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COUNTY OF SKAMANIA
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NO. 36161-2-II
Skamania County No. 06-1-00094-1

STATE OF WASHINGTON,

Respondent,

vs.

JOHN MELCHER

Appellant.

BRIEF OF APPELLANT

ANNE CRUSER/WSBA #27944
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A. ASSIGNMENT OF ERROR

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II. MR. MELCHER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO RAISE THE CORRECT GROUNDS FOR SUPPRESSION OF EVIDENCE.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

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C. STATEMENT OF THE CASE

The Skamania County Prosecuting Attorney charged Appellant, John Melcher, with one count of Possession of Methamphetamine with Intent to Deliver and one count of Use of Drug Paraphernalia. CP 1-2.

Mr. Melcher moved to suppress evidence pursuant to CrR 3.6 and the motion came before the court for a hearing on November 16, 2006.

Report of Proceedings, Vol. I.

Deputy Garcia testified at the motion to suppress. He testified that on September 26th, 2006 he saw Mr. Melcher's car speeding on Washougal River Road in Skamania County. I RP, p. 9. After identifying Mr. Melcher as the driver he discovered Mr. Melcher had a warrant for his arrest and placed him under arrest. I RP, p. 14. Mr. Melcher had a passenger named Mr. Brown, who was a co-defendant in this CrR 3.6 hearing. Report of Proceedings, Volume I. Deputy Garcia testified that he intended to search the vehicle incident to arrest prior to contacting the passenger, Mr. Brown. I RP, p. 15.

After the arrest of Mr. Brown, which is not at issue in this appeal, Deputy Garcia began to search the vehicle. I RP, p. 18. He began by looking under the front passenger seat and found a measuring spoon with a white crystal substance in it, as well as a black digital scale directly underneath where Mr. Brown was sitting. I RP, p. 19. After stopping to mirandize Mr. Melcher and Mr. Brown, Deputy Garcia continued searching the car. I RP, p. 19. He opened the glove box and testified that the dash panel "fell out" because it was being held up by the glove box. I RP, p. 19. He testified that when the dash panel fell out it pushed out the

CD player, and said the CD player was sitting loosely so that one could pull it in and out. I RP, p. 20. Deputy Garcia then pulled the CD player/stereo out and looked in the area where it had been. I RP, p. 21. He testified there was a crack in the dash board that was streaming in sunlight, and he could see a black cloth material underneath the steering column. I RP, p. 21. When he shined his flashlight he saw that it was a cloth bag. I RP, p. 21. He then reached under the steering column and pulled it out. I RP, p. 21.

When he opened the bag he found a large amount of suspected methamphetamine in it, and it later field tested positive for methamphetamine. I RP, p. 23. At trial, the evidence established that there were 12.2 grams of methamphetamine in this bag. I RP, p. 77, 88, 89. The methamphetamine in this bag was, according to the State, the methamphetamine that Mr. Melcher possessed with the intent to deliver. II RP, 183-93.

Prior to taking testimony at the motion to suppress, counsel for Mr. Melcher indicated that there was some question about whether the district court warrant upon which Mr. Melcher was arrested had actually been issued or whether it was validly issued. I RP, p. 7. Counsel stated: "I represented Mr. Melcher in that matter and there was some misunderstanding as to whether or not there had, in fact, been a warrant

issued.” I RP, p.7. Counsel indicated that he abandoned that as a basis to move to suppress, and did not even investigate the matter, because he believed that even if a warrant had not actually been issued, or was invalid, it would not matter under the good faith exception to the exclusionary rule. I RP, p. 7. Counsel for Mr. Melcher focused his argument on whether the arrest of the passenger, Mr. Brown, was valid and did not raise any challenge to whether Deputy Garcia exceeded the permissible scope of the search when he searched the vehicle. I RP, p. 7, 41-43.

Counsel for Mr. Melcher argued that whereas a search of a vehicle incident to arrest would ordinarily be justified if the driver of the vehicle is validly placed under arrest, in this particular case it was not justified because up until the officer discovered facts that led him to believe he had probable cause to arrest Mr. Brown for Use of Drug Paraphernalia, his intention was to release the vehicle without searching it and insofar as his intent changed, it was only due to the arrest of Mr. Brown. Therefore, counsel maintained, if the arrest of Mr. Brown was unjustified, so then was the search of the car incident to Mr. Melcher’s arrest. I RP, p. 41-43.

The Court denied the motion to suppress and entered findings of fact and conclusions of law. CP 11-15. Mr. Melcher proceeded to trial and was found guilty of both counts as charged. CP 69-70. He was given

a standard range sentence and this timely appeal followed. CP 73, 76, 85-86.

D. ARGUMENT

I. THE SEARCH OF MR. MELCHER'S CAR, IN WHICH A BAG OF METHAMPHETAMINE WAS FOUND BEHIND THE DASH PANEL AND UNDERNEATH THE STEERING COLUMN, EXCEEDED THE PERMISSIBLE PHYSICAL SCOPE OF A SEARCH INCIDENT TO ARREST.

In *State v. Contreras*, 92 Wn.App. 307, 313-14, 966 P.2d 915 (1998), Division II held that so long as the record is sufficiently developed so the Court can determine whether a motion to suppress would have been granted or denied, a suppression issue can be raised for the first time on appeal, pursuant to R.A.P. 2.5, when it involves a manifest constitutional error. This is in contrast to Division I's approach, in which they will not review a claim of an illegal seizure for the first time on appeal except through a claim of ineffective assistance of counsel. *Contreras* at 317-18, citing *State v. Mierz*, 72 Wn.App. 783, 789, 866 P.2d 65 (1994).

Here, the record is sufficiently developed for this Court to review Mr. Melcher's claim that the search of his car incident to arrest exceeded the permissible scope. This is so because trial counsel for Mr. Melcher in fact brought a motion to suppress, he simply focused on the question of whether Deputy Garcia actually intended to search Mr. Melcher's vehicle incident to arrest prior to the arrest of Mr. Brown.

Warrantless searches are per se unreasonable unless they fall within a narrow class of established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). A search incident to a valid arrest is a well recognized exception to the warrant requirement. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969); *United States v. Vasey*, 834 F.2d 782 (1987); *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). In *Chimel*, the United States Supreme Court ruled that incident to a lawful arrest, officers may search the area of the arrestee's wingspan, meaning the area into which a suspect might reach a weapon or evidence. *Chimel* at 762-63; *Vasey* at 787. In *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860 (1981), the United States Supreme Court, based on the rather unfair assumption that officers in the field lacked the ability to make very simple determinations about what areas are within an arrestee's reach and which areas are not, established a rule that when officers search an automobile incident to arrest, they may search the entire passenger compartment of the automobile and any containers found within the passenger compartment, without regard to an arrestee's *actual* ability to reach the areas or items searched.

In *State v. Stroud*, 106 Wn.2d 144, 151, 720 P.2d 436 (1986), the Washington State Supreme Court, applying Article 1, Section 7 of the

Washington State Constitution held that officers in this state may search the entire passenger compartment of a vehicle incident to the lawful arrest of an occupant of that vehicle. Although the rationale behind this rule is that an arrestee may reach for a weapon, thereby putting an officer at risk, or reach evidence that he may destroy, thereby justifying the search, this rationale is a legal fiction because the search may occur even if the arrested subject is already secured and in the custody of the police. The *Stroud* court, like the *Belton* court, reasoned that officers in the field were incapable of identifying obvious exigencies and determined that a bright line rule was required, even though it came at the expense of individual rights. *Stroud* at 151. The *Stroud* court departed from the *Belton* court, however, by ruling that only the passenger compartment and unlocked containers may be searched, as opposed to locked containers. *Stroud* at 151-52.

As Division II of the Court of Appeals noted in *State v. Johnston*, 107 Wn.App. 280, 285, 28 P.2d 775 (2001), *reviewed denied*, 145 Wn.2d 1021, 41 P.3d 483 (2002), the *Stroud* rule is not without limitation. The *Johnston* court stated:

...[T]he key question when applying *Belton* and *Stroud* is whether the arrestee had *ready* access to the passenger compartment at the time of the arrest. If he could suddenly reach or lunge into the compartment for a weapon or evidence, the police may search the compartment incident to his arrest. If he could not do that, the

police may not search the compartment incident to his arrest. Sometimes, this is referred to as having “immediate control” of the compartment.

Johnston at 285-86. In this case, the methamphetamine was found resting underneath the steering column in an area that could only be reached by removing the stereo and the dash panel. This area would not be reachable by a person sitting in the driver’s seat, and would be reachable only with great effort and difficulty by a person sitting in the passenger seat. While this area might be accessible from the passenger area without *leaving the vehicle*, this area is not a “container” as that term is defined in *Belton*. (*Belton* court defined “container” to mean “any object capable of holding another object.” *Belton* at 460, n. 4). Nor is it an area, such as a trunk or engine compartment, which would require an occupant of the vehicle to leave the vehicle in order to access it.

The area in which the drugs were found, however, was not readily accessible by either Mr. Melcher or Mr. Brown at the time Mr. Melcher was arrested. The passenger compartment certainly cannot be said to include areas which require dismantling of the interior of the vehicle in order to be reached. When the court in *Stroud* excluded locked containers from the permissible items which can be searched incident to arrest, it gave the following rationale:

First, by locking the container, the individual has shown that he or she reasonably expects the contents to remain private...Secondly, the 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 at 152. Although the area in which the methamphetamine was found cannot technically be considered a locked container, it is certainly analogous in character and spirit.

Applying the *Stroud* rationale to the area in which the methamphetamine was found in this case, it is clear that Mr. Melcher expressed a reasonable expectation that this item would remain private. The item was secreted behind the dash panel and underneath the steering column and could not be reached without a certain level of dismantling by Deputy Garcia. The search conducted by Deputy Garcia clearly exceeded the scope of a lawful search incident to arrest and violated Article I, Section 7 of the Washington State Constitution.

In *State v. Boursaw*, 94 Wn.App. 629, 635, 976 P.2d 130 (1999), Division I of the Court of Appeals held that the officers' removal of the dashboard ashtray that was in the area immediately reachable by the driver and the front passenger was proper because it was within reach of the occupants of the automobile. This case is distinguishable from *Boursaw* in that the area searched in Mr. Melcher's car was not immediately

reachable by the occupants of the car, unlike the dashboard ashtray in the *Boursaw* case. The *Boursaw* court was careful to state that its holding was limited to the facts of the case before it. *Boursaw* at 635. Further, Division I's opinion in *Boursaw* is not binding authority on this Court, but merely persuasive authority.

However, should this court hold that Mr. Melcher is not entitled to argue that the search of the car exceeded the permissible scope of a search incident to arrest for the first time on appeal because his counsel failed to raise the issue and invited the error, Mr. Melcher was denied effective assistance of counsel at the trial level.

II. MR. MELCHER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO SEEK SUPPRESSION OF THE BAG OF METHAMPHETAMINE ON THE GROUNDS THAT THE DEPUTY EXCEEDED THE PERMISSIBLE PHYSICAL SCOPE OF A SEARCH INCIDENT TO ARREST.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127

Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

When an appellant claims he was denied effective assistance of counsel because his counsel failed to bring a motion to suppress (or, in this case, failed to argue what Appellant maintains was the correct basis for suppression), the appellant must demonstrate first, that no legitimate tactical reason existed for failing to bring the motion, and second, that the motion probably would have been granted. *Contreras* at 318-19, citing *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). A claim of ineffective assistance of counsel is reviewed de novo. *State v. Rainey*, 107 Wn.App. 129, 135, 28 P.3d 10 (2001); *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995).

There is was no legitimate tactical reason for trial counsel to have failed to argue that this search exceeded the permissible physical scope of a search incident to arrest. He brought a motion to suppress, testimony was taken, briefs were written, and arguments were made. It is not as though counsel was faced with the choice of whether to bring a motion to suppress at all, perhaps because he feared that the State would seek a stiffer penalty or file enhancements against his client if he lost the motion. Again, the motion was brought. There was nothing left to lose and, as

such, failing to challenge the scope of the search was only to Mr. Melcher's detriment. There was no legitimate tactical reason for counsel's failure to raise this issue.

Second, the motion probably would have, or should have been granted, for the reasons argued at length above in Section I. Mr. Melcher's case should be reversed and dismissed because the evidence used to convict him was obtained in violation of his rights under Article I, Section 7 of the Washington State Constitution.

III. MR. MELCHER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO INVESTIGATE WHETHER MR. MELCHER ACTUALLY HAD A VALID WARRANT FOR HIS ARREST, BELIEVING THE VALIDITY AND/OR EXISTENCE OF THE WARRANT WAS IMMATERIAL.

The legal standard for ineffective assistance of counsel is discussed in Section II above and is incorporated here. Defense counsel indicated he had a concern that the warrant that Mr. Melcher was arrested on may not have been valid or may not have even been issued. Further, he had represented Mr. Melcher in the case that gave rise to the alleged warrant. However, he did no investigation of whether the warrant was either valid or in effect because he believed it was immaterial due to the good faith exception to the exclusionary rule. This representation falls below an

objective standard of reasonableness because in Washington, there is no good faith exception to the exclusionary rule.

Unlike federal law, in Washington, any unconstitutional search or seizure absolutely requires exclusion of all evidence found following the constitutional violation. *State v. Ladson*, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999); *State v. Morse*, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *State v. Littlefair*, 129 Wn.App. 330, 344, 119 P.3d 359 (2005). “[A]ll subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *Ladson* at 359-60. Unlike the federal system, Washington does not recognize a good faith exception to the exclusionary rule. *Littlefair* at 344; *White* at 107-08; *Morse* at 9-10; *State v. Wallin*, 125 Wn.App.648, 660, 105 P.3d 1037 (2005).

In *State v. Wallin*, 125 Wn.App. 648, 105 P.3d 1037 (2005) Division I was faced with an unusual case where DOC officers had searched the home of a sex offender they believed to be under their supervision. At issue was an order entered by the trial court modifying Mr. Wallin’s sentence with the intent of extending the period of his community placement for ten years. *Wallin* at 651. The officers, acting on the authority they believed was granted to them by this order, searched Mr. Wallin’s residence based on a well founded suspicion he had violated

the terms of his supervision. *Wallin* at 652. During the search, officers found evidence proving that Mr. Wallin had committed, among other things, first degree rape of a child and first degree child molestation. *Wallin* at 652-53. Mr. Wallin, in fact, confessed to these crimes. *Id.* On appeal, Mr. Wallin argued for the first time that the trial court lacked the authority to extend his community placement to ten years and, as such, the initial warrantless search (which revealed evidence that provided the basis for later search warrants) was conducted without the authority of law. *Wallin* at 654.

Division I agreed, noting that the invalidity of the order meant that Mr. Wallin's status was not that of an offender under DOC supervision. As such, the lower standard of "reasonable suspicion" did not apply. *Wallin* at 656. The State argued that because the DOC officers could not have known the order was invalid, they were acting with the authority of law. *Wallin* at 657. The Court noted that while the DOC officers reasonably believed they had the authority to conduct the search and had clearly acted in good faith, it did not matter. "But article 1, section 7, as currently read by our state Supreme Court, demands more than belief, and indeed more than good faith. It demands existing authority of law, and none existed here." *Wallin* at 660. Noting that suppression in Washington

is mandatory, the Court reversed Mr. Wallin's conviction and dismissed the case.

In *State v. Nall*, 117 Wn.App. 647, 72 P.3d 200 (2003) Clallam County Sheriff's deputies arrested Mr. Nall on an Oregon warrant at the request of the Multnomah County Sheriff's Office in Portland. The Oregon authorities told Clallam County they had an active warrant for Mr. Nall and a Clallam County deputy verified the warrant with central communications prior to the arrest. *Nall* at 649. Drugs and drug paraphernalia were found during the search incident to arrest. *Id.* It was learned later that this warrant should have been quashed because Mr. Nall's probation in Oregon had been terminated, but the administrative agency responsible for the warrant had made a clerical mistake and failed to quash the warrant. *Nall* at 649.

Division II agreed with the trial court that the officers, in spite of their good faith, did not have the authority of law to make the arrest that gave rise to the search. The Court held that under the fellow officer rule, the officer in Clallam County were presumed to know what the authorities in Oregon knew, which is that Mr. Nall's probation had been terminated and the warrant was void. *Nall* at 651, citing *State v. Mance*, 82 Wn.App. 539, 542, 918 P.2d 527 (1996).

In *State v. Littlefair*, Skamania County officers had placed Mr. Littlefair's property under surveillance suspecting that he was manufacturing marijuana. The officers had obtained permission from the adjoining property owner, Longview Fibre, to observe Mr. Littlefair's property from the Fibre property. *Littlefair* at 336. On the evening in question, Detective Gosner of the Clark-Skamania Task Force, believing he was on Fibre property, smelled a strong odor of growing marijuana from a venting system in an underground container on Littlefair's property. *Littlefair* at 334. The officer then obtained a search warrant and found evidence of marijuana manufacture. Littlefair moved to suppress on the basis that the detective was actually on his property, not Fibre's property, when he smelled the marijuana. *Littlefair* at 338. The trial court denied the motion, finding that Detective Gosner had reason to believe he was on Fibre property and in fact believed he was on Fibre property. *Littlefair* at 337.

Division II reversed, holding that the State could not rely on the "open view" exception to the warrant requirement where Detective Gosner was not lawfully on Littlefair's property. *Littlefair* at 343-44. "The question is not whether Detective Gosner made a mistake in good faith, but rather whether the detective 'had a lawful basis for his presence in the specific location from which he spied something incriminating.'"

Littlefair at 343, citing *State v. Thorson*, 98 Wn.App. 528, 537, 990 P.2d 446 (1999). The Court noted that the trial court justified its decision on the basis that the officer had a good faith belief he was not on Littlefair's property, but admonished that Washington does not recognize a good faith exception to the exclusionary rule. *Littlefair* at 344.

Here, if the warrant in question had not been validly issued, or had been cancelled or recalled, there was no authority of law for Deputy Garcia to arrest Mr. Melcher and every piece of evidence collected in this case would have to be suppressed, thereby requiring dismissal of this case (hence, the obvious prejudice to Mr. Melcher). It was unbelievably negligent for defense counsel to have simply ignored this issue, having reason to believe the warrant in this case did not provide the authority of law for this arrest, because he believed Washington has a good faith exception to the exclusionary rule. Such a belief is objectively unreasonable. Mr. Melcher's conviction should be reversed and, should this Court disagree with Mr. Melcher's first assignment of error, he should be appointed new counsel and given an opportunity to renew his suppression motion.

E. CONCLUSION

Mr. Melcher's conviction should be reversed and dismissed.
Alternatively, it should be reversed and he should be appointed new
counsel on remand.

RESPECTFULLY SUBMITTED this 20th day of December, 2007.



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

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and that said envelope contained the following

- (1) BRIEF OF APPELLANT
- (2) REPORT OF PROCEEDINGS (TO MR. BANKS)
- (3) RAP 10.10 (TO MR. MELCHER)
- (4) AFFIDAVIT OF MAILING

Dated this 20th day of December 2007,


 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: December 20, 2007, Kalama, Washington

Signature: Anne M. Cruser

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