69563-1

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No. 69563-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

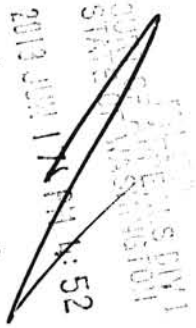
v.

ROY E. DETAMORE, JR.,

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 trial court erred in holding that police had probable cause to believe that Mr. Detamore possessed drug paraphernalia with intent to use it prior to his arrest. CP 155-56.

2. The trial court erred in refusing to suppress the fruits of the search incident to Mr. Detamore's arrest. CP 156.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Police may not arrest a person unless they have probable cause to believe that the person has committed or is committing a crime. Simple possession of drug paraphernalia, without actually using or intending to use it for a prohibited purpose, is not a crime under the Revised Code of Washington, the Snohomish County Code, or the Everett Municipal Code. Was Mr. Detamore's arrest unlawful where the arresting officer had probable cause to suspect that Mr. Detamore currently possessed drug paraphernalia, but had not observed residue or any other indication that Mr. Detamore had used or intended to use the paraphernalia?

C. STATEMENT OF THE CASE

On September 17, 2010, Everett police responded to a call about a disturbance at Roy Detamore's home. CP 154. On arriving, the

responding officer, Stephen Harney, saw Mr. Detamore standing outside his home. CP 155. Mr. Detamore was calm, compliant, non-threatening, and did not appear to be under the influence of any substances. 12/8/11 RP 7, 17; 9/24/12 RP 94-95.

Officer Harney asked Mr. Detamore if he had any weapons, and Mr. Detamore responded that he had a knife in his pocket. CP 155. Officer Harney frisked Mr. Detamore to retrieve the knife and any other weapons he might have had. *Id.* Before he located the knife, Officer Harney felt an object in Mr. Detamore's pocket that he recognized by feel as a type of pipe typically used to smoke methamphetamine. *Id.*; 12/8/11 RP 8-9, 11-12. Without removing the pipe from Mr. Detamore's pocket, Officer Harney immediately placed him under arrest "for drug paraphernalia." CP 155; 12/8/11 RP 11, 21. During a search incident to arrest, Officer Harney discovered the knife, "as well as assorted drug paraphernalia and a bag containing a substance that later tested positive for methamphetamine." CP 155.

The State charged Mr. Detamore with one count of possession of a controlled substance. CP 180. Mr. Detamore moved before trial to suppress the evidence seized after he was arrested. CP 165-72. Mr. Detamore argued that police did not have any reason to suspect that he

was both armed *and* dangerous, so the initial frisk for weapons was unlawful. CP 168-70. He also argued that because merely possessing the pipe was not a crime, (1) the "plain feel" exception to the warrant requirement could not justify Officer Harney's seizure of the pipe, because it was not immediately identifiable as contraband; and (2) Harney did not have probable cause to arrest him based only on feeling the pipe, without visually inspecting it for residue or otherwise having "any information indicating that the pipe had been used or that it was intended to be used." CP 170-72. The trial court denied the motion, holding that "because a pipe like this serves no purpose other than to smoke methamphetamine," merely feeling the shape of the pipe through Mr. Detamore's pocket gave the officer "probable cause to believe the defendant possessed it with the intent to smoke methamphetamine." CP 155-56.

Mr. Detamore's case proceeded to a jury trial in April 2012, which ended with a hung jury. CP 151-52. After a second jury trial in September 2012, he was convicted of the single charged count of possession of a controlled substance. CP 61, 14-24. To support the conviction, the State elected to rely only on the methamphetamine found in the bag seized incident to the arrest, and not on any residue

that was present inside the pipe that Officer Harney felt inside Mr. Detamore's pocket or on any of the other objects seized. 9/24/12 RP 36-37. Mr. Detamore now appeals the trial court's denial of his motion to suppress and his subsequent conviction.

D. ARGUMENT

Mr. Detamore was arrested without probable cause to suspect that he had committed a crime.

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. As used in article I, section 7, "authority of law" means a valid warrant, or one of a "few jealously guarded exceptions" to the warrant requirement. *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010) (citing *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009)). Evidence seized without authority of law must be suppressed. *Id.* at 180 ("Unlike its federal counterpart, Washington's exclusionary rule [under article I, section 7] is 'nearly categorical.'") (quoting *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009)).

One recognized exception to the warrant requirement is a search incident to arrest. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Because the "authority of law" to conduct such a search comes

from the arrest itself, the search is valid only if it occurs after a lawful custodial arrest. *State v. O'Neill*, 148 Wn.2d 564, 585, 62 P.3d 489 (2003) (quoting *State v. Parker*, 139 Wn.2d 486, 496-97, 987 P.2d 73 (1999)).

In order to arrest a person without a warrant, police must have probable cause to believe the person has committed or is committing a felony, has committed certain specific misdemeanors or gross misdemeanors, or has committed any misdemeanor while in the arresting officer's presence. RCW 10.31.100; *State v. Barker*, 143 Wn.2d 915, 921-22, 25 P.3d 423 (2001). "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). "Appellate courts review de novo the legal conclusion of law whether probable cause is established." *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

The evidence used to convict Mr. Detamore here was obtained during a search incident to his arrest. 9/24/12 RP 36-37. But at the time of the arrest, police had probable cause only to believe that Mr.

Detamore was in possession of drug paraphernalia. Because simple possession of paraphernalia is not a crime, and police had no evidence to suggest that Mr. Detamore intended to use the paraphernalia illegally, Officer Harney arrested him without probable cause to believe that he had committed or was committing any crime. Thus, the arrest was unlawful, *Barker*, 143 Wn.2d at 921-22, the search incident to arrest was conducted without authority of law, *O'Neill*, 148 Wn.2d at 585, and its fruits must be suppressed, *Afana*, 169 Wn.2d at 180.

1. Possession of drug paraphernalia is not a crime.

As Mr. Detamore noted in his motion to suppress, CP 170-71, and the trial court acknowledged, 12/8/11 RP 34, merely possessing drug paraphernalia is not a crime under Washington law. *See, e.g.*, *State v. Rose*, 175 Wn.2d 10, 19, 282 P.3d 1087 (2012) (citing *O'Neill*, 148 Wn.2d at 584 n.8; RCW 69.50.412(1)). The Revised Code of Washington does not prohibit possession of drug paraphernalia, only its use, delivery, possession with intent to deliver, manufacture with intent to deliver, or advertisement for sale. RCW 69.50.412(1), (2), (4). Nor is mere possession a crime under the laws of Snohomish County or the City of Everett, where this arrest took place. *See* Snohomish County Code (SCC) 10.48.020 (prohibiting use of drug paraphernalia and

possession with intent to use, but not mere possession); Everett Municipal Code (EMC) 10.35.020(A) (same).

This Court and our Supreme Court thus have sensibly held that a person cannot lawfully be arrested merely for possessing drug paraphernalia. *Rose*, 175 Wn.2d at 19; *O'Neill*, 148 Wn.2d at 584 n.8; *State v. Neeley*, 113 Wn. App. 100, 107, 52 P.3d 539 (2002); *State v. McKenna*, 91 Wn. App. 554, 557, 958 P.2d 1017 (1998); *State v. Lowrimore*, 67 Wn. App. 949, 959, 841 P.2d 779 (1992). These cases have made clear that the reason simple possession cannot justify arrest is because it is not a crime. *Rose*, 175 Wn.2d at 19; *O'Neill*, 148 Wn.2d at 584 n.8; *Neeley*, 113 Wn. App. at 107; *McKenna*, 91 Wn. App. at 563; *Lowrimore*, 67 Wn. App. at 959. By their terms, these holdings apply equally to all drug paraphernalia, regardless of whether the paraphernalia is known to have any legitimate alternative uses. Either way, merely possessing the paraphernalia is no crime.

Nothing in the Snohomish County Code or Everett Municipal Code changes that. Unlike RCW 69.50.412, SCC 10.48.020 and EMC 10.35.020(A) prohibit possession of paraphernalia with the intent to use it. But like the state statute, the municipal laws do not proscribe the mere possession of paraphernalia. Thus, even under these local laws,

the mere possession of drug paraphernalia cannot justify an arrest. And like the state statute, the reason is not because such items might have lawful uses, but because possession of an item that falls within the definition of "drug paraphernalia" simply is not, in and of itself, a crime. Something more is always required.

2. Establishing probable cause for possession with intent to use requires more than evidence of mere possession.

Even if simple possession of drug paraphernalia is not a crime, the question remains whether possession of paraphernalia can, standing alone, support an inference that a person intends to use that paraphernalia for a prohibited purpose, such as to inhale drugs, SCC 10.48.020. While Washington courts have not decided this precise question, the issue closely parallels another in which numerous Washington courts have analyzed the evidentiary standard necessary to establish possession of a controlled substance with intent to deliver, rather than simple possession. These cases have left no doubt as to the correct answer in that context: "It is firmly established Washington law that mere possession of a controlled substance is generally insufficient to establish an inference of intent to deliver." *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). Instead, intent to deliver may only be inferred if, beyond mere possession, "[s]ome additional factor"

is present that suggests such an intent, as where a defendant is caught simultaneously with drugs and a large amount of cash or delivery paraphernalia like "scales, cell phones, address lists, and the like." *State v. Zunker*, 112 Wn. App. 130, 136, 48 P.3d 344 (2002), *rev. denied*, 148 Wn.2d 1012 (2003). This rule applies even if the quantity of drugs found is "greater than is deemed usual for personal use" or could even be called "large." *Id.* at 135-36 (citing *State v. Campos*, 100 Wn. App. 218, 222, 998 P.2d 893 (2000); *State v. Hagler*, 74 Wn. App. 232, 236, 872 P.2d 85 (1994); *State v. Brown*, 68 Wn. App. 480, 484, 843 P.2d 1098 (1993)); *see also State v. Darden*, 145 Wn.2d 612, 624-25, 41 P.3d 1189 (2002). Thus, even where a person is caught with a quantity of drugs that strongly suggests dealing, rather than personal use, the mere possession of those drugs cannot support an inference of intent to deliver without some additional evidence to corroborate the intent. *E.g.*, *Brown*, 68 Wn. App. at 483-84.

This Court recently adopted this same analysis when interpreting the exact provision of the Snohomish County Code that is at issue here. In *State v. Fisher*, a Snohomish County Sheriff's Deputy contacted the defendant and frisked him for weapons. 132 Wn. App. 26, 29, 130 P.3d 382 (2006). The deputy felt an object in the

defendant's pocket, which the defendant said was a pipe. The deputy then "removed it and saw that it was a glass pipe with a bulb at one end and burnt residue. He recognized the pipe as drug paraphernalia. Fisher stated that the pipe was not his. [Deputy] Wilson arrested him for possession of drug paraphernalia." *Id.*[1]

The defendant argued that "his possession of the glass pipe was insufficient to create probable cause for possession with intent to use . . . [because] possession with intent must involve evidence of intent beyond mere possession." *Id.* at 29-30. This Court evidently agreed with this formulation of the legal standard, citing *Goodman* as relevant authority on the point. *Id.* at 30. The Court then rejected the defendant's claim, but only because "[t]he circumstances of the deputy's encounter with Fisher . . . provide[d] evidence beyond mere possession":

> The pipe contained burnt residue. Fisher told the deputy that the pipe was not his, but gave no other explanation for the pipe's presence on his person. The lack of explanation gave the deputy reasonable grounds to disbelieve Fisher's denial. Because the pipe was on Fisher's person and because it had been used to inhale a controlled substance, it was reasonable to conclude that

[1] The defendant apparently did not contest the lawfulness of the initial weapons frisk, nor did he argue that the deputy exceeded the permissible scope of the frisk by removing the pipe from his pocket. The *Fisher* court therefore did not address either of those issues. *See* 132 Wn. App. at 29-32.

> Fisher possessed it with the intent to use it in the future. The deputy had probable cause to arrest Fisher.

Id. Because this additional information corroborated the inference of intent to use the paraphernalia, and was available to the deputy prior to the arrest, the arrest was proper. *Id.* But under this same analysis, a person's mere possession of a methamphetamine pipe, without additional corroborative evidence, would not establish probable cause that he intended to use it for a prohibited purpose.

3. Officer Harney did not have probable cause before the arrest to suspect Mr. Detamore of anything more than merely possessing drug paraphernalia.

As described above, even though possessing drug paraphernalia is not itself a crime, Mr. Detamore's arrest might have been lawful if Officer Harney could point to evidence or circumstances—aside from mere possession—to suggest that Mr. Detamore intended to use the pipe. *See Fisher*, 132 Wn. App. at 30. But unlike the deputy in *Fisher*, Officer Harney here had no evidence at all prior to the arrest to corroborate any inference that Mr. Detamore intended to use the pipe. Officer Harney handcuffed Mr. Detamore and placed him under arrest immediately upon feeling the pipe through the fabric of his pants. 12/8/11 RP 11. Harney had not yet removed the pipe from the pocket, 12/8/11 RP 21, so he had not seen any residue on it. He was not

investigating a drug-related offense, 12/8/11 RP 5, so he had no preexisting reason to think that Mr. Detamore might be intending to use drug paraphernalia. Unlike the defendant in *Fisher*, Mr. Detamore did not make any statements regarding the pipe before the arrest. *See* 12/8/11 RP 21; 9/24/12 RP 63-65. And Mr. Detamore's demeanor did not lead Officer Harney or his backup officer to believe that he was under the influence of any drugs. 9/24/12 RP 95, 113.

The information available to Officer Harney prior to the arrest therefore established nothing more than that Mr. Detamore had drug paraphernalia in his pocket. As noted above, that is not a crime. Officer Harney had no additional information, beyond the mere fact of possession, to suggest that Mr. Detamore had actually used the pipe, or intended to use it, for ingesting drugs or for any other prohibited purpose. Without such information, he did not have probable cause to arrest Mr. Detamore. The arrest was therefore unlawful. *Barker*, 143 Wn.2d at 921-22.

4. The trial court's holding impermissibly criminalizes the mere possession of drug paraphernalia.

The trial court acknowledged that merely possessing drug paraphernalia, without using or intending to use it for a prohibited purpose, is not a crime. 12/8/11 RP 34. But it upheld the arrest in this

case anyway, reasoning that once Officer Harney determined that the object in Mr. Detamore's pocket was a methamphetamine pipe, he could infer that Mr. Detamore would only possess the pipe if he were intending to use it to consume drugs. 12/8/11 RP 34-35; CP 155-56. That holding, however, is inconsistent with both the relevant statutes and the well-established precedent of this Court and our Supreme Court.

The trial court's ruling conflicts with the statutes because it effectively criminalizes the mere possession of paraphernalia, whereas the statutes do not. The trial court claimed that "because a pipe like this serves no purpose other than to smoke methamphetamine, the officer had probable cause to believe the defendant possessed it with the intent to smoke methamphetamine." CP 155-56. The court thus held that if a particular item—say, a certain type of pipe—is strongly associated with illegal drug use, then the knowledge of a person's mere possession of that item inherently supports an inference that the person also intends to use it for a prohibited purpose.

But establishing that some particular item is strongly associated with illegal drug use does nothing more than demonstrate that the item is, in fact, drug paraphernalia. *See* RCW 69.50.102(b) ("In determining

whether an object is drug paraphernalia . . . a court or other authority should consider, in addition to all other logically relevant factors, . . . (13) [t]he existence and scope of legitimate uses for the object in the community; and (14) [e]xpert testimony concerning its use."); SCC 10.48.010 (same); EMC 10.35.010(B) (same). Indeed, the notion that an item might inherently be recognizable as "drug paraphernalia" at all indicates that such an association must exist. The trial court's holding thus effectively criminalizes the possession of paraphernalia precisely because it *is* paraphernalia—i.e., because it is associated with drug use. Criminalizing mere possession this way is beyond anything that the legislatures of the State of Washington, Snohomish County, or the City of Everett authorized.

The trial court's holding also conflicts with substantial precedent from both this Court and our Supreme Court. The relevant point reflected by the cases such as *Rose* and *McKenna* is that if a statute does not criminalize the mere possession of drug paraphernalia, then possession alone is not and cannot be a crime. That conclusion has nothing to do with whether the items have any commonly accepted uses apart from facilitating illicit activity. And the analogous precedent addressing possession of a controlled substance with intent to deliver,

which this Court adopted in this context in *Fisher*, clearly holds that possession alone is insufficient evidence to find the intent to *do* any particular thing. Instead, some other evidence must exist to corroborate that intent.

While Snohomish County and the City of Everett do have laws that, unlike the statewide prohibitions, ban possession of drug paraphernalia with intent to use, those laws still do not ban mere possession. SCC 10.48.020; EMC 10.35.020(A). Thus, as with the state statute, something more than evidence of mere possession is required to establish even a probable violation of those laws. *See Neeley*, 113 Wn. App. at 107 ("[P]ossession of drug paraphernalia alone does not give probable cause to arrest for possession of such items [because] bare possession of drug paraphernalia is not a crime.") (citing *McKenna*, 91 Wn. App. at 563; *Lowrimore*, 67 Wn. App. at 959). The trial court's holding to the contrary conflicts with both the statutory language and the relevant case law. The court thus erred in finding that probable cause supported Mr. Detamore's arrest. And because the arrest was therefore unlawful, its fruits, including all evidence gathered during the search incident to arrest, must be suppressed. *Afana*, 169 Wn.2d at 180.

E. CONCLUSION

Officer Harney searched Mr. Detamore after an arrest for possession of drug paraphernalia. But because mere possession of drug paraphernalia is not a crime and Officer Harney had no other evidence prior to the arrest to suggest that Mr. Detamore intended to use the paraphernalia illegally, the arrest was made without probable cause to suspect that Mr. Detamore had committed or was committing a crime. Mr. Detamore therefore asks this Court to hold that the arrest and the search incident to arrest were unlawful, to suppress the fruits of the arrest and search accordingly, and to reverse his conviction.

DATED this 16th day of June, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent/Cross-appellant, ROY DETAMORE, JR., Appellant-Cross-respondent.	)	NO. 69563-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF JUNE, 2013, 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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SIGNED IN SEATTLE, WASHINGTON, THIS 17TH DAY OF JUNE, 2013.

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