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COURT OF APPEALS  
06 MAR 22 PM 12:33  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

Nº. 33810-6-II

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

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STATE OF WASHINGTON  
Respondent,

v.

STAVIS J. DAIGNAULT,  
Appellant.

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**OPENING BRIEF OF APPELLANT**

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Appeal from the Superior Court of Kitsap County,  
Cause No. 05-1-00889-8  
The Honorable Leila Mills, Presiding Judge

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pm 3/21/06

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**A. ASSIGNMENTS OF ERROR**

1. Mr. Daignault's rights under Washington constitution article 1, section 7 were violated by an unlawful warrantless search.
2. There was insufficient evidence to convict Mr. Daignault of possession of methamphetamine.
3. There was insufficient evidence to impose the sentencing enhancement for delivering methamphetamine within 1000 feet of school grounds.
4. Mr. Daignault received ineffective assistance of counsel.

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Does a search incident to arrest exceed its permissible scope where the arresting officer unlocks and searches inside a locked box found beneath the front passenger seat of a vehicle? (Assignment of Error No. 1)
2. Must Mr. Daignault's conviction for possession of methamphetamine be reversed and the charge dismissed where it was based on the evidence discovered during an illegal warrantless search? (Assignment of Error No. 2)
3. Was there insufficient evidence to impose the sentencing enhancement for delivering methamphetamine within 1000 feet of school grounds where no map or diagram was presented by the State, a school district employee testified that she knew where the boundary of school property was but did not testify about how far the boundary was from the perimeter of the school grounds and the police officer who measured the distance did not know where school property began? (Assignment of Error No. 3)
4. Did Mr. Daignault receive ineffective assistance of counsel where defense counsel failed to submit a pre-trial motion to suppress evidence obtained from a locked box found inside Mr. Daignault's vehicle without a warrant? (Assignment of Error No. 4)

**C. STATEMENT OF THE CASE**

On February 22, 2005 and March 1, 2005, Port Orchard police prepared and used confidential informant Adam Dempsey to make controlled buys of methamphetamine from Stavis Daignault. CP 96; CP 104; CP 106-107; CP 131-135; CP 141-147.

On June 12 2005, Port Orchard Police Officer Meador arrested Mr. Daignault on an outstanding warrant. CP 257-258; CP 270. Officer Meador contacted Mr. Daignault in his vehicle, removed him from the car at gunpoint and handcuffed him. CP 270. At the time of Mr. Daignault's arrest, there was a passenger sitting on the right side of the rear seat. CP 279. Incident to the arrest, Mr. Daignault was searched, at which time the officer found "[v]ery tiny keys. That might belong to a small lock." CP 272.

The officer also searched Mr. Daignault's vehicle incident to his arrest and discovered "a small tin black metal box with a key lock on top" underneath the passenger seat. *Id.*

After Mr. Daignault was Mirandized, he was asked by the officer who the box belonged to, and told the officer it did not belong to him. CP 271-272. The passenger also denied that the box was his. CP 272. When he was asked whether the small keys would open the box, Mr. Daignault told the officer "they didn't go to the box." CP 273.

The officer testified:

Q. Did you see if they went to the box?

A. Yes, I did.

Q. What was the result of that?

A. Upon opening the box – they fit the box, and I opened the box.

Q. What was – was there anything in the box?

A. Yes, there was.

Q. What was in the box?

\* \* \*

A. His identification and present ID, two separate bags of methamphetamine, both were later tested and positive.

CP 273.

The officer then “advised him he’s under arrest for possession with intent.” CP 274.

Mr. Daignault was originally charged with two counts of delivery of methamphetamine in violation of RCW 69.50.401(1) and RCW 69.50.401(2)(b) based on the February 22 and March 1 controlled buys. CP 1-2. On September 1, 2005, a First Amended Information was filed, adding a special allegation that the March 1 delivery of methamphetamine took place within one thousand feet of the perimeter of school grounds,

constituting a violation of RCW 69.50.401 and 69.50.435(1). Also added was one count of possession of methamphetamine, a violation of RCW 69.50.4013 and 69.50.206(d)(2), based on the evidence discovered during the June 12, 2005 arrest. CP 20-22.

Mr. Daignault's counsel did not move pre-trial for suppression of the methamphetamine discovered during the June 12, 2005 arrest.

Trial to the jury began on September 6, 2005. CP 88. To support the special allegation that Mr. Daignault had delivered methamphetamine within 1000 feet of school grounds, the State presented two witnesses, Janice Harrison, who is the assistant director of transportation for South Kitsap School District (CP 138), and Port Orchard police officer Beth Deatherage. CP 282.

The State presented no maps showing school property boundaries pursuant to RCW 69.50.435(5), but Ms. Harrison stated she is familiar with the property boundaries of schools in the South Kitsap School District. CP 138. Ms. Harrison testified on direct examination:

Q. Miss Harrison, based on your information of these records, can you tell us if there is a high school on Mile Hill Drive in Port Orchard?

A. The high school's address is actually on Mitchell. But the property is adjacent to Mile Hill.

Q. And, ma'am, have you been in that area?

A. Yes, I have.

Q. On the Mile Hill Drive portion of it, is there an A & W near where that property line is?

A. Yes, there is.

Q. And the property line that we're talking about, could you describe for the jury where along Mile Hill that property line is or ends?

A. Um, if you are headed west on Mile Hill Drive, which would be towards the roundabout, the entrance to the high school property is just past – State Farm I believe has an insurance company, there's a building there with several businesses in it, then the school property begins. And then the drive down into the school property. Then there's a storage unit, then Plisko. Plisko is right across the street from the A & W, and—

Q. And so that drive down into the school, as you begin that drive, would you then be on or within the school property?

A. Yes.

CP 139-140.

Officer Deatherage took a measurement from “the west side of the phone booth down to the entrance road to the South Kitsap High School.”

CP 283. Officer Deatherage testified that her measurement was

“approximately 668 feet.” CP 285. Officer Deatherage also testified that

she did not know where on the entrance road the “actual property of South Kitsap High School begins.” CP 286.

Mr. Daignault was found guilty as charged, and by special verdict the jury also found that Mr. Daignault had delivered methamphetamine within one thousand feet of the perimeter of school grounds. CP 90; CP 92.

Mr. Daignault was sentenced to 20 months each on Count I and II, to be served concurrently, plus 24 months for the school grounds enhancement. CP 92. Mr. Daignault was also sentenced to 12 months and 1 day on Count III, to run consecutively to the time imposed for Counts I and II. CP 92.

Notice of Appeal was timely filed on September 16, 2005.

***D. ARGUMENT***

This Court will not review an alleged error that was not raised at trial unless it is a “manifest error affecting a constitutional right.” *State v. Contreras*, 92 Wn. Ap. 307, 311, 966 P.2d 915 (1998). To establish that an error is “manifest,” the appellant must “show actual prejudice.” *Id.*, citing *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

Where, as here, an alleged constitutional error arises from defense counsel’s failure to move to suppress, “the defendant ‘must show the trial court likely would have granted the motion if made [and] actual prejudice must appear in the record.’” *Contreras*, 92 Wn. App. at 312, 966 P.2d

915, quoting *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

This Court has concluded that

when an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.

*Contreras*, 92 Wn. App. at 313, 966 P.2d 915 (1998).

Although there was no suppression motion filed in this case, as in *Contreras*, the record here is “sufficiently developed” and this Court can “determine whether a motion to suppress clearly would have been granted or denied,” and can thus review the suppression issue. *Contreras*, 92 Wn. App. at 314, 966 P.2d 915.

**1. Mr. Daignault’s rights guaranteed by article 1, section 7 of the Washington constitution were violated by the warrantless search of the locked metal box.**

Absent an exception to the warrant requirement, a warrantless search is impermissible under both article I, section 7 of the Washington Constitution and the fourth amendment to the United States Constitution. *See State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996). Generally, evidence seized during an illegal search is suppressed under the exclusionary rule. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

“A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement [.]” *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 8, 145 L.Ed.2d 16 (1999); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992).

The Washington State Supreme Court has stated: “The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception.” *Ladson*, 138 Wn.2d 343, 357, 979 P.2d 833.

A search incident to arrest is a well-recognized exception to the warrant requirement. *State v. Vrieling*, 144 Wn.2d 489, 492, 28 P.3d 762 (2001).

Under the search incident to arrest exception to the warrant requirement, officers may search a suspect’s person and the area within that person’s immediate control at the time of the arrest even in the absence of exigent circumstances. This permission extends to the passenger compartment of the suspect’s vehicle if the compartment was within the suspect’s immediate control at the time of or immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car. To invoke this exception, the State must prove both close physical and close temporal proximity.

*State v. Turner*, 114 Wn. App. 653, 657, 59 P.3d 711 (2002) (internal citations omitted).

In *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the United States Supreme Court held that the scope of a search incident to arrest extends as far as, but no farther than, the area into which the arrestee might reach to grab a weapon or destroy evidence.

In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the United States Supreme Court held as a “bright-line rule” that when an arrestee is occupying the passenger compartment of a car at the time of arrest, he might grab a weapon or destroy evidence located anywhere within the compartment.

However, this is not an exception without limitations: the exception has been narrowly drawn to address officer safety and prevent the destruction of evidence. *Vrieling*, 144 Wn.2d at 494, 28 P.3d 762. While recognizing these dual justifications, in *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986), the Washington Supreme Court observed that “because of our heightened privacy protection [under article I, section 7], we do not believe that these exigencies always allow a search.” *Stroud*, 106 Wn.2d at 151, 720 P.2d 436.

In *Stroud*, the Washington Supreme Court followed *Belton* **except for locked containers**. The court reasoned:

During the arrest process...officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. **However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant....** [T]he danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container.

*Stroud*, 106 Wn.2d at 152, 720 P.2d 436 (emphasis added).

Thus, in Washington, locked containers within a vehicle may not be searched incident to an occupant's arrest. *See State v. Fladebo*, 113 Wn.2d 388, 395, 779 P.2d 707 (1989).

The record here shows that the arresting officer used keys taken from the person of Mr. Daignault to unlock and open a locked container found beneath the passenger's seat on his vehicle, and that this was done "incident to arrest," without a warrant. Under *Stroud*, the trial court "clearly" would have been bound to suppress evidence that methamphetamine was found inside the locked container.

**2. Without the tainted evidence, there was no evidence to support a conviction for possession of methamphetamine.**

Mr. Daignault was found guilty on a charge of possession of methamphetamine discovered during the search incident to the June 12,

2005 arrest. CP 92. This Court should reverse the conviction and dismiss the charge because without the tainted evidence, there is no basis for the charge of possession of methamphetamine on June 12, 2005.

**3. There was insufficient evidence to support the sentence enhancement for delivering a controlled substance within one thousand feet of the perimeter of the school grounds.**

A special allegation was made in the First Amended Information that the delivery of methamphetamine on March 1, 2005 took place within one thousand feet of the perimeter of the school grounds. *See* CP 21-22. Pursuant to RCW 69.50.435 and RCW 9.94A.310(6), the State sought a 24-month sentence enhancement based on the location of the delivery.

“Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation which triggers the enhanced penalty.” *State v. Hennessey*, 80 Wn. App. 190, 907 P.2d 331 (1995), quoting *State v. Lua*, 62 Wn. App. 34, 42, 813 P.2d 588, *review denied*, 117 Wn.2d 1025, 820 P.2d 510 (1991).

“On appeal, the standard of review is whether a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts to support the enhancement.” *Hennessey*, 80 Wn. App. at 194, citing *Jackson v. Virginia*, 443 U.S. 307,

99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

The evidence presented by the State failed to establish beyond a reasonable doubt that the March 22, 2005 delivery of methamphetamine took place within 1,000 yards of the perimeter of South Kitsap High School. There was no map or diagram presented at trial showing the boundaries of the school property, and no evidentiary hearing was held to determine whether the State had satisfied the prima facie elements of the violation.

The State presented testimony of lay witness Janice Harrison and the testimony of police officer Beth Deatherage.

Ms. Harrison testified that she had personal knowledge of the location of the school property boundaries, but offered no opinion as to the distance from the location of the delivery (the first parking space to the west of the A & W Drive-in on Mile High Road) to the perimeter of the school property. *See* CP 139-141.

Officer Deatherage testified that she had measured 668 feet from the west side of the telephone booth in the parking lot of the A & W Drive-in “down to the entrance road to the South Kitsap High School.” CP 283. She also testified that she had not consulted with the South Kitsap School District to locate the South Kitsap High School property

boundary, and did not know where on the “entrance road” the perimeter of the school grounds was located. CP 285-286.

In *Hennessey*, this Court ruled that the testimony of a school district official who knew about the location of school bus stops but took no measurements from the bus stops to the location of the drug sale was insufficient to establish that the sale had taken place within 1,000 feet of the bus stops. *Hennessey*, 80 Wn. App. at 333-334, 907 P.2d 331.

The *Hennessey* school district official presented two maps to show the location of the school bus stops in relation to the site of the drug sale, and the undercover police officer who took part in the drug transaction “guesstimated” that it had taken place 600-750 feet of the bus stops, but “no witness testified as to any actual measured distance between the drug purchase sites and the bus stops, nor did any witness use the maps to delineate the distance.” *Hennessey*, 80 Wn. App. at 332-333, 907 P.2d 331.

In this case, no maps were presented and the school district official did not testify regarding the distance from the perimeter of the school grounds to the situs of the drug transaction. Although Officer Deatherage testified about her 668-foot measurement, she stated that she did not know where the actual perimeter of the school grounds was located. CP 286.

The State presented insufficient evidence to prove beyond a reasonable doubt that the March 1, 2005 delivery of methamphetamine took place within 1,000 yards of the perimeter of South Kitsap High grounds. This Court should reverse the sentencing enhancement and remand for resentencing without the enhancement. *Hennessey*, 80 Wn. App. at 334, 907 P.2d 331.

**4. Mr. Daignault received ineffective assistance of counsel.**

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*McFarland*, 127 Wn.2d at 334-335, 899 P.2d 1251 (citing *State v. Thomas*, 109 Wn.2d 222, 225-226, 7453 P.2d 816 (1987) (applying the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984))).

In *Contreras*, this Court wrote that it could reach the issue of an illegal seizure where no motion for suppression had been filed by defense counsel "through [an] ineffective assistance of counsel claim." *Contreras*, 92 Wn. App. at 317, 966 P.2d 915. Mr. Daignault's claim of ineffective assistance of counsel is based on the fact that his counsel failed to file a

motion to suppress evidence obtained when police unlocked and opened a locked container during the search of his vehicle incident to his arrest.

Such a failure rendered defense counsel's representation deficient because Washington law is clear and well-established that such police conduct is prohibited. *Stroud*, 106 Wn.2d at 152, 720 P.2d 436 (“However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant . . .”).

There were three charges against Mr. Daignault, all of which involved methamphetamine, and two of which were for alleged delivery of methamphetamine to a confidential informant during controlled buys. Mr. Daignault's defense was that he did not deliver methamphetamine to the confidential informant, but that he was “set up” by the confidential informant, who must have had tiny amounts of methamphetamine on his person that were missed by the pre-transaction searches of the informant.

Mr. Daignault was prejudiced because the jury heard that he was arrested with methamphetamine in his possession on June 12, 2005. The Supreme Court has taken notice that “[i]n view of society's deep concern today with drug usage and its consequent condemnation by many if not most, evidence of drug addiction is necessarily prejudicial in the minds of

the average juror.” *State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835 (1974).

Evidence that Mr. Daignault was found with methamphetamine in his car “necessarily” prejudiced the jury against him. Absent such evidence, there was a reasonable probability that the jury would not have convicted Mr. Daignault on Count I and Count II, delivery of methamphetamine to the confidential informant.

There was both deficient representation and resulting prejudice to Mr. Daignault. The Court should reverse Mr. Daignault’s convictions on Counts I and II and remand for a new trial with instructions that evidence of the methamphetamine found in the locked metal box is inadmissible.

#### **E. CONCLUSION**

Because the only evidence that Mr. Daignault was in possession of methamphetamine on June 12, 2005 was discovered during an illegal warrantless search of a locked container found inside his vehicle, the Court should reverse his conviction on Count III and dismiss the charge.

Because there was insufficient evidence to support the sentence enhancement based on delivery of drugs within 1,000 feet of the perimeter of school grounds, the Court should reverse the enhancement and remand for sentencing on Counts I and II without the enhancement.

Because Mr. Daignault received ineffective assistance of counsel and was prejudiced thereby, the Court should reverse his convictions on Counts I and II and remand for a new trial on those counts only with instruction that the sentencing enhancement does not apply.

DATED this 17 day of March, 2006.

Respectfully submitted,



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Respondent, )

vs. )

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Appellant. )

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Superior Court No. 05-1-00889-8

**AFFIDAVIT OF MAILING**

The undersigned, being first duly sworn, under oath, states: That on the 20<sup>th</sup> day of March 2006, affiant deposited in the United States mails, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha  
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Court of Appeals  
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the original and one copy of the Brief of Appellant, and to

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a true copy of the Brief of Appellant.

[Signature]  
ANN BLANKENSHIP

SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day of March 2006.

[Signature]  
MEBEDITH NDRA DRPILLA

NOTARY PUBLIC in and for the State of  
Washington, residing at Port Orchard.  
My commission expires 9-11-06.