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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

NO. 37649-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ZACHARY LOREN BECK,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

P.M. 1-15-2009

TABLE OF CONTENTS

| | Page |
|--|-----------|
| A. TABLE OF AUTHORITIES | iv |
| B. ASSIGNMENT OF ERROR | |
| 1. Assignment of Error | 1 |
| 2. Issue Pertaining to Assignment of Error | 1 |
| C. STATEMENT OF THE CASE | |
| 1. Factual History | 2 |
| 2. Procedural History | 3 |
| D. ARGUMENT | |
| I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION TO SUPPRESS EVIDENCE THE POLICE SEIZED WITHOUT A WARRANT AND WITHOUT OTHER LEGAL JUSTIFICATION IN VIOLATION OF WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT | 8 |
| II. THE TRIAL COURT VIOLATED CrR 3.5 WHEN IT ALLOWED THE STATE TO ELICIT INTO EVIDENCE STATEMENTS THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION BECAUSE THE COURT DID NOT HOLD A HEARING UNDER CrR 3.5 AND THE DEFENDANT DID NOT WAIVE HIS RIGHT TO A HEARING UNDER THIS RULE | 13 |
| E. CONCLUSION | 18 |

F. APPENDIX

| | |
|---|----|
| 1. Washington Constitution, Article 1, § 7 | 19 |
| 2. Washington Constitution, Article 1, § 9 | 19 |
| 3. United States Constitution, Fourth Amendment | 19 |
| 4. United States Constitution, Fifth Amendment | 19 |
| 5. CrR 3.5 | 20 |

TABLE OF AUTHORITIES

Page

Federal Cases

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 13

State Cases

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) 14

State v. Earls, 116 Wn.2d 364, 805 P.2d 211 (1991) 14

State v. Holland, 98 Wn.2d 507, 656 P.2d 1056 (1983) 14

State v. Nogueira, 32 Wn.App. 954, 650 P.2d 1145 (1982) 15

State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980) 8

State v. Spearman 59 Wn.App. 323, 796 P.2d 727 (1990) 16

State v. Tim S., 41 Wn.App. 60, 701 P.2d 1120 (1985) 15

Constitutional Provisions

Washington Constitution, Article 1, § 7 8, 10

United States Constitution, Fourth Amendment 8, 10

Statutes and Court Rules

CrR 3.5 13-17

JuCr 1.4(b) 15

Other Authorities

R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988) 8

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion to suppress evidence the police seized without a warrant and without other legal justification in violation of Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

2. The trial court violated CrR 3.5 when it allowed the state to elicit into evidence statements the defendant made during custodial interrogation because the court did not hold a hearing under CrR 3.5 and the defendant did not waive his right to a hearing under this rule.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it denies a defendant's motion to suppress evidence the police seized without a warrant and without other legal justification in violation of Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment?

2. Does a trial court violate CrR 3.5 if it allows the state to elicit into evidence statements a defendant made during custodial interrogation when the court did not first hold a hearing under CrR 3.5 and the defendant did not waive the right to a hearing under this rule?

STATEMENT OF THE CASE

Factual History

On June 8, 2007, Community Corrections Officer (CCO) Dan Johnson was sitting in a motor vehicle at a stop light or stop sign when he and another CCO saw the defendant Zachary Loren Beck drive by in a Black Chevy Truck owned by the defendant's wife. RP 102-104. At the time, the defendant was on community supervision with CCO Johnson, who knew that the defendant did not have a valid driver's license. RP 1-2. CCO Johnson followed the defendant to a local shopping center parking lot. RP 102-104. However, before Officer Johnson could get into the lot, the defendant had parked and walked into a store. *Id.* As a result, CCO Johnson and CCO Todd Dillman waited by the truck. RP 105-106.

About fifteen minutes after stopping in the parking lot, the defendant returned to his truck. RP 105-106. As he did, CCO Johnson engaged him in conversation, and then told him he was under arrest. RP 105-107. CCO Johnson also called for police assistance. RP 105-106. About five minutes later, Officer Tim Watson arrived to take the defendant into his custody. RP 127-132. As he was doing this, he told CCO Johnson and CCO Dillman that another police officer by the name of Chris Angel had told him that the night previous the defendant had overdosed on heroin. RP 7 CCO Johnson believed that the defendant's pupils were some what "constricted," although

he did not see any signs of any type of intoxication. RP 5-6, 8-10.

After the defendant was taken into custody, CCO Dillman decided to search the truck. RP 12. When he did, he found a small bundle of cocaine under the seat. RP 13. The defendant denied knowing that it had been in the truck. RP 288-289. In fact, a friend of the defendant later stated that he had been driving the truck, that the cocaine was his, that he had put it under the driver's seat when he thought a police officer was going to arrest him, and that the incident had so upset him that he had left the cocaine in the vehicle. RP 299-235.

Procedural History

By information filed June 12, 2007, the Cowlitz County Prosecutor charged the defendant with one count of possession of cocaine and one count of driving while suspended. CP 3-4. The state later amended the information to add a charge of bail jumping based upon the defendant's failure to appear at a scheduled hearing in this case. CP 91-93. Prior to trial, the defense brought a motion to suppress the evidence found in the truck on the basis that the community corrections officer's warrantless search of the vehicle violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. CP 9-11.

On April 2, 2008, the court called this case for a hearing on the defendant's motion to suppress. RP 1. At that hearing, the state called CCO

Johnson and CCO Dillman as witnesses. RP 1, 11. At that hearing, these officers testified to the facts contained in the preceding factual history. *See* Factual History. After this testimony and argument from both parties, the court denied the motion. RP 16-17. The court made the following statement upon denying the motion.

While Mr. Beck was returning to the vicinity of the vehicle, he had left it and it was locked. It was not someplace where he could immediately reach for weapons or contraband. So the analysis, if it is a proper search it is strictly under the reasonable suspicion standard attached to a parolee/probationer. There is a basis for the initial contact. The officer indicates that he sees Mr. Beck driving although he did not have a license previously and knows that he has only been out of jail for a couple of days. That is sufficient to contact Mr. Beck. And Mr. Beck's statements, "No, I don't have a license." Certainly there is a basis to arrest at this point. So everything up to that point is proper.

At that time, the basis to search the car is you saw Mr. Beck in the car, his eyes were somewhat pinned, not very much. He's got the information from the LPD contact that Mr. Beck had overdosed the evening before and he has a bandaid on his arm. Is that sufficient to amount to a reasonable suspicion that an offense has occurred and that Mr. Beck is related or involved in the offense or that there is evidence of that offense in the vehicle?

Obviously I think it is really, really close. And taking that information as a whole and with the -- I guess I will call it part of the boilerplate that we are all aware of that there are many people who use drugs and keep them in their vehicle. I am going to find that barely it is sufficient to deny the motion to suppress which takes us to the motion in limine.

RP 16-17.

As far as counsel for appellant can ascertain, the state has never

prepared or presented written findings of fact and conclusions of law on this ruling. CP 1-390.

On April 9, 2008, the defendant asserted his right to self-representation. RP 22-29. The defendant persisted in this argument even after the court held a colloquy in which the court informed the defendant of the statutory maximums and the standard ranges for the offenses for which he was charged. *Id.* Following the colloquy, the court granted the defendant's request, and the defendant thereafter appeared pro se in the case with standby counsel present at all times. *Id.* Prior to the beginning of trial on June 9, 2008, the court repeated the colloquy on self-representation. RP 78-84. The defendant repeated that he wanted to represent himself. *id.*

Following this colloquy, the court called the case for trial, during which the state called eight witnesses, including Community Corrections Officers Johnson and Dillmon, and two police officers. RP 97, 121, 127, 156. These officers testified to the facts contained in the preceding factual history. *See Factual History.* The state also called Community Corrections Officer Jessica Johnson, who testified that on June 19, 2007, she called a DOC hearing on a claim that the defendant had violated the conditions of his community custody on a prior conviction, that at the hearing, and that at this hearing, which was held without the defendant having access to an attorney,

the defendant admitted that he had possessed cocaine in the case at bar. RP 184-200.

At no point in this case did the court hold a hearing under CrR 3.5 to determine the admissibility of these statements. RP 1-350. Neither did the defendant ever waive his right to a hearing under CrR 3.5. *Id.* In fact, on the morning of trial, the court inquired concerning the need for the hearing, and the state specifically told the court that none was necessary because the state did not intend to elicit any statements that the defendant had made. RP 89-90. The prosecutor stated the following on this issue:

MR. NGUYEN: I don't anticipate soliciting any statements from Mr. Beck so we won't need a 3.5.

RP 89-90.

At trial, the state also called two superior court clerks. They testified that the court in this case had released the defendant from custody upon a requirement that he subsequently appear at all court hearings in his case, that on October 30, 2007, the court ordered the defendant to personally appear for a trial review on November 27, 2007, and that on that date the defendant did not appear in court. RP 203-210, 216-219. Following their testimony, the state rested its case. RP 322. The defendant then called five witnesses, including Kevin Robinson and the defendant himself. RP 229, 288. Mr. Robinson testified that he had been driving the truck earlier on the date in

question, that the cocaine was his, that he had put it under the driver's seat when he thought a police officer was going to arrest him, that the incident had so upset him that he had left the cocaine in the vehicle, and that the defendant did not know it was there. RP 229-231. The defendant testified that he did not know the cocaine was in the truck, and that had been unable to appear in court on November 27th because he had been injured and was under a doctor's order that prohibited him from traveling, although he had previously arranged transportation to get to court. RP 288-292.

Following the close of the defendant's case, the state put on two brief parties and presented closing argument. RP 322-331, 331-350. The jury then retired for deliberation, eventually returning verdicts of guilty to possession of cocaine and bail jumping. CP 371-371. Following sentencing within the standard range, the defendant filed timely notice of appeal. CP 374-388, 390.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE SEIZED WITHOUT A WARRANT AND WITHOUT OTHER LEGAL JUSTIFICATION IN VIOLATION OF WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under Article 1, § 7 of the Washington Constitution, as well as under the Fourth Amendment to the United States Constitution, warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving that the search falls within one of the various “jealously and carefully drawn” exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). One exception to the warrant requirement allows probation officers to search the homes and persons of probationers without a warrant. *State v. Rainford*, 86 Wn.App. 431, 438, 936 P.2d 1210 (1997). In addition, while most arrests and searches may only be made upon probable cause, our courts have reduced the probable cause requirement for the arrest, search, or issuance of warrants for defendants who have already been adjudicated guilty. *State v. Lucas*, 56 Wn.App. 236, 783 P.2d 121 (1989). Thus, for example, a probation or police officer may arrest or search without a warrant, or by

inference, the court may issue a warrant to arrest based upon a probation or police officer's "reasonable belief" that an offender has violated his or her conditions of probation or conditions of release pending sentencing. *State v. Simms*, 10 Wn.App 75, 516 P.2d 1088 (1974).

For example, in *State v. Fisher*, 145 Wn.App. 206, 35 P.3d 366 (2001), the defendant pled guilty to a drug charge and the court released her upon conditions pending sentencing. Prior to the sentencing hearing, the same court issued a warrant for the defendant's arrest upon the state's affidavit alleging that the defendant had violated the court's conditions of release. Upon execution of the warrant and a search incident to that arrest, the police found drugs on the defendant's person. The state then charged the defendant with possession of the drugs found upon her arrest on the bench warrant. Following this charge, the defendant moved to suppress the evidence seized upon an argument that the state's affidavit did not establish probable cause to believe that she had violated her conditions of release.

The trial court eventually denied the defendant's motion, holding that while the state's affidavit did not establish probable cause, it did establish a "well-founded suspicion" to believe that the defendant had violated her conditions of release. The defendant was later found guilty after a jury trial, and she appealed, arguing that the trial court had erred when it denied her motion to suppress. However, the Court of Appeals affirmed, holding that

the warrant was properly issued under CrR 3.2(j) upon the state's allegation that she had violated her conditions of release. After this ruling, the defendant sought and obtained review before the Washington Supreme Court.

Before the Supreme Court, the defendant argued that to the extent the court rules allow the issuance of an arrest warrant on less than probable cause (*i.e.*, reasonable suspicion), the rules violated Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment. In the alternative, the defendant argued that the prosecutor's affidavit failed to meet the reliability and specificity requirements of those same constitutional provisions, which is an implied requirement of the "reasonable suspicion" standard (should that standard apply).

In analyzing these arguments, the court first recognized a dichotomy in our constitutional law between the privacy rights of an "accused" person as opposed to the privacy rights of a person who has already been "convicted." The former is entitled to protection under the "probable cause" standard, while the latter is only entitled to the protection of the "reasonable suspicion" standard, provided the information given in support of the claim of violation meets the reliability and specificity requirements of Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment. The court stated as follows on this point.

Our Court of Appeals cases suggest that an exception to the

probable cause requirement exists when a defendant adjudged “guilty” of a felony is released with specified conditions. Although those cases questioned the constitutionality of RCW 9.94A.195 permitting searches without probable cause, that statute, like CrR 3.2(j)(1), also provides for arrest without determination of probable cause. In upholding the constitutionality of RCW 9.94A.195, the Courts of Appeal in Lucas and Massey have ruled that “search and seizure of [probationer’s or parolee’s] person” only requires a showing of reasonable cause and not probable cause. Thus, the lower standard, reasonable cause, satisfies the Fourth Amendment when a bench warrant is issued for a convicted felon who has been released subject to conditions. This undermines Petitioner’s argument that the Fourth Amendment requires probable cause for issuance of a bench warrant.

Respondent is correct in its contention that a “well-founded suspicion” that violation of a condition of release has occurred should be required for the court to issue a bench warrant under CrR 3.2(j)(1) for persons who have pleaded “guilty” to a felony and await sentencing. Under the facts in this case, the rule must be read together with CrR 3.2(f).

State v. Fisher, 145 Wn.2d at 228-229.

As the court explained, a “convicted” person, whether sentenced or not, has a reduced expectation of privacy that allows the state to obtain a warrant of arrest on “reasonable suspicion” even though the specific language of the Fourth Amendment requires the existence of probable cause. Thus, the court proceeded to the defendant’s alternative argument that the prosecutor’s affidavit did not establish a “reasonable suspicion” to believe she had violated her conditions of release. In this argument, the court agreed with the defendant, holding as follows:

The arrest of Petitioner Fisher under the bench warrant in this

case was not reasonable because the State in its application for the bench warrant did not provide specific and articulable facts of a willful violation of any condition of her release pending sentencing. The Fourth Amendment requires, at a minimum, that the information the officer relies upon at least carry some indicia of reliability. ***The application and affidavit submitted in support of the bench warrant for arrest of Petitioner did not provide any indicia of reliability or specificity that Petitioner had violated any condition of her release.*** There was at best a vague suggestion that she might have violated the condition that she “have no violation of any criminal laws.” But there is absolutely no indication of what laws, if any, she might have violated. The simplest test is to ask the question, “what condition of her release does the State in its application claim was violated by Petitioner Fisher?” From the record in this case, the answer can only be “none,” even applying the “well-founded suspicion” standard.

State v. Fisher, 35 P.3d at 376-377 (footnotes omitted) (emphasis added).

As the court in *Fisher* clarifies, a warrant may issue for the arrest of a “convicted” person upon a “reasonable suspicion” that the person has violated the terms of his or her judgment and sentence, in spite of the fact that the literal language of the Fourth Amendment requires the existence of “probable cause.” In addition, while the level of proof for a probationer is reduced, the government agent performing the search must still have a “reasonable suspicion” that the contraband the defendant is suspected of possessing will be in the place to be searched.

In the case at bar, the CCO’s search of the vehicle the defendant had been driving fails to meet this requirement because under the facts as they were known to the probation officer, there was no “reasonable suspicion” that there would be drugs in the truck the defendant was driving. First, the only

evidence of drug use that the CCO claimed was the fact that the defendant's pupils were somewhat "constricted." This evidence was not accompanied with any expert evidence as to how this indicated drug use. Much to the contrary, all of the other evidence was that the defendant did not appear at all under the influence of drugs. His mood was fine, he had no problem driving, he did not have slurred speech or any indicators of any type of intoxication. There was a claim that the CCO heard the officer on the scene claim that he had heard that some other officer had claimed that the defendant had overdosed on heroin the night before at his house. Not only is this evidence so tenuous as to be unreliable, but it also fails to support a claim that the defendant was then possessing any type of drug in his wife's truck. Thus, the trial court erred when it denied the defendant's motion to suppress evidence.

II. THE TRIAL COURT VIOLATED CrR 3.5 WHEN IT ALLOWED THE STATE TO ELICIT INTO EVIDENCE STATEMENTS THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION BECAUSE THE COURT DID NOT HOLD A HEARING UNDER CrR 3.5 AND THE DEFENDANT DID NOT WAIVE HIS RIGHT TO A HEARING UNDER THIS RULE.

Under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before a defendant's custodial statements may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: " (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3)

he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly informed the defendant of these rights, but that the defendant’s waiver of these rights was knowing and voluntary. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). If the police fail to properly inform a defendant of these four rights, then the defendant’s answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

In order to implement the requirements the United States Supreme Court created in *Miranda*, the Washington Supreme Court has adopted a procedure that, absent a waiver, must be followed prior to the admission of a defendant’s post-arrest statements given in response to police interrogation. This procedure is found in CrR 3.5, which states in part:

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not,

testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5.

This rule is also applicable in juvenile criminal proceedings through JuCr 1.4(b) which states that “[t]he Superior Court Criminal Rules shall apply in juvenile offense proceedings when not inconsistent with these rules and applicable statutes.” *State v. Tim S.*, 41 Wn.App. 60, 701 P.2d 1120 (1985). The use of a CrR 3.5 hearing in both adult and juvenile proceedings is mandatory whether requested or not unless the defense waives the hearing.

Id. The court of appeals stated the following on this issue.

Furthermore, it does not appear from the record that a CrR 3.5 hearing was held, nor was one requested. A CrR 3.5 hearing is mandatory. The purpose of the hearing is to protect constitutional rights, by assuring a defendant of his right to have the voluntariness of the statement or confession determined prior to trial, and to allow the court to rule on its admissibility.

State v. Tim S., 41 Wn.App. at 63 (citations omitted); *see also State v. Nogueira*, 32 Wn.App. 954, 650 P.2d 1145 (1982) (state bears the burden of

calling a CrR 3.5 hearing and putting on sufficient evidence to meet the requirements of the rule; defense counsel's failure to ask for a hearing under CrR 3.5 is not a waiver of the rights protected in that rule); *cf. State v. Spearman* 59 Wn.App. 323, 796 P.2d 727, *review denied* 115 Wn.2d 1032, 803 P.2d 325 (1990) (defendant may not raise voluntariness of statement for the first time on appeal if it is not raised below at the combined trial and CrR 3.5 hearing).

In the case at bar the state specifically told the court at the beginning of trial that a CrR 3.5 hearing was not necessary as it did not intend to introduce any post-arrest statements the defendant made into evidence. In spite of this fact, the state none the less later called a witness whose sole connection with the case was to testify to post-arrest statements the defendant made while in custody. When it became apparent to the court that the state was in the process of introducing such statements, the court should have precluded the evidence unless or until the court either held the CrR 3.5 hearing or the defendant affirmatively waived it. The burden was on the court and the state to hold the hearing; the burden was not upon the defendant to object or ask for the hearing.

In this case, there was no evidence presented that any agent of the state properly informed the defendant of his *Miranda* rights following his arrest. Thus, in the case at bar, the trial court erred when it allowed the state

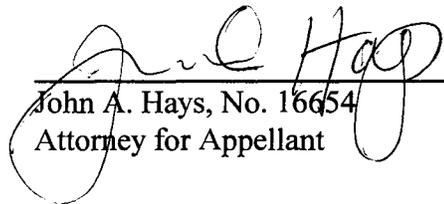
to elicit the defendant's statements absent the holding of a CrR 3.5 hearing. This error also caused severe prejudice to the defendant's case because the evidence the state elicited from the probation officer was that the defendant confessed to the crime of possessing cocaine. When seen in the light of the facts that (1) the cocaine was not found on the defendant's person, and (2) a witness testified that the cocaine belonged to him, it is more likely than not that but for this error, the jury would have returned a verdict of acquittal on the charge of possession of cocaine. Thus, the defendant is entitled to a new trial.

CONCLUSION

This court should vacate the defendant's conviction for possession of cocaine and remand with instructions to grant the defendant's motion to suppress evidence. In the alternative, this court should vacate the defendant's conviction for possession of cocaine and remand for a new trial as the defendant's statements are excluded from evidence unless the trial court first holds a hearing under CrR 3.5.

DATED this 15th day of January, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CrR 3.5
CONFESSION PROCEDURE

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

