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Division I  
State of Washington

73036-3

NO. 73036-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

K. C-S.,

Appellant.

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

The Honorable John P. Erlick, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The warrant permitting the search of the vehicle K.C-S. drove was not supported by probable cause, as the circumstances known to the officers did not establish a reasonable belief that evidence of a narcotics crime would be found in the vehicle. The trial court should have suppressed the evidence obtained from this tainted warrant, including the fruits of the search performed pursuant to a subsequent warrant addendum.

2. The trial court erred in entering CrR 3.6 conclusion of law 8. CP 88.

3. The trial court erred in entering CrR 3.6 findings of fact 20, 21, 22, and 23, as the temporal sequence of events indicated by the order of these findings was not supported by substantial evidence in the record. CP 85-86.

Issues Pertaining to Assignments of Error

1. Did the circumstances known to the officers establish a reasonable belief that evidence of a narcotics crime would be found in the vehicle K.C-S. drove such that the search warrant of the vehicle was supported by probable cause?

2. Should the trial court have suppressed the evidence obtained from the search warrant because the search warrant was not based on probable cause of criminal activity?

3. Did the invalid search warrant taint the subsequent addendum to the search warrant and the evidence obtained therefrom?

4. Was the trial court's finding that a search incident to arrest revealed a marijuana baggie supported by substantial evidence where record does not establish K.C-S. had been arrested at the time of the search?

5. Where the only evidence supported K.C-S.'s conviction flowed from a warrant that was not supported by probable cause, must the conviction be reversed and must the charge be dismissed with prejudice?

B. STATEMENT OF THE CASE

The State charged K.C-S. with one count of second degree unlawful possession of a firearm. CP 1, 7-8. The firearm was found by officers executing a search warrant of the vehicle K.C-S. drove on August 1, 2014. CP 2-4.

On August 1, 2014, King County Sheriff's detective Joseph Eshom recognized a vehicle that had been involved in vehicle pursuits the previous summer. RP 63-64. Eshom recognized the driver as K.C-S. RP 63. Eshom, who was in the car with sheriff's deputy Aaron Thompson, saw the vehicle turn into a minimart parking lot. RP 65.

As the officers drove by the parking lot, they saw K.C-S. emerge from the vehicle. RP 66. Then the officers did an immediate U-turn and

watched K.C-S. make contact with another vehicle, get back into his car, and pull out of the parking lot. RP 67. Officers suspected the short stay in the parking lot was a narcotics deal, but saw nothing to confirm this suspicion. RP 67, 103, 143, 145, 169-70.

Officers followed K.C-S. as he turned into a fourplex about a block away and activated their lights. RP 70. Officers stated K.C-S. turned around, pushed himself up with his legs, "was digging around" in his waist area, and then bent forward as if he were hiding something by stuffing it under the driver's seat. RP 72-73, 146. K.C-S. and other passengers in the vehicle began exiting, prompting officers to order K.C-S. to the ground at gunpoint and order the passengers back into the car. RP 71-72.

While on K.C-S. lay on the ground, Thompson approached and handcuffed him. RP 147-49. K.C-S. allegedly exclaimed there was nothing in the car. RP 147. K.C-S. allegedly identified himself by another name initially, but Eshom told Thompson K.C-S.'s name. RP 149. Thompson then stood K.C-S. up and searched him. RP 149-50. Thompson found marijuana in one of K.C-S.'s pants pockets. RP 150.

Both Thompson and Eshom smelled fresh, rather than burnt, marijuana emanating from the car. RP 76, 78-79, 150. But neither officer had concerns regarding the passengers' possession of marijuana given that the passengers were over the age of 21. RP 98, 129, 151.

Officers impounded the vehicle and had it towed to a police facility. RP 77, 79, 119. A K-9 unit performed a search of the car while it was in the impound lot. RP 39-40. The dog alerted her handler to the presence of narcotics in the vehicle. RP 42-43. However, the dog could not differentiate marijuana from other narcotics, could not indicate whether the odor came from narcotics currently in the vehicle or from narcotics previously in the vehicle, and could not determine the quantity of marijuana, if any, in the car. RP 45-46.

Eshom applied for a search warrant, requesting a search for narcotics and firearms in the vehicle. RP 128-29. Eshom relied, in part, on the odor of marijuana coming from the car but did not disclose that two of the passengers in the vehicle were older than 21. RP 129. The magistrate permitted only a search for narcotics because officers did not see any firearms. RP 87, 128.

During the search for narcotics, officers found two guns in the car. RP 84. Eshom then prepared an addendum to the search warrant to permit a search for firearms, which the magistrate approved. RP 87.

The State sought to admit K.C-S.'s statement that there was nothing in the car. Thompson testified the statement was made while K.C-S. was handcuffed and on the ground. RP 148. The trial court admitted the

statement, concluding that K.C-S. made the statement during a lawful Terry<sup>1</sup> stop, rather than a full custodial arrest. CP 102; RP 193.

K.C-S. moved to suppress the firearm evidence, asserting that there was no probable cause to support the search warrant of the vehicle. CP 9-21. The trial court disagreed<sup>2</sup> and concluded the following circumstances provided sufficient probable cause:

- a. Deputies were familiar both with the car as well as the driver
- b. The questionable activity in the mini-mart suspected as a drug deal
- c. The respondent's furtive movements prior to his arrest
- d. The respondent's outstanding felony warrants
- e. Strong smell of marijuana coming from the vehicle
- f. Possession of marijuana by the respondent.
- g. The Respondent's statement that he had nothing in his car.

CP 88 (CrR 3.6 finding of fact 8). The trial court also concluded "probable cause to search the respondent's vehicle was enhanced by K-9 Jade's positive reaction to the presence of narcotics." CP 88; RP 214.

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<sup>1</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

<sup>2</sup> The trial court ruled the impoundment of the vehicle was unlawful but that the unlawful impoundment did not invalidate the subsequent and untainted search under the independent source doctrine. CP 87-88; RP 240.

As for K.C-S.'s marijuana possession, the trial court determined the marijuana was found during a search incident to arrest. CP 86; RP 203. However, Thompson testified he searched K.C-S. almost immediately after handcuffing him and that K.C-S. was not arrested until Eshom confirmed his outstanding warrants shortly before officers removed K.C-S. from the scene. RP 149-50, 163, 171. The trial court's finding that the marijuana was found during a search incident to arrest was also inconsistent with its conclusion for CrR 3.5 purposes that K.C-S. was merely detained pursuant to Terry when he was handcuffed and on the ground. It is unclear from the record when the arrest occurred.

Because it refused to suppress the firearm evidence, the trial court determined K.C-S. was guilty of second degree unlawful possession of a firearm beyond a reasonable doubt. CP 97; RP 278-82. The trial court determined a local sanctions disposition was too lenient and imposed a manifest injustice sentence of 42 to 52 weeks, but suspended the sentence for 12 months to allow him to participate in treatment. CP 92; RP 350-53. K.C-S. timely appeals. CP 76-77.

C. ARGUMENT

BECAUSE POLICE LACKED PROBABLE CAUSE TO SEARCH THE CAR K.C-S. DROVE FOR EVIDENCE OF NARCOTICS, THE FIREARM FOUND PURSUANT TO A SUBSEQUENT ADDENDUM TO THE WARRANT WAS FRUIT OF THE POISONOUS TREE, REQUIRING SUPPRESSION OF THIS EVIDENCE, REVERSAL OF THE CONVICTION, AND DISMISSAL OF THE PROSECUTION

“The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual’s right to privacy.” State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)). Probable cause to support a search warrant “must be based on more than mere suspicion or personal belief that evidence of a crime will be found on the premises searched.” Neth, 165 Wn.2d at 183. “Probable cause for a search requires a nexus between criminal activity and the item to be seized and between that items and the place to be searched.” Id. (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)). “Although [courts] defer to the magistrate’s determination, the trial court’s assessment of probable cause is a legal conclusion [courts] review de novo.” Neth, 165 Wn.2d at 182.

On review, the “question is whether the facts available to the magistrate . . . justified a reasonable belief, rather than mere suspicion, that

evidence of a crime was located in [K.C-S.]’s car.” Id. at 183. Here, the answer is no.

The trial court determined there was probable cause to search the vehicle K.C-S. drove for evidence of marijuana possession or delivery because (1) police were familiar with K.C-S. and the car he drove; (2) K.C-S. made brief stop in a minimart parking lot, which the police suspected was a drug deal; (3) K.C-S. made “furtive movements” in the vehicle; (4) there were outstanding bench warrants for K.C-S.’s arrest; (5) the vehicle K.C-S. drove strongly smelled of marijuana; (6) police found marijuana on K.C-S.’s person during an alleged Terry pat-down or alleged search incident to arrest; (7) K.C-S. stated there was nothing in the car; and (8) a K-9 officer’s positive reaction to the presence of narcotics enhanced probable cause. CP 88. Taken individually or together, these circumstances did not furnish probable cause to search the vehicle. The warrant authorizing the search of the vehicle for evidence of marijuana was invalid, which tainted a subsequent warrant addendum to search for firearms. Because all the State’s evidence flowed from the illegal search of the vehicle, this court must reverse K.C-S.’s conviction, suppress the unconstitutionally obtained evidence, and remand for dismissal of this unlawful prosecution with prejudice.

1. Mere familiarity with the subject of an investigation does not provide probable cause

While prior criminal history might at times be used as a factor when determining probable cause, this is so only when the criminal history is of the same general nature of the crimes under investigation. State v. Clark, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001). “If a prior conviction, not to mention a prior arrest, should afford grounds for believing that an individual is engaging in criminal activity at any given time thereafter, that person would never be free of harassment, no matter how completely he had reformed.” State v. Hobar, 94 Wn.2d 437, 446-47, 617 P.2d 429 (1980).

At the suppression hearing, no evidence was adduced that any of K.C-S.’s prior convictions or involvement with law enforcement were related to narcotics or narcotics trafficking. The only testimony given about K.C-S.’s prior convictions during the CrR 3.6 hearing pertained to outstanding felony warrants, probation violations, or a prior eluding incident. RP 63-66, 101, 124, 253. Because the State established no nexus between K.C-S.’s criminal history and the narcotics-related crime for which it sought a warrant, officers’ familiarity with K.C-S.’s criminal history provided no probable cause to search the vehicle.

2. Stopping briefly in a “high crime area” fails to furnish probable cause of a crime

The police cannot create geographical zones in order to convert innocuous activities into probable cause to suspect a crime. The fact that K.C-S. stopped in a minimart parking lot in a “high crime area” and briefly talked to the occupants of another vehicle does not establish probable cause that K.C-S. was involved in criminal activity. To hold otherwise would endorse a regime in which citizens may freely carry on activities in public only at the whim of police officers.

“It is beyond dispute that many members of our society live, work, and spend their waking hours in high crime areas, a description that can be applied to parts of many of our cities. That does not automatically make those individuals proper subjects for criminal investigation.” State v. Larson, 93 Wn.2d 638, 345, 611 P.2d 771 (1980). Indeed, “[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.” Papachristou v. City of Jacksonville, 405 U.S. 156, 165, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1975) (quoting United States v. Reese, 92 U.S. 214, 221, 23 L. Ed. 563 (1875)).

Nor is short-stay traffic sufficient to establish probable cause. In State v. Doughty, 170 Wn.2d 57, 60, 239 P.3d 573 (2010), for instance, Doughty approached a suspected drug house late at night, stayed for two minutes, and then drove away. Although officers did not see Doughty's actions in the house, they stopped Doughty for suspicion of drug activity. Id. The Washington Supreme Court held that the stop was invalid: "The two-minute length of time Doughty spent at the house—albeit a suspected drug house—and the time of day do not justify the police's intrusion into his private affairs." Id. at 64.

As in Doughty and Larson, K.C-S.'s presence in a purportedly high narcotics area did not establish probable cause to suspect K.C-S. of a drug crime. See RP 53-54, 67-68 (Detective Joseph Eshom testifying about areas "that we will go if we are hunting for drug dealers," believed the minimart parking lot was such an area, and asserted K.C-S.'s presence in the parking lot alone warranted a traffic stop). And K.C-S.'s short stay and communication with the occupants of another vehicle could not have established reasonable suspicion to conduct a Terry stop, so it certainly could not have established probable cause. Officers admitted during the suppression hearing that they saw no hand-to-hand exchange between K.C-S. and the other vehicle's occupants. RP 67, 103, 143, 145, 169-70. The fact that K.C-S. stopped in a minimart parking lot and briefly spoke to the

occupants of another vehicle provided no probable cause that K.C-S. was committing or had committed a crime.

3. Appearing to hide items from police does not establish probable cause that a crime has been committed

Officers indicated K.C-S. straightened up and then bent down as if to conceal something right before exiting the vehicle. RP 72-73, 146. But even if K.C-S. was attempting to conceal items from police, it did not establish probable cause.

In State v. Gatewood, police observed Gatewood “twist [ ] his whole body to the left, inside the bus shelter, as though he was trying to hide something.” 163 Wn.2d 534, 537, 182 P.3d 426 (2008) (alteration in original) (quoting report of proceedings). Gatewood walked away, approached bushes, and “bent over and reached into his waistband. The officers could not see what he was doing, so they drew their guns and ordered Gatewood to stop and show his hands. Gatewood pulled something out of his waistband, threw it into the bushes, and then complied with the officers’ request.” Id. at 538. Our supreme court held that officers had no reasonable basis to suspect Gatewood of criminal activity based on officers’ perception that he was attempting to hide something from their view. Id. at 541.

In State v. Graham, 130 Wn.2d 711, 725, 927 P.2d 227 (1996), in contrast, officers “testified that they saw the defendant carrying a large amount of cash and a small packet containing what looked like rock cocaine.” When he saw the officers, Graham’s reaction “was to quickly conceal the contents of his hands and to hide it in his front pants pockets. He then ignored the officers’ request to stop. He looked very nervous and was sweating profusely even though the temperature was cold to the officers.” Id. at 725-26.

This case is more like Gatewood. Unlike Graham, officers did not see what K.C-S. had in his hands, if anything; nor did K.C-S. appear nervous or refuse to comply with the officers’ commands. RP 73-75. Although an officer said, “it looked to me just like he had pulled a bag of drugs or a gun out of his waistband and was shoving it under the seat,” RP 72, this pure speculation did not establish probable cause. Likewise, though it appeared to one of the officers K.C-S. might attempt to flee, K.C-S. never did so. RP 70-71. There was no probable cause to search K.C-S.’s vehicle for narcotics activity based on his purported suspicious movements.

4. The outstanding warrants had nothing to do with marijuana, and therefore did not provide probable cause to search the vehicle for marijuana evidence

The record at the CrR 3.6 hearing does not establish why K.C-S. had outstanding warrants. As discussed in Part 1 above, evidence of prior crimes

supports probable cause to the extent the prior crimes are of the same general nature as the crimes under investigation. Clark, 142 Wn.2d at 749; Hobar, 94 Wn.2d at 446-47. The State did not adduce evidence that the warrants had anything whatsoever to do with narcotics. Therefore, the existence of the outstanding warrants for some unknown reason cannot establish the required nexus to suspected narcotics activity or a nexus between the suspected narcotics activity and the search of the vehicle. The outstanding warrants add absolutely nothing to support probable cause.

5. Although police omitted it from the warrant affidavit, there were two adults in the car for whom it was lawful to possess marijuana; the marijuana odor therefore does not establish any probability a crime had been committed

In the application for a search warrant, officers relied on the smell of fresh, rather than burned, marijuana coming from the vehicle. RP 76, 78-79, 150. The trial court relied on the marijuana odor as one of the circumstances supporting probable cause. CP 88. But two adults over the age of 21 were in the car at the time of the stop and adults in Washington may legally possess up to 40 grams of marijuana. RCW 69.50.360(3); RCW 69.50.4013(3); RCW 69.50.4014. Detective Eshom acknowledged as much during his testimony.<sup>3</sup> RP 98, 129. Moreover, officers only found “a little

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<sup>3</sup> Detective Eshom told Deputy Aaron Thompson “he was going to write a search warrant based on the odor of marijuana in the car.” RP 152. Eshom prepared the search warrant application. RP 81-82, 152. Yet, troublingly, Eshom misled the

bit of residue” in the vehicle at the time of the search, indicating that the marijuana odor had indeed emanated from the adults who legally possessed it, not from K.C-S. RP 117-18. In such circumstances, the odor of marijuana did not provide evidence of a marijuana crime and could not have furnished probable cause to search the vehicle on this basis.

6. The search of K.C-S.’s person was unlawful under Terry, which allows only a protective frisk for weapons, and was an invalid search incident to arrest because there is not substantial evidence K.C-S. had been arrested at the time of the search

At the suppression hearing, officers stated they found a small amount of marijuana on K.C-S.’s person. But this search was invalid under Terry, as it exceeded a Terry frisk’s limited scope to search for weapons. And the record fails to establish K.C-S. had been arrested at the time of the search, so the search was not a valid search incident to a lawful arrest. The marijuana found on K.C-S.’s person was unconstitutionally obtained, must be suppressed, and therefore may not factor into the probable cause analysis for the vehicle search.

- a. The search of K.C-S.’s person was not valid under Terry because the scope of a Terry frisk is limited to officer safety concerns

Deputy Thompson testified he handcuffed K.C-S. and attempted to verify K.C-S.’s identity while K.C-S. lay on the ground. RP 148-49. K.C-S.

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magistrate by not disclosing that two adults were in the car. RP 129; cf. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

allegedly gave a false name; “Detective Eshom walked over and told [Thompson] that [the name] was in fact [K.C-S.]” RP 149. Then the prosecutor asked, “so then what did you do?” RP 149. Thompson responded, “He was -- stood up and searched” and stated the search disclosed “a small baggie of marijuana in one of his pockets.” RP 149-50.

The trial court initially concluded, for the purposes of the CrR 3.5 hearing, that K.C-S. had not been arrested at this point, despite being handcuffed and on the ground. CP 101-02; RP 192-93. Instead, the trial court determined this amounted to a mere Terry stop, and officers were not required to administer Miranda<sup>4</sup> warnings. CP 102; RP 193.

If K.C-S. was subjected to a Terry stop rather than a full arrest, as the trial court concluded, then Thompson’s search of K.C-S. was invalid. The scope of a valid Terry frisk is strictly limited to protective purposes. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). Thus, an officer may only conduct a search of a suspect’s outer clothing for weapons that might be used to harm the officer or the public. Terry v. Ohio, 292 U.S. 1, 29-30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). Once police determine there is no weapon involved, the authority to conduct even a limited search ends. Garvin, 166 Wn.2d at 254.

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<sup>4</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).

Thompson did not limit the scope of his search to finding weapons. Instead, he thoroughly searched K.C-S. as he would have incident to K.C-S.'s arrest. See RP 150 (Thompson testified he found a small marijuana baggie during what he believed was search incident to arrest). Thus, accepting the trial court's conclusion that K.C-S. was detained subject to Terry at the point he was handcuffed and searched, Thompson clearly exceeded Terry's limited scope.

- b. The search was not incident to arrest because there was not substantial evidence K.C-S. had been arrested at the time of the search

Contrary to the trial court's previous conclusion that K.C-S. was subjected to a mere Terry stop, not an arrest, at the time he was searched, the trial found that the marijuana baggie resulted from a search incident to arrest. CP 85-86 (findings of fact 20 through 23); RP 203. Indeed, according to the trial court's findings, K.C-S. was handcuffed (finding 20), Eshom then confirmed K.C-S.'s identity (finding 21), then warrants were confirmed and K.C.S was placed under arrest (finding 22), and then pursuant to a search incident to arrest, the marijuana baggie was found (finding 23). CP 85-86. These findings and the temporal sequence of events they imply were not supported by substantial evidence.

Courts review challenged CrR 3.6 findings for substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 879 P.2d 313 (1994). Substantial

evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair minded, rational person of the truth of the finding. Id.

Here, as discussed, based on the evidence adduced at the CrR 3.5/CrR 3.6 hearing, the trial court concluded K.C-S. was not under arrest at the time he was handcuffed. Rather, as the trial court accepted for the purpose of its CrR 3.5 findings, K.C-S.'s arrest did not occur until Officer Eshom confirmed the outstanding warrants. See RP 124 (Eshom testifying confirmation of arrest warrants occurred shortly before leaving the scene of arrest); RP 163 (Thompson's testimony that K.C-S. was not under arrest until Eshom confirmed the warrants); CP 102 ("The respondent was not in "custody" for purposes of Miranda when Deputy Thompson drew his gun, ordered the respondent to the ground, and placed the respondent in handcuffs.").

But the officers' testimony did not establish that the search of K.C-S.'s person occurred after the warrants were confirmed and thus after they arrested K.C-S. Their testimony actually suggested the opposite. Eshom testified,

Q. And did you see what Kyle was doing after that?

A. No, because Detective Thompson went and started with him, and I think he put him on the ground and then handcuffed him.

Q. All right, and the -- did you -- do you know whether Detective Thompson searched Kyle?

A. I believe he did and found the bag of marijuana on him.

Q. And do you know -- when did that happen?

A. Right then, I believe.

Q. Right then while he was on the ground?

A. Actually, no. I mean right there following the arrest. I mean I don't know if it was right then when he was on the ground or if it was five minutes later. I don't know.

Q. Okay. So you know if was soon after the --

A. Soon after.

Q. -- initial contact, but you couldn't say how long?

A. Right. No.

Q. Did he -- did you see that or is it something that he told you about later?

A. It is something I learned about right then. I don't know if he told me like, "Hey, he has got a bag of marijuana on him," or what; I don't remember how it went down.

RP 110-11. Thompson, when asked "how long was it after the time you laid him on the ground before you found the marijuana in his pocket," responded, "Hmmm -- a couple of minutes, probably? Two or three minutes? Five minutes?" RP 171. Thompson also said he was on scene for 30 to 35 minutes altogether. RP 171. Thompson had previously testified that he performed the search immediately after Eshom walked over informed Thompson of K.C-S.'s identity:

A. I asked him his name again and he said it was Lionel Barry.

Q. [By prosecutor] And at that point what happened?

A. Detective Eshom walked over and told me that it was in fact [K.C-S.].

Q. Okay, *so then what did you do?*

A. He was -- stood up and searched.

Q. Okay, and did you find anything on his person?

A. Yes.

Q. What did you find?

A. There was a small baggie of marijuana in one of his pockets.

RP 149-50 (emphasis added).

This evidence cannot persuade a fair-minded, rational person that the search disclosing the marijuana occurred after K.C-S. was formally arrested. Therefore, the trial court's finding that the search of K.C-S.'s person was incident to arrest was not supported by substantial evidence. The arrest did not occur until the warrants were confirmed. The warrants were confirmed sometime shortly before leaving the scene, some 30 minutes after the initial stop of the vehicle. The search occurred, at most, five minutes after K.C-S. was placed in handcuffs on the ground. And, according to Thompson, who performed the search in question, the search more likely occurred

immediately after the handcuffing. There is nothing from this evidence to support the trial court's findings that the arrest occurred before the search.

Moreover, the record is clear that the trial court was merely refashioning the sequence of events wrought out by the testimony in order to avoid suppression of the marijuana evidence. Compare RP 201 (The court stating, "well . . . Deputy Thompson testified that he did not read the respondent his Miranda rights because he was handcuffed but not under arrest until the warrants were confirmed"), and RP 202 (court asking, "how do you search someone incident to arrest if you haven't arrested them?"), with RP 203 ("I am going to find that . . . based upon both the testimony of Deputy Thompson, Detective Eshom and Detective Eshom's affidavit in support of search warrant --that the search of [K.C-S.] was incident to his arrest for the warrants and therefore could be considered by the judge in issuance of the search warrant.")). Thus, the court seemed to acknowledge the evidence was less than clear that the arrest occurred before the search yet nonetheless determined the search was valid incident to arrest. The trial court's twisting and sanitizing of the facts to fit tidily into the rules of criminal procedure is offensive, and this court should reject it.

The search resulting in the marijuana baggie exceeded the scope of Terry. There was not substantial evidence to conclude the search occurred after K.C-S.'s arrest. Accordingly, the State failed to establish that the

search of K.C-S. was valid, requiring suppression of the marijuana found on his person. Without this marijuana, officers lacked probable cause to search for additional marijuana evidence in the vehicle.

7. K.C-S.'s statement he had nothing in the car might arouse officers' suspicions, but it does not establish probable cause

Officers became suspicious because K.C-S. allegedly stated, "there's nothing in my car." RP 148. The trial court concluded that K.C-S.'s alleged statement actually indicated there was incriminating evidence in the car, and concluded the statement for supported probable cause of criminal activity. CP 88; RP 281. But it is unreasonable to conclude that a suspect's proclamation of innocence as he is being forced to the ground at gunpoint and handcuffed by police officers indicates involvement in criminal activity. While K.C-S.'s statement might have led to an officer's hunch K.C-S. had evidence in the car, it cannot reasonably or realistically furnish probable cause that K.C-S. had committed or was committing a crime.

8. The dog sniff adds nothing to the probable cause analysis and the trial court illogically and erroneously concluded otherwise

The trial court concluded the positive K-9 search "enhanced" the probable cause that there were narcotics in the vehicle. CP 88; RP 214. But the evidence was clear that the dog could not differentiate between marijuana and other narcotics, and was trained just to alert to all narcotics odors. RP

44-45. Moreover, the dog's handler indicated he could not say whether the odor the dog detected was coming from actual narcotics in the vehicle or narcotics that had been in the car previously. RP 45. As discussed above, given that there were two adults in the car who were allowed to legally possess marijuana, the positive K-9 search indicating the presence of narcotics in the vehicle at some point in time provides no support whatsoever for the probable cause determination. The trial court erred in concluding otherwise.

9. The search warrant for narcotics was not supported by probable cause and therefore taints the subsequent search warrant for firearms, requiring that the firearms be suppressed as fruit of the poisonous tree

Based on all the facts available to the magistrate, the warrant allowing search the vehicle for evidence of narcotics was not supported by probable cause. With the unconstitutional search for narcotics, the State would never have found the firearms. See RP 86 (Eshom testifying, "I did an addendum to the search warrant to go back for the firearms . . . because the original search warrant was for narcotics, so I had to do an addendum for the firearms."). Therefore, the firearm evidence found in the vehicle resulted from the unconstitutional narcotics search, and is therefore inadmissible as fruit of the poisonous tree. State v. Ridgway, 57 Wn. App. 915, 920, 790

P.2d 1263 (1990) (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

Without the firearm evidence, the State cannot prove every element of unlawful possession of a firearm, requiring reversal of K.C-S.'s conviction and remand for dismissal of the charge with prejudice. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997) (concluding dismissal appropriate where unlawfully obtained evidence forms sole basis for the charge).

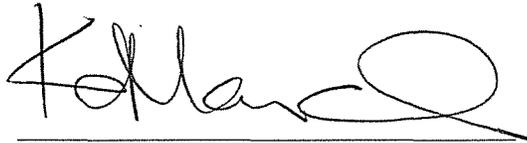
D. CONCLUSION

The warrant permitting the search of the vehicle for narcotics evidence was not supported by probable cause. Because all the State's evidence is tainted by this invalid search warrant, K.C-S. asks this court to suppress the unconstitutionally obtained evidence, vacate his conviction, and remand for dismissal of this unlawful prosecution.

DATED this 6<sup>th</sup> day of August, 2015.

Respectfully submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 73036-3-1
	)	
K.C-S.,	)	
	)	
Appellant.	)	

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**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 7<sup>TH</sup> DAY OF AUGUST, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KYLE CONNER-SMITH  
8419 GRATTAN PLACE S  
SEATTLE, WA 98118

**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF AUGUST, 2015.

x *Patrick Mayovsky*