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No. 64873-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DAVID P. FENDICH,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

THE POLICE OFFICER DID NOT HAVE PROBABLE  
CAUSE TO ARREST MR. FENDICH FOR THE  
CRIME OF POSSESSION OF A STOLEN MOTOR  
VEHICLE

The State contends Officer Gendreau had probable cause to arrest Mr. Fendich for the crime of possession of a stolen motor vehicle, in part, due to Mr. Fendich's actions that the State claims demonstrate "guilty knowledge." SRB at 11. Specifically, the State relies on portions of the officer's testimony describing his perceptions of Mr. Fendich's actions. SRB at 11-12.

But the State may not rely upon those aspects of Officer Gendreau's testimony, because the trial court made no findings of fact regarding those disputed factual issues. Officer Gendreau testified that he assumed Mr. Fendich and Ms. Portra saw his patrol car; that initially Mr. Fendich did not comply with his commands; that Mr. Fendich stopped and looked around when the officer started giving him orders; and that Mr. Fendich started to get back up after the officer had ordered him to the ground. 9/14/09RP 27-30. The officer assumed Mr. Fendich's actions indicated he was deliberately refusing to comply and was "looking for an escape route." 9/14/09RP 29-30.

But Mr. Fendich's testimony contradicted the officer's assumptions. At the CrR 3.6 hearing, Mr. Fendich testified that when he first heard the officer order him to the ground, he "was confused." 9/14/09RP 76. He was not sure if the officer was talking to him or to someone else. 9/14/09RP 76. Mr. Fendich explained, "when he said get on the ground, I checked to see if he was talking to me or somebody else. And when I noticed that he was talking to me, I got down on the ground." 9/14/09RP 76. Mr. Fendich looked left to right not in search of an escape route, but in order to make sure the officer was not talking to someone else. 9/14/09RP 76. Also, when he was down on the ground, he pushed his upper body up in order to turn his face in response to the officer's command that he stop looking at him. 9/14/09RP 78-79. He was not trying to get away. Id. He explained that he did not understand why the officer was approaching him or why the officer had pulled a gun on him. 9/14/09RP 84-85.

The trial court found that both Officer Gendreau and Mr. Fendich were "credible." 9/14/09RP 100. The court explained that their descriptions of events were not inconsistent. 9/14/09RP 100. Thus, the trial court deliberately did *not* find that Mr. Fendich's

actions demonstrated guilty knowledge or contributed to probable cause.

"[L]ack of an essential finding is presumed equivalent to a finding against the party with the burden of proof." In re Welfare of A.B., 168 Wn.2d 908, 927 n.42, 232 P.3d 1104 (2010) (citing State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed sustain their burden on this issue."); Smith v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986) ("[W]e presume from the absence of further findings in that regard that second purchasers [who had the burden of proof] failed to sustain their burden."); Goldberg v. Sanglier, 96 Wn.2d 874, 880, 639 P.2d 1347, 647 P.2d 489 (1982) (same); Pilling v. E. & Pac. Enters. Trust, 41 Wn. App. 158, 165, 702 P.2d 1232 (1985) (same)).

The State has the burden to show that a police officer had probable cause to arrest. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). Because the trial court made no finding that Mr. Fendich's actions demonstrated guilty knowledge and contributed to probable cause, this Court must presume the court concluded the State failed to prove such facts. Instead, the court

found only that Mr. Fendich's "[p]lacing personal items into the car provided the basis for probable cause." CP 157. But as argued in the opening brief, Mr. Fendich's placing personal items onto the back seat of the passenger side of the car suggests only that he was about to ride as a passenger in the car. This fact is insufficient to provide a reasonable basis to conclude Mr. Fendich possessed the car, because it is well settled that merely riding as a passenger in a car is insufficient to establish possession of the car. State v. Plank, 46 Wn. App. 728, 733, 731 P.2d 1170 (1987).

The State also argues probable cause was established because "Portra and Fendich's actions would lead any reasonable person to believe they were acting in concert." SRB at 10-11. But as argued in the opening brief, article 1, section 7 of the Washington Constitution "requires *individualized* probable cause for each occupant of the vehicle." Grande, 164 Wn.2d at 138 (emphasis added). The State's brief completely ignores Grande. It is no wonder, because in Grande, the Washington Supreme Court made plain its rejection of the "common criminal enterprise" inference adopted by the United States Supreme Court when applying the Fourth Amendment. Id. at 145 (citing Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003)

(holding "where it is reasonable for a police officer to infer a common enterprise among the occupants, there is probable cause to arrest the passengers as well as the driver of a vehicle."). Instead, the Washington Constitution "requires individual probable cause that the defendant committed some specific crime." Grande, 164 Wn.2d at 145. There must be "specific evidence pinpointing the crime on a person." Id. Thus, even if Mr. Fendich and Ms. Portra were acting "in concert," this is insufficient to conclude that Mr. Fendich, individually, possessed the car.

Finally, the State contends State v. Plank does not apply, because that case addressed the sufficiency of the evidence to convict a passenger for the crime of possession of a motor vehicle, whereas here, the issue is the sufficiency of the evidence to establish probable cause for the crime. SRB at 9. To the contrary, Plank is directly on point. As stated, Plank establishes that merely riding as a passenger in an allegedly stolen vehicle is insufficient to prove possession of the vehicle. Plank, 46 Wn. App. at 731, 733. Thus, in order to establish probable cause, the police officer must have some reasonable basis to conclude the arrestee had possession of the car beyond merely riding as a passenger in it. Here, the officer was aware of no additional facts suggesting that

Mr. Fendich had actual or constructive possession of the car. Therefore, the information within the officer's knowledge was insufficient to establish probable cause.

B. CONCLUSION

For the reasons set forth above and in the opening brief, the police officer did not have individualized probable cause to arrest Mr. Fendich for the crime of possession of a stolen motor vehicle. Thus, the arrest was invalid and the fruits of the search incident to arrest must be suppressed.

Respectfully submitted this 5th day of January 2011.

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

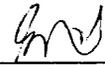
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64873-0-I
v.	)	
	)	
DAVID FENDICH,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5<sup>TH</sup> DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **REPLY 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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[X] DAVID FENDICH 32605 49 <sup>TH</sup> CT SW FEDERAL WAY, WA 98023	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF JANUARY, 2011.

X \_\_\_\_\_ 

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