

NO. 36796-3-II

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

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STATE OF WASHINGTON

Respondent,

v.

DAVID LAMAR SMITH,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY **SM**

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ON APPEAL FROM THE  
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable John F. Nichols, Judge  
and Before the Honorable John Wulle, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR .....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	2
C. STATEMENT OF THE CASE.....	3
1. <u>Procedural History:</u> .....	3
a. <u>Motion to suppress.</u> .....	3
b. <u>Trial Testimony.</u> .....	7
c. <u>Jury Instructions.</u> .....	9
d. <u>Sentencing.</u> .....	9
D. ARGUMENT .....	10
1. <u>THE ALLEGED INFRACTION USED TO JUSTIFY THE STOP OF APPELLANT WAS PRETEXTUAL AND A VIOLATION OF ARTICLE I, § 7 OF THE WASHINGTON STATE CONSTITUTION.</u> .....	10
a. <u>The State must prove the legality of the warrantless seizure.</u> .....	10
b. <u>Pretextual traffic stops violate Article I, § 7 of the Washington Constitution.</u> .....	11
2. <u>BECAUSE THE TWO CONVICTIONS FOR POSSESSION OF COCAINE MERGED AND BECAUSE ONE COUNT WAS THEREFORE NOT SUBJECT TO SEPARATE PUNISHMENT, IMPOSITION OF AN ENHANCEMENT BASED ON COUNT II VIOLATED CONSTITUTIONAL</u> .....	

**PROTECTIONS AGAINST DOUBLE  
JEOPARDY**.....16

3. **THE CASE MUST BE REMANDED TO  
CORRECT A SCRIVENER'S ERROR IN THE  
JUDGMENT AND SENTENCE**. ....18

E. **CONCLUSION** .....19

F. **APPENDICES**.....A-1 through A-3 and B-1

## TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>City of Seattle v. Mesiani</i> , 110 Wn.2d 454, 755 P.2d 775 (1988).....	13, 15
<i>State v. Angelos</i> , 86 Wn. App. 253, 936 P.2d 52 (1997) .....	12
<i>State v. Chelly</i> , 94 Wn. App. 254, 970 P.2d 376 (1999).....	11
<i>State v. Gunwall</i> , 106 Wn.2d 54, 740 P.2d 6080 (1986) .....	11
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	11, 12
<i>State v. Johnson</i> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	10
<i>State v. Johnston</i> , 100 Wn. App. 126, 996 P.2d 629 (1999).....	16
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	10, 11, 12, 13, 14, 15, 16
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	11
<i>State v. Michaels</i> , 60 Wn.2d 638, 374 P.2d 989 (1962) .....	15
<i>State v. Montague</i> , 73 Wn.2d 381, 438 P.2d 571 (1968).....	15
<i>State v. Moten</i> , 95 Wn.App.927, 976 P.2d 1286 (1999).....	18
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	12
<i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	16, 17
<i>State v. White</i> , 135 Wn.2d 761, 958 P.2d 982 (1998).....	11
<i>State v. White</i> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	11
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Coolidge, v. New Hampshire</i> , 403 U.S. 443, 91 S. Ct. 2022, 20 L. Ed. 2d 564 (1971) .....	10
<i>Delaware v. Prouse</i> , 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).....	13
<i>Miranda v. Arizona</i> , 34 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	5
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) ...	11, 13

*Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed.  
2d 89 (1996).....11, 13, 14

**REVISED CODE OF WASHINGTON** **Page**

RCW 9.94A.533(5).....18

RCW 9.94A.533(5)(c) .....3

RCW 69.50.4013(1).....3

RCW 69.50.412(1).....3

**CONSTITUTIONAL PROVISIONS** **Page**

U.S. Const. amend. IV .....12

Wash. Const. art. I, § 7.....2, 10, 11, 12, 13, 14, 15, 16

**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in admitting evidence found on Appellant David Smith's person and in his car because the State failed to prove that the officer stopped Smith for the sole purpose of enforcing the traffic code and not for the unconstitutional purpose of conducting a warrantless criminal investigation.

2. The trial court erred in entering the following CrR 3.6 Findings of Fact insofar as the Appellant challenges the constitutionality of the traffic stop:

- 1) On April 17, 2007, at approximately 2:00 am, Vancouver Police Officer Jason Beach observed defendant's vehicle failing to use a turn signal when turning onto O Street from 29<sup>th</sup> Street, in the City of Vancouver, in Clark County, Washington.
- 2) Upon observing the subject traffic infraction, Officer Beach immediately conducted a stop of defendant's vehicle.
- 3) Prior to conducting the stop of defendant's vehicle, Officer Beach had no prior knowledge that defendant was the driver of the vehicle.
- 4) Officer Beach is credible as to his testimony that the actual reason for stopping defendant's vehicle was because of the observed traffic infraction of failing to use a turn signal.
- 5) There is no evidence of a pretextual reason or circumstance regarding the traffic stop.

3. The trial court erred in entering the following Conclusion

of Law:

Based on the above findings of fact, as a conclusion of law, the subject traffic stop by Vancouver Police Officer Jason Beach of defendant's vehicle on April 17, 2007, was a valid stop.

4. The court's imposition of an enhancement based on Count 2, which was merged with Count 1 for sentencing purposes, violated constitutional double jeopardy.

5. The trial court erred when it entered a Judgment and Sentence that contained an obvious scrivener's error.

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

1. The State bears the burden of providing the constitutionality of warrantless seizures. Whether the pretextual traffic stop, the real purpose of which was to search Smith and his car for further evidence, violated Article I, § 7 of the Washington Constitution? Assignments of Error No. 1, 2, and 3.

2. Smith was convicted of two counts of possession of cocaine. The court determined that the convictions merged for sentencing purposes. The court imposed a 12 month enhancement in Count 2. Where the court did not elect as to which charge merged, and where Count 2 therefore may not be subject to separate punishment, did imposition of an enhancement based on that offense violate double jeopardy? Assignment of Error No. 4.

3. Whether the case should be remanded to correct an obvious scrivener's error in the Judgment and Sentence? Assignment of Error No. 5.

**C. STATEMENT OF THE CASE**

**1. Procedural history:**

David L. Smith was charged in the Clark County Superior Court on April 20, 2007, with two counts of possession of cocaine, in violation of RCW 69.50.4013(1), and one count of unlawful use of drug paraphernalia, in violation of RCW 69.50.412(1). Clerk's Papers [CP] at 1-2. The State alleged that Count 2 occurred in a jail facility, in violation of RCW 9.94A.533(5)(c), carrying a 12 month sentencing enhancement. CP at 1-2.

The matter was set for trial on September 5, 2007, following a Criminal Rule 3.5 and 3.6 suppression hearing on August 29, 2007. On September 6, 2007 a jury convicted Smith of two counts of possession of cocaine, and one count of unlawful use of drug paraphernalia. The jury found Count 2 was committed in a jail facility. CP at 88, 89, 90, 91.

Timely notice of appeal was filed on September 17, 2007. CP at 128. This appeal follows.

**a. Motion to suppress.**

On April 17, 2007, Vancouver Police Officer Jason Beach was on

patrol at 2:00 a.m. in a marked police vehicle in Vancouver, Washington. 1RP of Proceedings [RP] at 8, 9<sup>1</sup>. Officer Beach testified that he saw a vehicle traveling on 29<sup>th</sup> Street and that the car turned southbound onto O Street without signaling. 1RP at 9. Officer Beach followed the vehicle and stopped it on Fourth Plain, west of O Street. 1RP at 9. Officer Beach testified that he did not know who was in vehicle, that he had no other suspicion of criminal activity when he saw the vehicle, and that he was not following the vehicle in order to see if it would perform a traffic infraction. 1RP at 10, 24.

The driver of the vehicle, identified as David Smith, gave Officer Beach a Washington ID card, proof of vehicle insurance, and registration. 1RP at 11. Officer Beach ran Smith's ID on his mobile computer and found that Smith's license was suspended in the third degree and that he had two district court warrants. 1RP at 11. Officer Beach placed Smith in handcuffs and searched him incident to arrest. 1RP at 12. Officer Beach stated that he removed a brown piece of tubing from Smith's pocket and a black marking pen from his right front pants pocket. 1RP at 12, 14. As Officer Beach removed the tubing from Smith's pocket, Smith allegedly said "that is off my other car that is broken down." 1RP at 13. Officer

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<sup>1</sup> 1RP CrR 3.5, 3.6 Suppression Hearing August 29, 2007.

2RP Jury Trial, September 5, 2007.

3RP Jury trial September 6, 2007.

4RP Sentencing September 13, 2007.

Beach put the marker pen back into Smith's pocket. 1RP at 14.

In Smith's car, Officer Beach found a brass pipe fitting with a piece of brown tubing similar to the tubing he found in Smith's pocket. 1RP at 15. He also found a green zipper pouch in the center console of the car which contained several wire filters and a second container, which held a small piece of suspected crack cocaine. 1RP at 15. Officer Beach then administered Smith his constitutional warnings pursuant to *Miranda*.<sup>2</sup> 1RP at 15-16. Smith allegedly told Officer Beach that he knew that there was cocaine in the car, but that it belonged to his brother, who had been inside the car earlier. 1RP at 17. The officer reported that Smith said that the device, which Officer Beach termed "a makeshift crack pipe," had been on the car's seat and that he had put it in the driver's door pocket so that it was not in view. 1RP at 17.

Smith was booked into the Clark County Jail, where another officer discovered that the marking pen contained several pieces of suspected crack cocaine. 1RP at 18. Officer Beach subsequently recontacted Smith, who told him that that the suspected crack cocaine was not his. 1RP at 19. When accused of selling crack, he alleged that Smith said that he thought the pieces had to be separately packaged to be charged with delivery. 1RP at 20.

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<sup>2</sup>*Miranda v. Arizona*, 34 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Smith said that he had been stopped by Officer Beach four to five months before the April 17 stop. 1RP at 25. He testified that the officer “patrols my neighborhood, he—he knows where I live, he knows the vehicles that I drive.” 1RP at 25. He stated that about three months before the incident, Officer Beach pulled Smith over while driving a van for having a tag light that was not working. 1RP at 26. Officer Beach acknowledged that he had previously pulled Smith over for an alleged infraction, but that he did not recognize him when he stopped Smith’s car on April 17. 1RP at 33.

Smith stated that at 1:30 or 2:00 a.m. on April 17, he saw Officer Beach’s car emerge from an alleyway between R and P Streets in Vancouver. 1RP at 27. Smith was approximately a block away from the vehicle. 1RP at 27. He stated that he was turning when Officer Beach turned on the lights on his patrol car. 1RP at 27. Smith stated that he used his turn signal when he was making the turn. 1RP at 28. Smith stated that he was driving a new car and that the turn signal was operable. 1RP at 29. He had replaced a brake light bulb two weeks prior to the arrest, and he checked all the car’s bulbs at that time. 1RP at 30. Smith did not recall making any pre-*Miranda* statements to Officer Beach. 1RP at 28, 29.

The Court entered the following Findings of Fact and Conclusions

of Law on September 6, 2007:

FINDINGS OF FACT:

- 1) On April 17, 2007, at approximately 2:00 am, Vancouver Police Officer Jason Beach observed defendant's vehicle failing to use a turn signal when turning onto O Street from 29<sup>th</sup> Street, in the City of Vancouver, in Clark County, Washington.
- 2) Upon observing the subject traffic infraction, Officer Beach immediately conducted a stop of defendant's vehicle.
- 3) Prior to conducting the stop of defendant's vehicle, Officer Beach had no prior knowledge that defendant was the driver of the vehicle.
- 4) Officer Beach is credible as to his testimony that the actual reason for stopping defendant's vehicle was because of the observed traffic infraction of failing to use a turn signal.
- 5) There is no evidence of a pretextual reason or circumstance regarding the traffic stop.

CONCLUSION OF LAW:

Based on the above findings of fact, as a conclusion of law, the subject traffic stop by Vancouver Police Office Jason Beach of defendant's vehicle on April 17, 2007, was a valid stop.

Based on the above, the Defendant's 3.6 Motion to Suppress is DENIED.

CP at 93. Appendix A-1 through A-3.

**b. Trial testimony:**

At trial, Officer Beach testified that he stopped Smith's 2004

Chevrolet Malibu on April 17, 2007, for failing to signal while turning southbound onto 0 Street from 29<sup>th</sup> Street in Vancouver. 2RP at 54. After obtaining Smith's identification, Officer Beach learned that Smith had two misdemeanor warrants for his arrest and that his driver's license was suspended in the third degree. 2RP at 57, 58. Officer Beach put handcuffs on Smith and then searched his pockets, finding a brown piece of tubing and a black felt marking pen. 2RP at 60-61. The officer stated that he took the tubing and put the pen back in Smith's right front pants pocket. 2RP at 61. Exhibit 4. Officer Beach also took a folding knife from Smith's right front pants pocket. 2RP at 62, 63. The knife blade appeared to have "some white chalk-like substance on it." 2RP at 62, 63.

In the driver's door pocket in Smith's car, the officer found a brass pipe fitting with a piece of tubing similar to the tubing he found in Smith's pocket. 2RP at 65. Exhibit 2. The officer found in the car's center console a green zipper pouch that contained wire filters. 2RP at 71. The officer also found in the green pouch a black plastic container that held a piece of chalk-like substance, which he suspected was crack cocaine. 2RP at 71. The substance tested positive as cocaine. 2RP at 135-36. Officer Beach testified that after being administered his constitutional warnings, Smith said that he was aware that the suspected cocaine was in his vehicle but that it belonged to his brother. 2RP at 76.

Officer Beach transported Smith to the Clark County Jail. 2RP at 78. At the jail, Custody Officer Tim Winstead discovered approximately eleven pieces of suspected crack cocaine hidden inside the black marking pen. 2RP at 109. The substance tested positive as cocaine. 2RP at 128.

Smith denied having the black pen in his pocket, and stated that the first time he saw the pen was when he was being booked into the jail. 2RP at 144, 145. Smith stated that he did not open the center console the car before he drove it. 2RP at 147.

**c. Jury instructions.**

Neither counsel noted exceptions to requested instructions not given or objected to instructions given. 3RP at 175-76.

**d. Sentencing.**

The matter came on for sentencing on September 13, 2007. Judge Nichols granted the defense's motion to merge Counts 1 and 2. The standard range for each count is 12 to 24 months, and the court imposed a midrange sentence of 18 months for both counts. 4RP at 243. The Judgment and Sentence states that "both counts merge" and that each are to be served concurrently. CP at 103. Appendix B. The court imposed a 12 month enhancement for possession of cocaine in a jail facility in Count 2, for a total of 30 months. In an apparent scrivener's error, the Judgment and Sentence provides that Smith serve 30 months in Count 1. CP at 103.

The court imposed 49 days for Count 3, with credit for 49 days served. CP at 117.

**D. ARGUMENT**

1. **THE ALLEGED INFRACTION USED TO JUSTIFY THE STOP OF APPELLANT WAS PRETEXTUAL AND A VIOLATION OF ARTICLE I, § 7 OF THE WASHINGTON STATE CONSTITUTION.**

a. **The State must prove the legality of the warrantless seizure.**

In the instant case, the appellant's state constitutional privacy rights were violated when the officer initiated a pretextual traffic stop.

The State always bears the burden of proving the applicability of one of the narrow exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 454, 91 S. Ct. 2022, 20 L. Ed. 2d 564 (1971). *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999); *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

In order to meet this burden, the State must prove the traffic stop was justified at its inception and reasonable. *Ladson*, 138 Wn.2d at 350 (citing *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). A police officer's decision to stop an automobile is generally reasonable if the officer has probable cause to believe that a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 116 S. Ct.

1769, 135 L. Ed. 2d 89 (1996); *Ladson*, 138 Wn.2d at 349 (citing *State v. Mendez*, 137 Wn.2d 208-211-12, 219, 220, 970 P.2d 722 (1999)); *State v. Chelly*, 94 Wn. App. 254, 259, 970 P.2d 376 (1999). However, probable cause cannot justify a stop if the stop was pretextual and actually made in order to conduct a criminal investigation. *Ladson*, 138 Wn.2d at 351 (finding pretext stops to be “inherently unreasonable”).

b. **Pretextual traffic stops violate Article I, § 7 of the Washington Constitution.**

A pretextual traffic stop occurs when the police stop a driver for the purpose of conducting a criminal investigation unrelated to driving and do so under the guise of making the stop to enforce the traffic code. *Ladson*, 138 Wn.2d at 349. Under Article I, § 7 of the Washington Constitution, pretext stops are forbidden. *Id.* at 345.

It is well established that Article I, § 7 of the Washington State Constitution provides greater protection to an individual’s right of privacy than does the Fourth Amendment. *Ladson*, 138 Wn.2d at 349; *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). Thus no *Gunwall* analysis is needed in this case because the Court will apply established principles of state constitutional jurisprudence. *White*, 135 Wn.2d at 769. Article I, § 7 provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision differs

from the Fourth Amendment in that Article I, § 7 “clearly recognizes an individual’s right to privacy with no express limitations.” *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

The Washington State Supreme Court has determined that “the right to be free from unreasonable governmental intrusion into one’s ‘private affairs’ encompasses automobiles and their contents.” *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). Washingtonians, therefore, do not have reduced expectations of privacy in their automobiles. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996) (work release inmate had an expectation of privacy in his vehicle).

In *Ladson*, the Supreme Court recognized that in a pretext stop, the police may be able to articulate a facially valid reason for the stop, such as an infraction, but the reason, however valid on its face may nonetheless be a pretext for further investigation. The standard of review for determining whether a stop is pretextual is a consideration of the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior. *Ladson*, 138 Wn.2d at 359, citing *State v. Angelos*, 86 Wn. App. 253, 256, 936 P.2d 52 (1997).

In Washington State warrantless searches and seizures are *per se* unreasonable, in large part because under Article I, § 7, the warrant provides the “authority at law” to conduct a search. *Ladson*, 138 Wn.2d at

349-50. The exceptions to the warrant requirement are few and “jealously and carefully drawn”. They consist of “consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry*<sup>3</sup> investigative stops. *Ladson*, 138 Wn.2d at 349, citing, *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1966). The State bears the burden of proving one of the above exceptions. *Id.*

For the purpose of constitutional analysis, no matter how brief, a traffic stop, “whether pretextual or not is a “seizure””. *Ladson*, 138 Wn.2d at 350, *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *Whren v. United States*, 517 U.S. 806, 1809-10, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 560, 755 P.2d 775 (1988) (Dolliver, J., concurring). A pretextual traffic stop occurs when:

the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Therefore the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation.

*Ladson*, 138 Wn.2d at 349.

The Court in *Ladson* rejected *Whren* and the cases on which it relies in favor of the broader protections articulated under Article I, § 7,

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<sup>3</sup> *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

reasoning that to do otherwise would undermine precedent wherein individuals have a right to privacy even when they enter their vehicles.

*Ladson*, 138 Wn.2d at 357-58.

The traffic code is sufficiently extensive in its regulation that “whether it be for failing to signal while changing lanes, driving with a headlight out, or not giving ‘full time and attention’ to the operation of the vehicle, virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter.” Peter Shakow, Let He Who Never Has Turned Without Signaling Cast the First Stone; An Analysis of *Whren v. United States*, 24 Am. J. Crim. L. 627, 633 (1997) (footnote omitted). Thus, nearly every citizen would be subject to a Terry stop simply because he or she is in his or her car. But we have repeatedly affirmed that Washingtonians retain their privacy while in the automobile and we will do so today. See, *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988) (“From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles.”), citing, *State v. Gibbons*, 118 Wn. 171, 187, 203 P. 390 (1922).

*Ladson*, 138 Wn.2d at 358 n10.

Citing to *Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988), the Court in *Ladson*, noted that just as in the traffic infraction pretext, sobriety roadblocks violated article I, § 7 because the police lacked articulable suspicion of criminal activity to randomly stop drivers and there were no exceptions or “authority of law” in lieu of the warrant requirement. *Ladson*, 138 Wn.2d at 351-52, citing *Mesiani*, 110 Wn.2d at 457.

The Court in *Ladson* adopted the “strict no-pretext rule” articulated in *State v. Michaels*, 60 Wn.2d 638, 640, 644, 374 P.2d 989 (1962). In *Michaels*, the Court held that neither a traffic infraction nor an arrest may be used as a pretext to search for evidence. *Ladson*, 138 Wn.2d at 353, citing, *Michaels*, 60 Wn.2d at 644. See also, *State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968), (the court suppressed fruits of pretextual impound and inventory search).

Both *Ladson* and *Michaels* control. In each case, either the stop or arrest was facially valid, but for the fact that it was a pretext to accomplish further investigation. In *Michaels* the search was incident to a pretextual arrest. In *Ladson*, the search was incident to a pretextual stop.

In the instant case, Smith submits that the stop was pretextual and that it was conducted by Officer Beach in order to look for additional grounds to search. As it developed, Officer Beach determined that Smith had warrants, thus permitting a search incident to arrest.

Officer Beach, on the other hand, testified that he was on patrol in Vancouver and saw Smith’s car turn without signaling, but did not recognize Smith. 1RP at 24.

Smith submits that Officer Beach knew him, knew his vehicle, and even knew where he lived, and that Officer Beach needed to stop Smith in order to be able to obtain his license to run a warrants check, and search, if

the investigation bore fruit, which it did. 1RP at 25.

In sum, the evidence must be suppressed because the stop was pretextual and pretextual traffic stops violate article I, § 7, because they are seizures absent the ‘authority of law’ “which a warrant would bring.” Const. art. I, § 7; *Ladson*, 138 Wn.2d at 358.

2. **BECAUSE THE TWO CONVICTIONS FOR POSSESSION OF COCAINE MERGED AND BECAUSE ONE COUNT WAS THEREFORE NOT SUBJECT TO SEPARATE PUNISHMENT, IMPOSITION OF AN ENHANCEMENT BASED ON COUNT II VIOLATED CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY.**

Both state and federal double jeopardy principles prohibit multiple punishments for the same offense. This prohibition includes cumulative punishments for one crime committed in the course of another crime, unless specifically authorized by the legislature. *State v. Johnston*, 100 Wn. App. 126, 138, 996 P.2d 629, *review denied*, 141 Wn.2d 1030 (2000). Merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act which violates more than one statutory provision. *State v. Vladovic*, 99 Wn.2d 413, 419 n.2, 662 P.2d 853 (1983).

The court below found that the two drug possession charges merged with one other. 4RP at 237. Because the two counts merged, and

because it is unknown whether it is Count 1 or Count 2 for which Smith is being punished, the imposition of the jail facility enhancement in Count 2 violates double jeopardy. In other words, if Count 2 was merged with Count 1, no separate punishment may be imposed on Count 2. *See State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983). The trial court did not specify the specific count for which Smith was being punished, only that there is only one possession.

The court stated:

I think the equitable thing to do, and I think it's justified under the case law, is that there be one possession, but that does include the enhancement for the jail because he had that one possession that continued to the jail.

4RP at 236.

Although the trial court acknowledged that, for sentencing purposes, Smith had only one possession, it nonetheless imposed the enhancement based on the jury's special verdict as to that offense. But because it is not known whether Smith is being punished for Count 1 or Count 2, the enhancement constitutes a violation of state and federal guarantees against double jeopardy and must be vacated.

A jail facility enhancement is not a separate sentence. Rather, it is a statutorily-imposed sentence *increase* for a particular crime based on certain factors involved in the crime. Under the SRA, the court calculates

the defendant's sentence for a given offense based on the offender score, seriousness level, and aggravating or mitigating factors. It then adds any enhancements to that base sentence. RCW 9.94A.533(5). It necessarily follows, then, that where no sentence is imposed, there can be no enhancement. If Count 2 was merged, there was no sentence to enhance and no authority for the court to order the additional 12 months of incarceration.

Because it cannot be ascertained that Smith was being sentenced on Count 1 or Count 2, there is no authority for the court to impose an enhancement on Count 2. The enhancement therefore must be vacated.

3. **THE CASE MUST BE REMANDED TO CORRECT A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE.**

Judge Nichols imposed a midrange sentence of 18 months for both Count 1 and Count 2. 4RP at 243. The Standard range sentence for Count 1 is 12 to 24 months. The judgment and sentence, however, imposes a 30-month sentence for Count 1, 12 months in excess of the standard range. CP at 103. Appendix B. The Court did not indicate that it was imposing an exceptional sentence outside the range in Count 1. 4RP at 243. An obvious scrivener's error on a judgment and sentence form is correctable on remand if the error does not prejudice the defendant. *State v. Moten*, 95 Wn.App.927, 929, 976 P.2d 1286 (1999). The case should be remanded to

correct this deficiency.

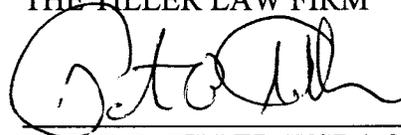
**E. CONCLUSION**

For the foregoing reasons, David Smith respectfully requests that this Court suppress the evidence seized as the fruits of an illegal pretext stop and reverse his convictions. In the alternative, Smith requests that the enhancement on Count 2 be vacated.

DATED: February 1, 2008.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "P. Tiller", written over a horizontal line.

PETER B. TILLER-WSBA 20835  
Of Attorneys for David L. Smith

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
Plaintiff,  
v.  
DAVID LAMAR SMITH,  
Defendant.

No. 07-1-00698-2

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE:  
DEFENDANT'S 3.6 HEARING MOTION  
TO SUPPRESS

On August 29, 2007, in the Superior Court of Clark County, Washington, the Honorable John P. Wulle, after evidence was presented and oral arguments made by the Plaintiff, the State of Washington, and the above-named defendant David Lamar Smith, did make the following Findings of Fact and Conclusion of Law in denying the defendant's 3.6 motion to suppress.

FINDINGS OF FACT:

- 1) On April 17, 2007, at approximately 2:00am, Vancouver Police Officer Jason Beach observed defendant's vehicle failing to use a turn signal when turning onto O street from 29<sup>th</sup> Street, in the City of Vancouver, in Clark County, Washington.
- 2) Upon observing the subject traffic infraction, Officer Beach immediately conducted a stop of defendant's vehicle.

FINDINGS OF FACT / CONCLUSIONS OF  
LAW - 1

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- 1 3) Prior to conducting the stop of defendant's vehicle, Officer Beach had no prior
- 2 knowledge that defendant was the driver of the vehicle.
- 3 4) Officer Beach is credible as to his testimony that the actual reason for stopping
- 4 defendant's vehicle was because of the observed traffic infraction of failing to use a
- 5 turn signal.
- 6 5) There is no evidence of a pretextual reason or circumstance regarding the traffic
- 7 stop.

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9 CONCLUSION OF LAW:

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11 Based on the above findings of fact, as a conclusion of law, the subject traffic stop by  
12 Vancouver Police Officer Jason Beach of defendant's vehicle on April 17, 2007, was a  
13 valid stop.

14  
15 Based on the above, the Defendant's 3.6 Motion to Suppress is DENIED.

16  
17 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

18 \_\_\_\_\_  
19 Judge John P. Wulle  
20 Clark County Superior Court

21 Presented by:

22 \_\_\_\_\_  
23  
24  
25 Deputy Prosecuting Attorney, WSB NO \_\_\_\_\_

26 On this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

27 FINDINGS OF FACT / CONCLUSIONS OF  
LAW - 2

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1 Approved as to form:

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\_\_\_\_\_

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Defense counsel, WSB No \_\_\_\_\_

6

On this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

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**FINDINGS OF FACT / CONCLUSIONS OF  
LAW - 3**

**CLARK COUNTY PROSECUTING ATTORNEY  
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VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (OFFICE)  
(360) 397-2230 (FAX)**

**B**

The defendant shall not have contact with \_\_\_\_\_ including, but not limited to, personal, verbal, telephonic, electronic, written or contact through a third party for \_\_\_\_\_ years (not to exceed the maximum statutory sentence).

- A Supplemental Domestic Violence Protection Order, Antharassment No Contact Order, or Sexual Assault Protection Order is filed with the Judgment and Sentence.
- The defendant is ordered to reimburse \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_, for the cost of pretrial electronic monitoring in the amount of \$ \_\_\_\_\_.

4.4 OTHER: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

30 days/months on Count 01  
30 days/months on Count 02 } *both counts merge - concurrent.*

Actual number of months of total confinement ordered is: \_\_\_\_\_  
(Add mandatory firearm and deadly weapons and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The confinement time on Count(s) \_\_\_\_\_ contain a mandatory minimum term of \_\_\_\_\_.

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with a juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

\_\_\_\_\_  
\_\_\_\_\_

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(b) CONFINEMENT. RCW 9.94A.712 (Sex Offenses only): The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count	minimum term	maximum term
01		
02		

(c) Credit for 49 days time served prior to this date is given, said confinement being solely related to the crimes for which the defendant is being sentenced. RCW 9.94A.505

4.6  COMMUNITY PLACEMENT is ordered on Counts \_\_\_\_\_ for \_\_\_\_\_ months

FILED  
COURT OF APPEALS  
DIVISION II

08 FEB -4 AM 9:37

STATE OF WASHINGTON  
BY     jn      
DEPUTY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DAVID LAMAR SMITH,

Appellant.

COURT OF APPEALS NO.  
36796-3-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to David L. Smith, Appellant, and Michael C. Kinnie, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on February 1, 2008, at the Centralia, Washington post office addressed as follows:

Mr. Michael C. Kinnie  
Deputy Prosecuting Attorney  
Clark County Prosecuting Attorney's  
Office  
P.O. Box 5000  
Vancouver, WA 98666-5000

Mr. David Ponzoha  
Clerk of the Court  
WA State Court of Appeals  
950 Broadway, Ste. 300  
Tacoma, WA 98402-4454

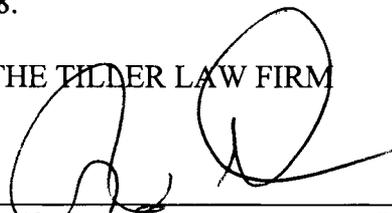
CERTIFICATE OF MAILING 1

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Mr. David L. Smith  
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P.O. Box 900  
Shelton, WA 98584

DATED: February 1, 2008.

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over the printed name of the attorney.

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PETER B. TILLER – WSBA #20835  
Attorney for Appellant

CERTIFICATE OF MAILING 2

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