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NO 34792-0-II.
Clark County No. 05-1-02607-3.

STATE OF WASHINGTON,

Respondent,

vs.

COREY ALAN RUNYON

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

 I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT MR. RUNYON'S CONVICTION ON COUNT I..... 1

 II. THE JUDGMENT AND SENTENCE MUST BE VACATED AS TO COUNT IV..... 1

 III. THE TRIAL COURT'S FINDING THAT COUNT I WAS A FELONY IN THE COMMISSION OF WHICH A MOTOR VEHICLE WAS USED MUST BE VACATED..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

 I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT MR. RUNYON'S CONVICTION FOR POSSESSION OF METHAMPHETAMINE..... 1

 II. THE JUDGMENT AND SENTENCE FOR DRIVING WHILE LICENSE SUSPENDED IN THE THIRD DEGREE MUST BE VACATED BECAUSE HE WAS NEVER CONVICTED OF THIS CHARGE..... 1

 III. THE PORTION OF THE JUDGMENT AND SENTENCE HOLDING THAT THE CRIME OF WHICH MR. RUNYON WAS CONVICTED WAS A FELONY IN THE COMMISSION OF WHICH A MOTOR VEHICLE WAS USED MUST BE VACATED..... 1

C. STATEMENT OF THE CASE..... 1

 1. PROCEDURAL HISTORY..... 1

 2. FACTUAL HISTORY..... 2

D. ARGUMENT..... 6

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT MR. RUNYON’S CONVICTION FOR POSSESSION OF METHAMPHETAMINE..... 6

II. THE JUDGMENT AND SENTENCE FOR DRIVING WHILE LICENSE SUSPENDED IN THE THIRD DEGREE MUST BE VACATED BECAUSE HE WAS NEVER CONVICTED OF THIS CHARGE..... 13

III. THE PORTION OF THE JUDGMENT AND SENTENCE HOLDING THAT THE CRIME OF WHICH MR. RUNYON WAS CONVICTED WAS A FELONY IN THE COMMISSION OF WHICH A MOTOR VEHICLE WAS USED MUST BE VACATED..... 19

E. CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

<i>City of Spokane v. Beck</i> , 130 Wn.App. 481, 123 P.3d 854 (2005).....	15
<i>State v. Batten</i> , 95 Wn.App. 127, 974 P.2d 879 (1999).....	22
<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969).....	13
<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969).....	10
<i>State v. Collins</i> , 76 Wn.App. 496, 886 P.2d 243, <i>review denied</i> 126 Wn.2d 1016, 894 P.2d 565 (1995).....	14
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	8
<i>State v. Hearn</i> , 131 Wn.App. 601, 128 P.3d 139 (2006).....	23
<i>State v. Hupe</i> , 50 Wn.App. 277, 748 P.2d 263 (1988).....	7
<i>State v. Johnson</i> , 104 Wn.2d 338, 705 P.2d 773 (1985).....	20
<i>State v. Jones</i> , 146 Wn.2d 328, 45 P.3d 1062 (2002).....	14
<i>State v. Lively</i> , 130 Wn.2d 1, 921 P.2d 1035 (1996).....	15
<i>State v. Mierz</i> , 127 Wn.2d 460, 901 P.2d 286 (1995).....	20, 21
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	9
<i>State v. Porter</i> , 58 Wn.App. 57, 791 P.2d 905 (1990).....	14
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	8
<i>State v. Smith</i> , 155 Wn.2d 496, 120 P.3d 559 (2005).....	19, 20
<i>State v. Spruell</i> , 57 Wn.App. 383, 788 P.2d 21 (1990).....	12, 13
<i>State v. Thereoff</i> , 25 Wn.App. 590, 608 P.2d 1254 (1980).....	9
<i>State v. Turner</i> , 103 Wn.App. 515, 13 P.3d 234 (2000).....	13
<i>State v. Wolf</i> , 134 Wn.App. 196, 139 P.3d 414 (2006).....	21

Statutes

RCW 46.20.270	22
---------------------	----

Rules

CrR 4.2.....	17, 18
CrR 6.1 (a)	17
CrR 6.1 (d)	17
CrR 6.16 (a)	17
CrR 7.1 (a)	18
CrR 7.3.....	18

A. ASSIGNMENTS OF ERROR

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C. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

The Clark County Prosecuting Attorney charged Corey Alan Runyon by Amended Information with Count I: Possession of a Controlled Substance-Methamphetamine; Count II: Unlawful Use of Drug Paraphernalia; Count III: Possession of Stolen Property in the Third Degree; and Count IV: Driving While License Suspended or Revoked in

the Third Degree. CP 12. A jury trial commenced on March 20th, 2006 before the Honorable Robert Harris. RP Vol. II. The trial court dismissed Count III pursuant to Mr. Runyon's motion to dismiss at the close of the State's case-in-chief. RP II, 133. During the discussion of preliminary matters, defense counsel advised the court that the driving while license suspended count would be "admitted." The prosecutor asked: "So the—if there's a stipulation by the defendant, then we don't have...there's no issue, then. That count is admitted; correct?" The court replied "Correct." Count IV was never submitted to the jury for a finding of guilt or non-guilt, and no guilty plea was ever entered by Mr. Runyon to the crime of Driving While License Suspended or Revoked in the Third Degree (DWLS 3). Clerk's Papers, Verbatim Report of Proceedings. The jury returned verdicts of guilty to Counts I and II. CP 67, 68. Mr. Runyon was sentenced for Counts I and II, as well as Count IV (DWLS 3). This timely appeal followed. CP 93.

2. FACTUAL HISTORY

On November 24th, 2005 Trooper Bettger conducted a traffic stop on a car being driven by Appellant, Corey Runyon, at around 11:50 in the morning. RP Vol. II, 66. Trooper Bettger was traveling southbound on I-5 in Clark County when he saw the car and noticed that it had what appeared to be expired tabs. *Id.* at 68. He learned through dispatch that

the license plates on the car were allegedly stolen. Id at 69. Trooper Bettger testified that he waited for back-up units rather than immediately initiate a traffic stop, and followed Mr. Runyon for a short period of time as he waited. Id. at 70. Bettger claimed that Mr. Runyon was making furtive movements, but he never described those movements nor indicated what made them “furtive” beyond the fact that Mr. Runyon was putting on a jacket and temporarily did not have both hands behind the wheel. Id. at 71-73. Bettger also persisted in testifying, over repeated sustained objections, that he found it “odd” that Mr. Runyon’s small child looked at him several times from the back seat. Id. at 70-74. Bettger also testified that he saw Mr. Runyon make a cell phone call. Id. at 74. All of this occurred prior to Bettger activating his emergency lights. Id.

Bettger testified that after pulling over, Mr. Runyon removed his jacket. Id. at 79. Bettger arrested Mr. Runyon immediately after he got out of the car. Id. at 106. Mr. Runyon verbally identified himself and Trooper Bettger later learned he had a suspended license. Id. at 106. While searching the car incident to arrest, Trooper Bettger found two jackets on the front seat, one of which was a black and blue jacket and one of which was a black and white jacket. Id. at 81. Bettger could not say which jacket Mr. Runyon was wearing, nor could he recall which jacket was on top of the other. Id. at 82. He assumed that the jacket on top was

the jacket Mr. Bettger took off and searched that jacket. *Id.* at 82. In that jacket Bettger found a glass tubular smoking device. *Id.* The smoking device had residue in it that later tested positive for methamphetamine. *Id.* at 57.

In searching the front seat area of the car, Bettger saw a gap in the area where the plastic cover for the stick shift meets the carpet on the floor of the car. *Id.* at 87-88. He searched that area and found a plastic bag containing methamphetamine. *Id.* at 89. Mr. Runyon was not the registered or the legal owner of the car. *Id.* at 105. Trooper Bettger made no effort to contact the registered or legal owner of the car. *Id.* at 105-106. Trooper Bettger also did not seize the jacket that he assumed belonged to Mr. Runyon and in which he found the pipe. *Id.* at 107. There was no identifying information in the jacket linking it to Mr. Runyon. *Id.* at 107.

Noell Carney, Mr. Runyon's former girlfriend and the mother of his daughter, came to the scene of the arrest to pick up their daughter. She testified that she had never seen Mr. Runyon drive that car before. *Id.* at 47. She also testified that Mr. Runyon wanted her to take a motor that was in the trunk of the car, and which belonged to a friend of Mr. Runyon's, to his shop in Ridgefield. *Id.* at 46. Further, she took possession of his key ring which had approximately 21 keys on it. *Id.* at 45-46.

Mr. Runyon testified that he was driving on November 24th, 2005 because he had to take his daughter home and her mother would not come and get her. *Id.* at 138. This concerned him because he had a suspended license. *Id.* Because he did not have a car to drive, he borrowed a car from his friend Keith Graham. *Id.* at 139-140. In addition to his own jacket, there was another jacket on the front seat. *Id.* at 140. He testified he did not have a pipe or any drug paraphernalia on him. *Id.* The cell phone call he made was to Noell, because he saw Trooper Bettger behind him and knew he would be arrested if stopped due to his suspended license. *Id.* at 141.

The jury was instructed on the affirmative defense of unwitting possession. CP 60. The jury was also given a *Petrich* instruction that there were allegations that the defendant committed more than one act of possession of a controlled substance and that they must be unanimous as to the act or acts, if any, have been proved beyond a reasonable doubt. CP 59. During rebuttal closing argument the prosecutor made the following argument: “So is it...expected that this trooper’s supposed to call up the registered owner of the car and say, Well, Mr. Registered Owner, we found meth in your car, is this yours? Come on. This trooper knew who the meth—who owned the meth—who possessed the meth.” *Id.* at 185. The jury returned verdicts of guilty on both Count I and Count II. CP 67-

68. Mr. Runyon was sentenced to ninety days' confinement on Count I, PCS-Methamphetamine. CP 73. The court also entered a misdemeanor judgment and sentence for counts II and III. CP 83. The judgment and sentence stated that the defendant had previously entered valid pleas of guilty to the charges, as opposed to a jury finding of guilt. CP 83. The court imposed eighteen days' confinement on Count II and eighteen days' confinement on Count IV (DWLS 3). CP 84. The court also found that the Mr. Runyon had committed a felony in the commission of which a motor vehicle was used. CP 80. Mr. Runyon objected to this finding, arguing that the drugs were found in the coat, not in the car specifically. RP Vol. IV, 201. In making this argument, defense counsel advised the court that he had spoken with the jury and was told that the conviction was based upon the residue in the pipe (found in the jacket), not on the baggie of methamphetamine found under the plastic covering to the stick shift. Id.

D. ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT MR. RUNYON'S CONVICTION FOR POSSESSION OF METHAMPHETAMINE.

The State had the prerogative to either elect which act upon which it was relying to prove the defendant possessed methamphetamine, or to have the jury instructed that there was more than one act of possession

alleged and the jury must be unanimous as to which act relied upon.

Washington law requires unanimous jury verdicts in criminal cases. *State v. Hupe*, 50 Wn.App. 277, 282, 748 P.2d 263 (1988). In *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), the Supreme Court held:

“When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected.” The Court went on to say that the State could either elect the act upon which it would rely for conviction, or, alternatively, the jury could simply be instructed that all jurors must be unanimous on which underlying criminal act has been proved beyond a reasonable doubt. Here, no election was requested and the jury was properly instructed on the unanimity requirement, per *Petrich*, in Instruction number 11. CP 59.

The *Petrich* court, however, held that where the State does not elect to specify the underlying crime on which conviction is sought, the evidence must be sufficient to prove each underlying incident beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d at 573. Evidence is insufficient where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216,

220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. *State v. Thereoff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Here, the evidence was insufficient to prove the defendant knowingly possessed the baggie of methamphetamine hidden under the plastic covering to the stick shift. All of the evidence and testimony presented in this case points irrefutably to Mr. Runyon having unwittingly possessed that baggie of methamphetamine. The State's own evidence established that the car Mr. Runyon was driving was not his. The State made no effort to rebut the fact that Mr. Runyon borrowed this car from his friend Keith Graham. There was no identifying information specific to Mr. Runyon in the car. He had a small number of personal items, such as his child's car seat, a cell phone charger, a motor that he was working on as part of his business, and a jacket. The "investigation" that was done in this case can hardly be described as an investigation at all. Trooper Bettger made no effort to ascertain who the registered owner of the car

was, having already decided that such information was irrelevant because Mr. Runyon was obviously guilty.

The glaring insufficiency of the evidence to support a finding of guilty against Mr. Runyon for having possessed the baggie of methamphetamine was compounded by the misconduct of the prosecutor in closing argument, in which he opined that Trooper Bettger believed Mr. Runyon is a liar (“This trooper knew who the meth—who owned the meth—who possessed the meth.”) Other cases which have held the evidence insufficient to sustain a finding of either actual or constructive possession have contained evidence far more compelling than the evidence presented in this case of Mr. Runyon’s supposed possession of the baggie of methamphetamine.

In *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969), Seattle police officers went to a houseboat to serve a search warrant and found the defendant and another man in the living room sitting at a desk. On the desk were various pills and hypodermic needles, and on the floor between the two men was a cigar box filled with drugs. Drugs also were found in the kitchen and bedroom. *Callahan*, 77 Wn. 2d at 28. The defendant denied that any of the drugs belonged to him, although he did admit to handling the drugs earlier in the day. He also admitted ownership of two guns, two books on narcotics and a measuring scale that were found in the

search. *Callahan*, 77 Wn.2d at 28. The court ruled that the evidence was insufficient to convict the defendant of either actual or constructive possession of the drugs. The court found that the only evidence that the defendant had actual physical possession of the drugs was his admission to handling the drugs earlier that day and his close proximity to them at the time of the arrest. This was insufficient to sustain a finding of actual possession, the court said, stating that “such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.” *Callahan*, 77 Wn.2d at 29.

The court also found the evidence insufficient to sustain a finding of constructive possession because the defendant had no dominion and control over the drugs. The court held that despite evidence that the defendant had been staying on the houseboat for the preceding 2-3 days, that he owned several items found during the search that were related to drug use, that most of the drugs were found near the defendant and that he admitted to handling the drugs earlier in the day, the evidence was insufficient to show dominion and control over the drugs. *Callahan*, 77 Wn.2d at 31.

In *State v. Spruell*, 57 Wn.App. 383, 788 P.2d 21 (1990) Seattle police served a search warrant at the home of Spruell, finding defendants McLemore and Hill in the kitchen. On the kitchen table officers found

among other things, white powder which later proved to be cocaine. They also found white powder on the floor of the kitchen and white powder residue strewn throughout the kitchen. A plate found in the kitchen bore no cocaine residue but did bear a fingerprint of defendant Hill, the appellant in *Spruell*. *Spruell*, 57 Wn.App at 384.

On appeal, the court found the evidence was insufficient to establish that defendant Hill was in actual or constructive possession of any drugs. Hill was not seated at the table where the drugs were found, nor were there any drugs on the plate on which his fingerprint was found. *Spruell*, 57 Wn.App. at 386-87. The court found that Hill's fingerprint on the plate proved only that he at some point touched the plate, and said it had no more weight on the issue of actual possession than the defendant's admission in *Callahan* that he had previously handled the drugs. *Spruell*, 57 Wn.App. at 386.

Turning to the issue of constructive possession, the *Spruell* court also found insufficient evidence to sustain Mr. Hill's conviction. Specifically, they found no evidence that Hill had dominion and control over the premises, beyond his presence in the kitchen which was insufficient. *Spruell*, 57 Wn.App. at 388. Further, they found no evidence that Hill had dominion and control over the drugs themselves. They reiterated that mere proximity to the drugs and evidence of momentary

handling is not enough to establish constructive possession. *Spruell*, 57 Wn.App. at 388.

When contraband is not in the personal custody of an individual charged with possession, he is not in actual possession of the contraband but can be found in constructive possession provided he has dominion and control over the goods. *Callahan* at 29. Dominion and control means the object can be reduced to actual possession immediately. *State v. Turner*, 103 Wn.App 515, 521, 13 P.3d 234 (2000); *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Mere proximity to the object is not enough to establish constructive possession. *Jones*, 146 Wn.2d at 333. No single factor is dispositive of determining dominion and control but rather the totality of the circumstances must be considered. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977); *State v. Porter*, 58 Wn.App. 57, 60, 791 P.2d 905 (1990); *State v. Collins*, 76 Wn.App. 496, 501, 886 P.2d 243, *review denied* 126 Wn.2d 1016, 894 P.2d 565 (1995) .

Because constructive possession requires proof that the object can be reduced to actual possession immediately, it is axiomatic that the baggie of methamphetamine Mr. Runyon was accused of constructively possessing could not be reduced to his actual possession immediately when he had no idea it was there. When reviewing a challenge to the sufficiency of the evidence based on an affirmative defense which requires

the defendant to establish the defense by a preponderance of the evidence (such as unwitting possession), the inquiry is whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence. *City of Spokane v. Beck*, 130 Wn.App. 481, 486, 123 P.3d 854 (2005); *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996).

In Mr. Runyon's case, no rational trier of fact could have found that he failed to establish the affirmative defense of unwitting possession by a preponderance of the evidence as it pertained to the baggie of methamphetamine hidden in the innards of the stick shift column. Because the State failed to elect which act of possession it was relying on to convict Mr. Runyon, Mr. Runyon's conviction on this count must be reversed and dismissed.

II. THE JUDGMENT AND SENTENCE FOR DRIVING WHILE LICENSE SUSPENDED IN THE THIRD DEGREE MUST BE VACATED BECAUSE HE WAS NEVER CONVICTED OF THIS CHARGE.

The facts of this case as they relate to Count IV, DWLS 3, are quite unusual. Defense counsel and the prosecutor had apparently discussed, prior to trial, the fact that the DWLS 3 count would be "stipulated." The prosecutor and court then concluded that the fact of Mr.

Runyon having driven on a suspended license would not be put before the jury. However, that was not defense counsel's motivation for admitting this count. His motivation for admitting this fact was to tell the jury that it was Mr. Runyon's knowledge that his license was suspended that gave him a reason to believe he would be arrested upon being pulled over and not his knowledge of methamphetamine in the car.

Irrespective of the parties' divergent understanding of how and why this fact would be admitted, no written stipulation of this crime was ever admitted into evidence, the jury was never asked to render a verdict on this crime, the court was never asked to render a verdict on this crime (i.e. a stipulated facts trial accompanied with a written and signed jury trial waiver by the defendant, evidence upon which a finding of guilt could be based, and findings of fact and conclusions of law), and Mr. Runyon never pled guilty to this crime. In short, there is no conviction in the record of this crime.

Even more troubling, Mr. Runyon himself never stated his intention to concede guilt to this crime, and he never signed any document that would evidence such an intention. Again, the only discussion of Count IV occurred during the discussion of pre-trial matters in which defense counsel said this count would be "stipulated." He clarified his intention in so doing explicitly, stating that he intended to bring up the

suspension himself (for reasons which were entirely appropriate) and inviting the State's witness, Trooper Bettger, to testify about the suspension without objection. This tactical decision, however, cannot form the basis for a conviction absent some procedural steps that were not taken in this case.

The criminal rules for Superior Court contemplate the methods by which a person can be convicted of a crime. CrR 4.2 allows a defendant to plead guilty to a criminal charge and thereby relieve the State of its burden of proving the crime beyond a reasonable doubt to a jury or judge. CrR 6.1 (a) provides that a criminal trial shall be by jury unless a written waiver of a jury trial is filed by a defendant. CrR 6.1 (d) provides that when a defendant agrees to have his case tried without a jury the court shall render a decision and memorialize that decision in findings of fact and conclusions of law. CrR 6.16 (a) provides that when a jury returns a verdict to a criminal charge they shall memorialize their decision in a verdict form. CrR 7.1 (a) discusses procedures before sentencing, and states that a court may order a presentence investigation at the time of or after "...a plea, finding, or verdict of guilt..." CrR 7.3 states: A judgment of conviction shall set forth whether defendant was represented by counsel or made a valid waiver of counsel, the plea, the verdict or findings, and the adjudication and sentence."

The judgment and sentence for counts II and IV states, erroneously, that the judgment is based on the defendant having previously entered valid pleas of guilty. CP 83. We know this is erroneous because the jury returned a verdict of guilty as to Count II, and no guilty plea, as contemplated by CrR 4.2, was ever entered to Count IV. CrR 4.2 requires, among other things, that a written statement of the defendant on a plea of guilty shall be filed (subsection (g)). There can be no dispute that this was not done in this case. It also requires that before a court can accept a plea, it must satisfy itself that the plea is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea (subsection (d)). This subsection also requires that the court satisfy itself there is a factual basis for the charge. These things were indisputably not done here. The word “plea” was never uttered by the court in relation to this charge, nor was the word “guilty” ever uttered by the defendant in relation to this charge. Report of Proceedings.

Further, there is no factual basis for this charge in the record. Although counsel for Mr. Runyon stated during the pre-trial hearing that this charge was “stipulated,” no evidence was ever admitted that Mr. Runyon had a suspended driver’s license in the third degree. The only mention made of this fact by the witnesses were by Trooper Bettger, who

confirmed that he learned Mr. Runyon had a suspended license (although he did not mention the degree or basis for the suspension), and by the defendant himself, who also confirmed he had a suspended license but who also failed to state the degree or the basis for the suspension. Under *State v. Smith*, 155 Wn.2d 496, 120 P.3d 559 (2005), the statute proscribing driving on a suspended license provides that the basis for the suspension controls the degree of the suspension. In that case, the Supreme Court held that it is not enough to admit evidence demonstrating that the driver was suspended in the first degree. The Court held that the record must also contain evidence of the basis for the suspension because without that evidence, there was no way to determine that the suspension was in fact a first degree suspension. *Smith* at 504. The Court noted that defense counsel's concession that his client was driving on a first degree suspended license did not cure this deficiency because that would elevate counsel's remarks to a guilty plea, without compliance with the requirement that a plea be knowingly, intelligently, and voluntarily made. *Smith* at 505.

Because there can be no credible argument that Mr. Runyon pled guilty to DWLS 3, and because this charge was not submitted to the jury for its consideration, the only remaining method of conviction would have been a stipulated facts trial on this count. That clearly did not occur in this

case. In *State v. Mierz*, 127 Wn.2d 460, 468-69, 901 P.2d 286 (1995), the Supreme Court described a stipulated facts trial in the following manner:

A stipulated facts trial is still a trial of the defendant's guilt or innocence. In a stipulated facts trial, the right to appeal is not lost. The burden of proof remains upon the State, and the defendant may offer evidence and cross-examine the State's witnesses. "By the stipulation, [the defendant merely] agrees that what the State presents is what the witnesses would say."

Mierz at 469, citing *State v. Johnson*, 104 Wn.2d 338, 342, 705 P.2d 773 (1985). The *Mierz* Court emphasized that a stipulated facts trial involves an independent review of the evidence by the trial court and a finding of guilt or non-guilt. In Mr. Runyon's case, there was no trial on stipulated facts to Count IV. There was no independent review of the evidence by the trial court, there was no written waiver by Mr. Runyon of his right to a jury trial (which, the *Mierz* Court held, is required under CrR 6.1), and there was no finding of guilt by the trial court. *Mierz* at 468. The parties appear to have forgotten that is a procedure which gets one from point A, which is the filing of the charge, to point C, which is the entry of judgment and sentence. They appear to have forgotten the important procedural step of the conviction itself.

This case is distinguishable from *State v. Wolf*, 134 Wn.App. 196, 139 P.3d 414 (2006), in which Division I held that when a defendant stipulates to an element of a charge, he relieves the State of the burden of

proving that element to the jury. That case, and the cases upon which it relied, dealt with the situation in which the charge itself is submitted to the jury for its consideration, but the defendant merely stipulated to one or more *elements* of the crime. The jury was still required to render a verdict. Here, there simply was no conviction upon which to base a judgment and sentence for Count IV. The judgment and sentence on Count IV must be vacated.

III. THE PORTION OF THE JUDGMENT AND SENTENCE HOLDING THAT THE CRIME OF WHICH MR. RUNYON WAS CONVICTED WAS A FELONY IN THE COMMISSION OF WHICH A MOTOR VEHICLE WAS USED MUST BE VACATED.

Although possession of the baggie of methamphetamine would clearly trigger the driver's license revocation requirement of RCW 46.20.270, possession of the methamphetamine residue from the pipe found in the jacket would not. In *State v. Batten*, 95 Wn.App. 127, 131, 974 P.2d 879 (1999), Division II of the Court of Appeals held that in order to trigger this particular statutory provision, the possession must have some reasonable relation to the operation of a motor vehicle or that the use of the motor vehicle must contribute in some reasonable degree to the commission of a felony. The items the defendant is accused of possessing, under this standard, cannot be on the person of someone in the vehicle. *Batten* at 131. In *State v. Hearn*, 131 Wn.App. 601, 610-611, 128 P.3d

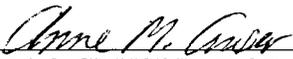
139 (2006), Division III applied this test and held that where the defendant was found to possess methamphetamine in her purse and in the pant leg of some pants found in a basket of laundry in her car, the trial court had erred in finding she had used the car in the commission of a felony because her possession of the methamphetamine bore no reasonable relation to the operation of the car and her use of the car did not contribute to the commission of the crime. The Court held that the methamphetamine was found in her “effects.” *Hearn* at 610.

Applying this test to Mr. Runyon’s case where, again, the State failed to elect which act of possession upon which it was relying for conviction, the trial court erred in finding this was a felony the commission of which involved the use of a motor vehicle. The methamphetamine contained within the pipe found in the jacket that supposedly belonged to Mr. Runyon was “on his person” at the time Trooper Bettger activated his lights. Mr. Runyon’s removal of the jacket prior to exiting the vehicle does not change the analysis in light of *Hearn*, where the methamphetamine was not on the defendant’s person but merely within her personal effects in a basket of laundry. Paragraph 5.8 of the judgment and sentence on Count I must be vacated.

E. CONCLUSION

Mr. Runyon's conviction on Count I must be reversed and dismissed due to insufficiency of the evidence. The judgment and sentence on Count IV must be vacated because it is not predicated on a valid conviction. The trial court's finding that Count I was a felony the commission of which involved the use of a motor vehicle must be vacated.

RESPECTFULLY SUBMITTED THIS 21st day of November, 2006.


ANNE M. CRUSER, WSBA #27944
Attorney for Mr. Runyon

APPENDIX

1. CrR 4.2:

(a) Types. A defendant may plead not guilty, not guilty by reason of insanity or guilty.

(b) Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) Pleading Insanity. Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendants criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendants plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

2. RULE 6.1 TRIAL BY JURY OR BY THE COURT

(a) **Trial by Jury.** Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.

(b) **Number of Jurors.** Unless otherwise provided by these rules, the number of persons serving on a jury shall be 12, not including alternates. If prior to trial on a noncapital case all defendants so elect, the case shall be tried by a jury of not less than six, or by the court.

(c) **Juror Unable to Continue.** If a case has not yet been submitted to the jury and a juror is unable to continue and no alternate jurors were selected or none are available, or if a case has been submitted to the jury and a juror is unable to continue, all defendants may elect to continue with the remaining jurors. The court shall declare a mistrial for any defendant who does not elect to continue with the remaining jurors. If some, but not all, defendants elect to continue with the trial, the court shall proceed with the trial for those defendants unless the court determines manifest necessity requires a mistrial.

(d) **Trial Without Jury.** In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

3. RULE 7.1 PROCEDURES BEFORE SENTENCING

(a) Generally. At the time of, or within 3 days after, a plea, finding, or verdict of guilt of a felony, the court may order that a risk assessment or presentence investigation and report be prepared by the Department of Corrections, when authorized by law. The court shall also then:

(1) Set a date, time, and place for sentencing in compliance with the time requirements of RCW 9.94A.500;

(2) Order the defendant to return at the designated date, time, and place; and

(3) Set a date at least 10 days before sentencing for delivery of the risk assessment or presentence report, if any, to the court, to the prosecuting attorney, and to the defendant or defense counsel.

(b) Report. The report of the presentence investigation shall contain the defendant's criminal history, as defined by RCW 9.94A.030, such information about the defendant's characteristics, financial condition, and the circumstances affecting the defendant's behavior as may be relevant in imposing sentence or in the correctional treatment of the defendant,

information about the victim, and such other information as may be required by the court.

(c) Notice of New Evidence. At least 3 days before the sentencing hearing, defense counsel and the prosecuting attorney shall notify opposing counsel and the court of any part of the presentence report that will be controverted by the production of evidence.

(d) Other Reports. Any interested person, as designated in RCW **9.94A.500**, may submit a report separate from that furnished by the Department of Corrections.

4. RULE 7.3 JUDGMENT

A judgment of conviction shall set forth whether defendant was represented by counsel or made a valid waiver of counsel, the plea, the verdict or findings, and the adjudication and sentence. The court may order that its sentence include special conditions or requirements, including a specified schedule for the payment of a fine, restitution, or other costs, or the performance of community service. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

5. RCW 46.20.270 Conviction of offense requiring withholding driving privilege - Procedures - Definitions.

(1) Whenever any person is convicted of any offense for which this title makes mandatory the withholding of the driving privilege of such person by the department, the court in which such conviction is had shall forthwith mark the person's Washington state driver's license or permit to drive, if any, in a manner authorized by the department. A valid driver's license or permit to drive marked under this subsection shall remain in effect until the person's driving privilege is withheld by the department pursuant to notice given under RCW **46.20.245**, unless the license or permit expires or otherwise becomes invalid prior to the effective date of this action. Perfection of notice of appeal shall stay the execution of sentence including the withholding of the driving privilege.

(2) Every court having jurisdiction over offenses committed under this chapter, or any other act of this state or municipal ordinance adopted by a local authority regulating the operation of motor vehicles on highways, or

any federal authority having jurisdiction over offenses substantially the same as those set forth in Title 46 RCW which occur on federal installations within this state, shall immediately forward to the department a forfeiture of bail or collateral deposited to secure the defendant's appearance in court, a payment of a fine, penalty, or court cost, a plea of guilty or nolo contendere or a finding of guilt, or a finding that any person has committed a traffic infraction an abstract of the court record in the form prescribed by rule of the supreme court, showing the conviction of any person or the finding that any person has committed a traffic infraction in said court for a violation of any said laws other than regulations governing standing, stopping, parking, and pedestrian offenses.

(3) Every state agency or municipality having jurisdiction over offenses committed under this chapter, or under any other act of this state or municipal ordinance adopted by a state or local authority regulating the operation of motor vehicles on highways, may forward to the department within ten days of failure to respond, failure to pay a penalty, failure to appear at a hearing to contest the determination that a violation of any statute, ordinance, or regulation relating to standing, stopping, parking, or other infraction issued under RCW 46.63.030(1)(d) has been committed, or failure to appear at a hearing to explain mitigating circumstances, an abstract of the citation record in the form prescribed by rule of the department, showing the finding by such municipality that two or more violations of laws governing standing, stopping, and parking or one or more other infractions issued under RCW 46.63.030(1)(d) have been committed and indicating the nature of the defendant's failure to act. Such violations or infractions may not have occurred while the vehicle is stolen from the registered owner or is leased or rented under a bona fide commercial vehicle lease or rental agreement between a lessor engaged in the business of leasing vehicles and a lessee who is not the vehicle's registered owner. The department may enter into agreements of reciprocity with the duly authorized representatives of the states for reporting to each other violations of laws governing standing, stopping, and parking.

(4) For the purposes of Title 46 RCW the term "conviction" means a final conviction in a state or municipal court or by any federal authority having jurisdiction over offenses substantially the same as those set forth in Title 46 RCW which occur on federal installations in this state, an unvacated forfeiture of bail or collateral deposited to secure a defendant's appearance in court, the payment of a fine or court cost, a

plea of guilty or nolo contendere, or a finding of guilt on a traffic law violation charge, regardless of whether the imposition of sentence or sanctions are deferred or the penalty is suspended, but not including entry into a deferred prosecution agreement under chapter 10.05 RCW.

(5) For the purposes of Title 46 RCW the term "finding that a traffic infraction has been committed" means a failure to respond to a notice of infraction or a determination made by a court pursuant to this chapter. Payment of a monetary penalty made pursuant to RCW 46.63.070(2) is deemed equivalent to such a finding.

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

STATE OF WASHINGTON,)	Court of Appeals No. 34792-0-II
)	Clark County No. 05-1-02607-3
Respondent,)	
)	AFFIDAVIT OF MAILING
vs.)	
)	
COREY RUNYON,)	
)	
Appellant.)	

ANNE M. CRUSER, being sworn on oath, states that on the 24th day of November 2006, affiant placed a properly stamped envelope in the mails of the United States

addressed to:

Arthur Curtis
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

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Mr. Corey Runyon
20801 N.E. 10th Avenue
Ridgefield, WA 98642

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) VERBATIM REPORT OF PROCEEDINGS (TO MR. CURTIS)
- (3) R.A.P. 10.10 (TO MR. RUNYON)
- (4) AFFIDAVIT OF MAILING

DATED this 24th day of November, 2006

Anne M. Cruser

ANNE M. CRUSER, WSBA #27944
Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: November 24th, 2006, Kalama, Washington

Signature: Anne M. Cruser