

68094-3

68094-3

NO. 68094-3-1

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

JOHN LOMACK,

Appellant.

---

---

REC'D

NOV 15 2012

King County Prosecutor  
Appellate Unit

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

The Honorable Palmer Robinson, Judge

---

---

REPLY BRIEF OF APPELLANT

---

---

DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373



**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
THE TRIAL COURT WAS REQUIRED TO SUPPRESS ALL EVIDENCE STEMMING FROM THE UNLAWFUL SEIZURE.....	1
B. <u>CONCLUSION</u> .....	4

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

State v. Christopher Smith  
165 Wn. App. 296, 266 P.3d 250 (2011)  
review granted, 173 Wn.2d 1034, 277 P.3d 669 (2012)..... 4

State v. Eserjose  
171 Wn.2d 907, 259 P.3d 172 (2011)..... 4

State v. O’Neill  
148 Wn.2d 564, 62 P.3d 489 (2003)..... 3

**RULES, STATUTES AND OTHER AUTHORITIES**

RCW 9.94A.631 ..... 1, 2

RCW 9.94A.716 ..... 1

A. ARGUMENT IN REPLY

THE TRIAL COURT WAS REQUIRED TO SUPPRESS ALL EVIDENCE STEMMING FROM THE UNLAWFUL SEIZURE.

Lomack's position is simple. RCW 9.94A.631(1) is plain on its face:

If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without warrant, pending a determination by the court or by the department. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property."

The statute requires a specific order: reasonable cause a violation has occurred and *then* a CCO's authorization to seize or arrest.<sup>1</sup>

This is consistent with RCW 9.94A.716(2), which provides, "A community corrections officer, if he or she has reasonable cause to believe an offender has violated a condition of community custody, may . . . arrest or cause the arrest and detention in total confinement of the offender . . . ." <sup>2</sup>

---

1 In its brief, the State indicates some kind of inconsistency between Lomack's first issue statement pertaining to his assignments of error and his argument section of the brief. See Brief of Respondent, at 8. Undersigned counsel fails to understand the suggested distinction. Certainly none was intended.

2 The State accuses Lomack of improperly "attempting to conflate" RCW 9.94A.631(1) and RCW 9.94A.716(4). Brief of Respondent, at 12. This is incorrect. The opening brief acknowledges that one statute does not limit the other. See Brief

Lomack's fallback position also is simple. To the extent there is any ambiguity regarding the timing of events in RCW 9.94A.631(1), Lomack gets the benefit of the doubt because statutes authorizing warrantless arrests are strictly construed. See Brief of Appellant, at 10-11 (citing cases).<sup>3</sup>

It is the State that attempts to rewrite RCW 9.94A.631(1) by arguing that a CCO can properly order an individual's detention based on the hypothetical possibility of some future violation. Brief of Respondent, at 8-9. Under this interpretation of the statute, argues the State, Officer Tovar was preauthorized to seize Lomack as soon as he spotted Lomack in Seattle or, at the latest, when Lomack did not deny the prohibition was still in place. Brief of Respondent, at 17-18. While the Legislature could have drafted the statute in such a manner, it did not do so.

Moreover, even if the State's interpretation of RCW 9.94A.631(1) were correct, Officer Tovar's stale information – perhaps as much as one year old – did not provide Tovar with the

---

of Appellant, at 8. The latter statute is merely discussed to demonstrate consistent legislative language and intent.

<sup>3</sup> The State spends several pages distinguishing Lomack's cited cases on their facts. Brief of Respondent, at 9-12. But these cases are cited for the legal proposition of strict construction rather than factual similarity. The State also spends significant time explaining why Tovar's seizure was not a pretext. Brief of Respondent, at 15-17. Lomack, however, has not argued pretext on appeal.

necessary reasonable cause to seize Lomack without a warrant. He could not simply assume the ban was still in effect See Brief of Appellant, at 11-13. The State concedes this point. See Brief of Respondent, at 13 (“a bare assumption would not meet the reasonable cause standard”).

The State contends that Lomack was not seized until Officer Tovar placed a call to DOC. Brief of Respondent, at 13-14. While the trial court did not specifically identify the moment at which Lomack was seized, it was before the telephone call. A person is seized under article 1, section 7 "when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal quotations and citations omitted). A reasonable person in Lomack's situation would not have felt free to simply terminate the encounter once accused of unlawfully being within the Seattle city limits, which were Tovar's first words to Lomack. 2RP 7-8.

Finally, while the State concedes that if Tovar was not statutorily authorized to seize Lomack, all evidence of Lomack's drug

possession must be suppressed, it takes issue with Lomack's reliance on "but-for" analysis. Specifically, citing State v. Eserjose, 171 Wn.2d 907, 259 P.3d 172 (2011), the State asserts that the Washington Supreme Court has rejected this analysis. Brief of Respondent, at 4 n.2. This is incorrect. Eserjose did not produce a majority opinion on the issue, which is currently under consideration in another case. See State v. Christopher Smith, 165 Wn. App. 296, 313-315, 266 P.3d 250 (2011), review granted, 173 Wn.2d 1034, 277 P.3d 669 (2012).

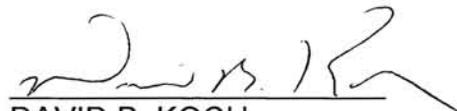
B. CONCLUSION

Because Lomack was unlawfully seized, all evidence obtained in the subsequent search should have been suppressed. His conviction must be reversed.

DATED this 15<sup>th</sup> day of November, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68094-3-1
	)	
JOHN LOMACK,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15<sup>TH</sup> DAY OF NOVEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHN LOMACK  
DOC NO. 911671  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF NOVEMBER 2012.

x Patrick Mayovsky

NOV 15 2012  
11:13 AM  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA