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COURT OF APPEALS  
DIVISION II

NO. 34439-4-II

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

STATE OF WASHINGTON  
DEPUTY

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STATE OF WASHINGTON,

Respondent,

v.

RYAN ALLEN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR LEWIS COUNTY

The Honorable Nelson E. Hunt, Judge  
Cause No. 05-1-00436-8

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RESPONDENT'S BRIEF

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## I. ISSUES PRESENTED

- A. Does Allen have automatic standing to assert Peggy Allen's constitutional rights where her alleged unlawful detention did not bear a direct relationship to the recovered methamphetamine?
- B. Did the trial court properly conclude that Peggy Allen's identification of her husband was an independent source of information establishing probable cause to arrest Allen for violation of a protection order?
- C. Did Allen validly waive his right to a jury trial both in writing and orally on the record after being advised of his right to a jury trial by the trial court and trial counsel?

## II. STATEMENT OF THE CASE

The State accepts Allen's "Statement of Facts and Prior Proceedings" appearing in Appellant's Opening Brief as adequate for this Response with the following additions and/or clarifications:

Allen assigns error to finding of fact 1.6 which states, "Dispatch advised that Peggy Allen had a clear license but revealed her to be the protected party in a no contact order with a Ryan W. Allen, DOB 08-16-77, as the restrained party." Clerk's Papers (CP) at 26. Officer Mike Lowery's testified during both direct and cross examination that dispatch advised him of the identity of the restrained party as "Ryan Weston Allen." Report of Proceedings (RP<sup>1</sup>) at 18, 22.

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<sup>1</sup> "RP" refers to the sequentially paginated volume containing proceedings from June 9 and 16, 2005, November 18, 2005, and February 17, 2006.

As to Allen's jury waiver, he avers that "[t]he court did not review the waiver with Mr. Allen on the record, although the judge indicated they had reviewed it together." Appellant's Opening Br. at 4. The record contains the following colloquy concerning Allen's jury waiver:

THE COURT: Mr. Allen, my recollection is that we went through the jury waiver process back when we were last in court where I explained to you the difference between a jury and a nonjury trial. Do you recall doing that or am I remembering it incorrectly?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And I'm sure Mr. Arcuri has explained to you as well the benefits versus the problems that might be attendant to a waiver of a jury trial. You have an absolute right to a jury. No one can take it away from you unless you determine that you don't want one.

THE DEFENDANT: Yes, Your Honor.

THE COURT: And that's what you want to do.

Also understand that the reason for that is I believe that you feel you have an appeal issue on my decision about the search in this case and that a trial is probably kind of a useless act because if the evidence comes in your guilt is established. Is that essentially correct? Is that what you're saying?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Well, I'll accept the waiver.

RP at 53-54.

In addition to this colloquy, Allen signed a "Waiver of Jury Trial" which stated: "I Ryan Allen hereby waive my right to a trial by an impartial jury of 12 people." CP at 21. Moreover, the factual stipulation,

also signed by Allen, stated that “[t]he defendant expressly waives his right to a trial by jury and stipulates that the court shall consider the following facts to arrive at a verdict[.]” CP at 22.

### III. ARGUMENT

#### A. ALLEN DOES NOT HAVE AUTOMATIC STANDING TO ASSERT PEGGY ALLEN’S FOURTH AMENDMENT RIGHTS WHERE HER ALLEGED UNLAWFUL DETENTION DID NOT BEAR A DIRECT RELATIONSHIP TO THE RECOVERED METHAMPHETAMINE.

Allen argues that he has automatic standing to assert a violation of Peggy Allen’s (Peggy) constitutional rights in moving to suppress the methamphetamine based on her alleged unlawful detention. Appellant’s Opening Br. at 9-11. This argument is without merit.

As an initial matter, it is clear from the unchallenged findings of fact<sup>2</sup> from the suppression hearing that Officer Lowery did not obtain Allen’s identity or any other information leading to Allen’s arrest as a result of his unlawful detention.<sup>3</sup> CP at 26 (findings of fact 1.8-1.14). Rather, Allen proffered a false name, social security number and date of

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<sup>2</sup> These unchallenged findings are verities on appeal. *State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993, 996 (2005).

<sup>3</sup> The trial court ruled that Officer Lowery unlawfully seized Allen when he requested identification from Allen in violation of *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004), and *Terry v. Ohio*, 392 US. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968). CP at 28 (conclusions of law 2.2-2.4). The State has not cross appealed this ruling.

birth that did not match any records in Washington or Oregon. *Id.* Thus, Officer Lowery was unable to determine, from Allen, any identifying information that would provide probable cause to arrest him for violation of a no contact order. Instead, Peggy provided this information after Officer Lowery asked her to accompany him back to his patrol car. CP at 27 (findings of fact 1.18-21); RP at 19-20. This requires Allen to assert a violation of Peggy's constitutional rights in order to challenge his arrest and the discovery of the methamphetamine incident to arrest.

Allen relies on *State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2002) in arguing that the doctrine of automatic standing applies. Appellant's Opening Br. at 9. *Jones* presents the general rule that "[t]o assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure." *Jones*, 146 Wn.2d at 322. However, *Jones* also provides that "[a] person may rely on the automatic standing doctrine only if the challenged police action produced the evidence sought to be use against him." *Id.* (citing *State v. Williams*, 142 Wn.2d 17, 23, 11 P.3d 714 (2000)). Here, the challenged police action, Peggy's detention, did not produce the methamphetamine. Peggy's detention produced Allen's identity; the lawful search incident to Allen's arrest produced the methamphetamine.

Thus, Allen cannot rely on automatic standing to assert Peggy's constitutional rights.

In *State v. Williams, supra*, a citizen informed police that Williams had an outstanding arrest warrant and was currently inside a local apartment. 142 Wn.2d at 19. Officers confirmed the outstanding felony arrest warrant, identified Williams' van in the parking lot, and approached the apartment's open door. *Id.* Officers spoke with the tenant and obtained permission to look for Williams. *Id.* at 20. They immediately located Williams, arrested him and recovered heroin from his pocket in a search incident to arrest. *Id.* Williams successfully moved to suppress the heroin asserting that he had automatic standing to challenge the police entry into the apartment as a violation of *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

The Washington Supreme Court reversed holding that "the defendant lacked standing to contest the police entry into a third party's home." *Williams*, 142 Wn.2d at 19. The Court noted that Washington maintained automatic standing in order to alleviate the self incrimination dilemma of statements made during a suppression hearing being used for impeachment, thus pitting a defendant's Fifth Amendment right against his Fourth Amendment rights. *Id.* at 21-22. Commensurate with this purpose, the Court explained that "[i]nherent in the conditions for

automatic standing is the principle that the 'fruits of the search' bear a direct relationship to the search defendant seeks to contest." *Id.* at 23.

Accordingly, the Court reasoned that:

Here, the defendant fails to meet the criteria for application of the automatic standing doctrine. The defendant stipulated that the police officers found the heroin on his person. The defendant has standing to object to an illegal search of his person. But, the defendant does not challenge the search of his person, which was a valid search incident to arrest under a valid arrest warrant. He is challenging only the officer's entry into a third party's residence to serve the arrest warrant. *The defendant's ability to challenge that entry does not depend upon his admission to possession of contraband or to any other illegal activity.* We cannot agree that the automatic standing rule as originally conceived by the Supreme Court would have any application where there is no conflict in the exercise of his Fourth and Fifth Amendment rights. Moreover, as expressed by the plurality in *Simpson*, the automatic standing rule may not be used where the defendant is not faced with "the risk that statements made at the suppression hearing will later be used to incriminate him albeit under the guise of impeachment." [*State v. Simpson*, 95 Wn.2d 170, 180, 622 P.2d 1199 (1980)]. Automatic standing is not a vehicle to collaterally attack every police search that results in a seizure of contraband or evidence of a crime.

*Id.* at 23 (emphasis added).

Similar to *Williams*, in this case police discovered the methamphetamine after a valid search incident to Allen's arrest.<sup>4</sup> Just as

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<sup>4</sup> Allen does challenge the search incident to arrest under the "fruit of the poisonous tree" doctrine insofar as it was derived from his unlawful detention. Opening Br. of Appellant at 5. However, as discussed above, and in more detail in section B *infra*, Officer Lowery did not derive any information from Allen's unlawful detention that produced probable cause for his arrest. Rather, Officer Lowery obtained this information independently from Peggy. Allen does not argue that Officer Lowery lacked probable cause to execute a lawful arrest.

Williams sought challenge police entry into the apartment for want of *Ferrier* warnings, Allen attempts to challenge Peggy's detention which yielded the identity information providing probable cause to arrest. Appellant's Opening Br. at 9-11. As in *Williams*, Allen's ability to challenge that detention "does not depend upon his admission to possession of contraband or to any other illegal activity." 142 Wn.2d at 23. Allen would not be required to make any incriminating statements at a suppression hearing concerning Peggy's detention that could be used to impeach him at trial on the possession charge. In fact, Allen would not even need to testify at such a hearing. Thus, because the methamphetamine does not bear a direct relationship to Peggy's detention, Allen cannot rely on automatic standing to collaterally attack his search incident to arrest. *Id.*

**B. PEGGY ALLEN'S IDENTIFICATION OF ALLEN WAS AN INDEPENDENT SOURCE OF THE INFORMATION ESTABLISHING PROBABLE CAUSE TO ARREST ALLEN FOR VIOLATION OF A PROTECTION ORDER.**

Allen also argues that the methamphetamine should be suppressed as fruit of the poisonous tree derived from his unlawful detention. Appellant's Opening Br. at 6-9. This argument fails because the trial court properly found that Peggy's identification of Allen was an independent

source of the information establishing probable cause to arrest and not an exploitation of Allen's unlawful detention. *See* CP at 28 (Conclusion of Law 2.5).

Under the independent source doctrine, evidence is not necessarily fruit of the poisonous tree:

simply because it would not have come to light but for the illegal action of the police, rather, the most apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

*State v. Early*, 36 Wn. App. 215, 220, 674 P.2d 179 (1983) (internal quotations omitted).

In *State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184 (1968), our Supreme Court applied the independent source doctrine in a context very similar to the case at bar. In *Rothenberger*, Officer Edwards conducted a traffic stop to perform a routine license check of the occupants.<sup>5</sup> 73 Wn.2d at 597. The driver, Pernar, did not have a valid driver's license. The passenger, Rothenberger, satisfied Officer Edwards that he owned the car and did have a driver's license. *Id.* Officer Edwards cited Pernar and allowed the men to continue with Rothenberger driving. *Id.* Officer

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<sup>5</sup> Notably, our Supreme Court decided *Rothenberger* approximately two months before the U.S. Supreme Court decided *Terry v. Ohio*. While the *Rothenberger* court did not evaluate the legality of the stop using the nascent *Terry* framework, it assumed that the traffic stop was an unlawful detention for the purpose of its analysis. *Rothenberger*, 73

Edwards conducted an identification check and discovered that Rothenberger had an outstanding felony warrant. *Id.* He transmitted this information to other officers who set up a roadblock and intercepted the car. Police arrested Rothenberger and searched the car discovering stolen items from a Seattle burglary. *Id.* at 597-98.

Rothenberger argued that the seized evidence should have been suppressed as fruit of the poisonous tree because Officer Edwards would not have acquired Rothenberger's identity information had he not unlawfully stopped the car. *Id.* Our Supreme Court rejected this argument and affirmed the admission of the evidence. *Id.* at 600-01. The Court held that the identifying information gathered during the initial unlawful stop did not impugn the subsequent lawful arrest based on information from an independent source that Rothenberger was wanted on a felony charge. *Id.* at 599-601.

Similar to the facts in *Rothenberger*, during the traffic stop Officer Lowery discovered Allen's identity and that he was the subject of a no contact order. This information was sufficiently attenuated from Allen's unlawful detention as to constitute an independent source providing probable cause for his arrest. *See Rothenberger*, 73 Wn.2d at 601. Officer Lowery did not obtain probable cause for the arrest from Allen through

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Wn.2d at 599-600.

exploitation of Allen's detention. Rather, dispatch independently informed that Allen was the subject of a no contact order and Peggy independently provided his identifying information. Thus, this court should hold that the trial court did not err in denying Allen's motion to suppress the methamphetamine recovered during the valid search incident to his arrest.

**C. THE TRIAL COURT AND TRIAL COUNSEL ADVISED ALLEN OF HIS RIGHT TO A JURY TRIAL AND HE VALIDLY WAIVED THIS RIGHT TWICE IN WRITING AS WELL AS ORALLY ON THE RECORD.**

Allen further argues that he did not validly waive his right to a jury trial under Article I, Section 21 of the Washington Constitution. Appellant's Opening Br. at 11-18. This argument is without merit.

Division I of this court has already held that a defendant validly waives his right to a jury trial when he executes a written waiver under CrR 6.1(a) and orally assents to a factual stipulation procedure. *State v. Harper*, 33 Wn. App. 507, 509, 655 P.2 1199 (1982). The record clearly reflects that the court made sure that Allen knew that he had an absolute right to a jury trial. RP at 53-54. Allen also signed a "Waiver of Jury Trial" which stated: "I Ryan Allen hereby waive my right to a trial by an impartial jury of 12 people." CP at 21. Moreover, the factual stipulation,

also signed by Allen, stated that “[t]he defendant expressly waives his right to a trial by jury and stipulates that the court shall consider the following facts to arrive at a verdict[.]” CP at 22. Allen orally assented to the jury waiver and twice provided written waivers. Thus, the record is sufficient for this court to find that Allen validly waived his right to a jury trial.<sup>6</sup> *See State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979).

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<sup>6</sup> Allen provides extensive analysis of the factors expressed in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) in support of his argument that the Washington Constitution has heightened requirements to sustain a jury waiver. Opening Br. of Appellant at 12-17. This court has addressed this issue in a recent unpublished opinion, *State v. Pierce*, 2006 WL 1914643 (2006) (cause number 32861-5). The undersigned is aware that RAP 10.4(h) prohibits citation of unpublished opinions. The State does not cite this opinion for authority but merely directs the court’s attention to its existence and the fact that the State has moved that this opinion be published in the Washington Appellate Reports.

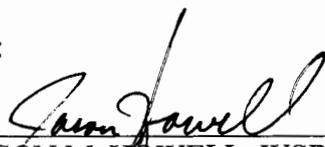
#### IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that Allen's convictions be affirmed and his appeal be denied.

Respectfully submitted this 1<sup>st</sup> day of August, 2006.

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By:

  
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CERTIFICATE

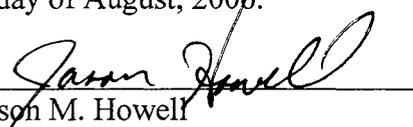
STATE OF WASHINGTON

I certify that on August 1, 2006, I mailed a copy of the foregoing  
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