LEVINSON
Defendant

APPENDIX B

SCC 10.48.020 provides:

It is unlawful for any person to use, or to possess with intent to use, any item of drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this act. Any person who violates this section is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 90 days or fined not more than \$500.00, or both.

RCW 69.50.412(1) provides:

(1) It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
) NO. 69035-3-I
)
)
 JOSHUA LEVINSON,)
)
)
 Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF NOVEMBER, 2012, 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:

- | | | |
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SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201 | (X) U.S. MAIL
() HAND DELIVERY
() _____ |
| [X] | JOSHUA LEVINSON
2502 152 ST.
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() HAND DELIVERY
() _____ |

NOV 16 2012
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

SIGNED IN SEATTLE, WASHINGTON, THIS 16TH DAY OF NOVEMBER, 2012.

x *Nina Arranza Riley*