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No. 37966-0-II

STATE OF WASHINGTON  
BY *[Signature]*  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOHN SCALARA,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John R. Hickman

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

A police officer conducted a traffic stop of Michael Scalara's automobile after determining that the front license plate had expired, although the officer also observed an apparently valid "dealer license plate" on the back of the car. Washington's dealer license plate law permits a person authorized to use a dealer plate to drive a car with an expired registration, as long as a valid dealer plate is affixed to the back of the car. Therefore, the facts known to the officer did not raise a reasonable, articulable suspicion that Mr. Scalara was committing a traffic infraction, and the traffic stop violated his state and federal constitutional right to privacy.

In addition, the officer's search of Mr. Scalara's car incident to his arrest for driving with a suspended license exceeded the permissible scope of a search incident to arrest, as Mr. Scalara was handcuffed and safely seated out of the way in the backseat of the patrol car throughout the entire search. All fruits of the search must therefore be suppressed.

Finally, Mr. Scalara's two convictions of possession of stolen property, where his possession of two items of stolen property was simultaneous and continuous, violated his constitutional right to be free from double jeopardy.

## B. ASSIGNMENTS OF ERROR

1. The traffic stop violated article 1, section 7 of the Washington Constitution.
2. The traffic stop violated the Fourth Amendment of the United States Constitution.
3. The search of the car incident to arrest violated article 1, section 7 of the Washington Constitution.
4. The search of the car incident to arrest violated the Fourth Amendment.
5. Prosecuting and convicting Mr. Scalara twice for the crime of possession of stolen property in the second degree, where he committed only a single offense, violated his state and federal constitutional right to be free from double jeopardy.

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A police officer may conduct a traffic stop of an automobile in order to enforce the vehicle registration laws only if the officer has a reasonable, articulable basis to suspect the driver has committed an infraction. Washington's dealer license plate law permits a dealer or other authorized person to drive a car with an expired registration, as long as a valid dealer license plate is affixed to the back of the car. Where the officer observed only that Mr.

Scalara's car had an expired license plate on the front, and an apparently valid dealer license plate on the back, did the officer have a reasonable, articulable basis to suspect that Mr. Scalara was violating the registration laws?

2. A warrantless search of a car incident to the arrest of the driver is permitted only where police have reasonable safety concerns or risk the destruction of evidence. Here, police conducted an extensive search of Mr. Scalara's car incident to his arrest for driving with a suspended license, even though Mr. Scalara posed no risk to officer safety and was handcuffed and sitting in the backseat of the patrol car throughout the entire search. Did the search exceed the allowable scope of a search incident to arrest?

3. The State may not charge and convict a person twice for simultaneously and continuously possessing two separate items of stolen property. Do Mr. Scalara's two convictions for possession of stolen property violate his constitutional right to be free from double jeopardy, where his possession of two stolen checks was simultaneous and continuous?

#### D. STATEMENT OF THE CASE

On May 17, 2007, at approximately 7 p.m., Pierce County Sheriff's Deputy Douglas Maier and Deputy Recruit Jason Bray were on routine patrol in the City of University Place when they observed a 1984 Plymouth Turismo at a stoplight. CP 126-27; 3/17/08RP 14-19, 30; 3/18/08RP 127. Deputy Maier noted the front license plate was an older-style Washington plate, with green numbers and lettering and a white background. CP 127; 3/17/08RP 16-19. This caught his attention. 3/17/08RP 19. Deputy Maier entered the license number into his mobile records system, which revealed that the license had been expired since 1999. CP 127; 3/17/08RP 20-21.

After running the check of the front license plate and driving past the Turismo through the intersection, the deputy noted in his side-view mirror that the Turismo appeared to have a Washington State "dealer's license plate" on the back where a regular license plate would be.<sup>1</sup> CP 127; 3/17/08RP 22. Deputy Maier decided to perform a traffic stop of the Turismo in order "to inquire about the

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<sup>1</sup> As discussed more fully below, the purpose of a "dealer license plate" is to allow dealers to use dealer inventory vehicles that do not otherwise have valid registration. See RCW 46.70.090; WAC 308-66-160.

inconsistent licensing status of the vehicle." CP 127 (Finding of Fact 4); 3/17/08RP 24; 3/18/08RP 89.

Michael Scalara was the driver and sole occupant of the Turismo. CP 127; 3/17/08RP 25. Deputy Maier ran a check of Mr. Scalara' driver's license and was informed it was suspended. CP 128; 3/17/08RP 26-27.

Mr. Scalara was arrested for driving with a suspended license in the third degree, handcuffed, and placed in the back seat of the patrol car. CP 128; 3/17/08RP 27, 33. Deputy Maier then conducted an extensive warrantless search of the interior of the Turismo incident to arrest. CP 128-29; 3/17/08RP 34, 38. During the search, the deputy found and seized an unlocked black bag containing several financial documents, including checks, belonging to various individuals, as well as numerous vehicle titles with names and addresses of people other than Mr. Scalara. CP 128-29; 3/17/08RP 34-37. The deputy also seized the dealer plate itself, which turned out to be "a laminated copy." 3/17/08RP 35. The deputy did not know the dealer plate was merely a copy until he examined it closely, however, as it appeared to be genuine. 3/17/08RP 35-36, 67.

The State charged Mr. Scalara with two counts of identity theft in the second degree (Counts I and V); two counts of possession of stolen property in the second degree (Counts II and III); four counts of forgery (Counts IV, VI, VII, and VIII); and one count of driving while license suspended in the third degree (Count IX). CP 1-5.

A pre-trial hearing was held to determine the admissibility of the items Deputy Maier seized from Mr. Scalara's car during the search incident to arrest.<sup>2</sup> CP 126-31. The court found the purpose of the traffic stop was "to inquire about the inconsistent licensing status of the vehicle." CP 127 (Finding of Fact 4). In its oral ruling, the court explicitly found "that the expired tabs alone was sufficient for this officer to initiate a traffic stop and make reasonable and further inquiry as to this particular defendant." 3/18/08RP 221-22. The court explained that the presence of the dealer plate on the Turismo was essentially a "non issue," as "[t]he dealer plate is not a license to drive a vehicle in violation of our traffic code and/or registration requirements." 3/18/08RP 221-22. If anything, the court believed, the dealer plate gave the officer an additional legitimate reason to stop the car, in order "to resolve what [the

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<sup>2</sup> A copy of the court's written findings and conclusions entered after the suppression hearing is attached to this brief as an appendix.

officer] perceived as an inconsistency in the licensing of the vehicle." 3/18/08RP 221-22. Thus, the court concluded the deputy had an objectively reasonable basis to perform the traffic stop. CP 130; 3/18/08RP 221-22.

The court also concluded the search of Mr. Scalara's car was "a lawful search done incident to the defendant's arrest" for driving with a suspended license. CP 130. Therefore, the court concluded all of the evidence seized during the search was admissible at trial. CP 130.

At the jury trial, the court admitted several of the documents seized during the search of the Turismo. Mr. Scalara was found guilty and convicted as charged. CP 117-25.

#### E. ARGUMENT

1. THE TRAFFIC STOP VIOLATED MR. SCALARA'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEIZURES
  - a. A traffic stop for the purpose of investigating a traffic infraction requires the officer have a reasonable, articulable suspicion that a violation has occurred. The stop of an automobile is a "seizure" and therefore must be reasonable under the Fourth Amendment and article 1, section 7 of the Washington Constitution. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); Delaware

v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Article 1, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

It is well settled that article 1, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment. E.g., State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999); State v. Mesiani, 110 Wn.2d 454, 456, 755 P.2d 775 (1988). Article 1, section 7 protects against warrantless searches and seizures with no express limitations. Mesiani, 110 Wn.2d at 456. Unlike any provision in the federal constitution, article 1, section 7 "explicitly protects the privacy rights of Washington citizens." State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

A warrantless seizure is valid under the Washington Constitution only if done with "authority of law." Mesiani, 110 Wn.2d at 457; Const. art.1, § 7. Indeed, a warrantless seizure is per se unconstitutional unless it falls within one of the "few jealously

and carefully drawn exceptions" to the warrant requirement.

Ladson, 138 Wn.2d at 349. A Terry investigative stop is one such exception. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); Kennedy, 107 Wn.2d at 5. The burden is on the State to prove a seizure falls within this narrow exception to the warrant requirement. Ladson, 138 Wn.2d at 350.

Neither the Fourth Amendment nor article 1, section 7 allows police officers to stop an automobile and detain the driver for the purpose of enforcing the traffic laws unless the officer has an articulable, reasonable suspicion of a violation. Prouse, 440 U.S. at 663; Ladson, 138 Wn.2d at 349; Mesiani, 110 Wn.2d at 457; Kennedy, 107 Wn.2d at 5-6 (adopting standard set forth in Terry, 392 U.S. at 21). The officer must have an articulable and reasonable basis to suspect the motorist is unlicensed or the automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law, before the officer may stop an automobile and detain the driver in order to check the driver's license or the registration of the automobile. Prouse, 440 U.S. at 663. In other words, an officer may not stop an automobile simply to ensure the driver is

complying with the registration laws. Id. at 661. The facts known to the officer must create a substantial possibility that a traffic infraction has in fact occurred or is about to occur. See Kennedy, 107 Wn.2d at 6.

Whether a warrantless stop falls under an exception to the warrant requirement is a question of law this Court reviews de novo. Gatewood, 163 Wn.2d at 539.

b. Deputy Maier had no reasonable, articulable basis to conclude Mr. Scalara was violating the vehicle registration laws. The trial court found "Deputy Maier performed a traffic stop of the vehicle to inquire about the inconsistent licensing status of the vehicle." CP 127. Specifically, the court found that when Deputy Maier ran the number from the front license plate into his computer, he discovered the license had been expired since 1999. CP 127. The deputy also "noticed that the vehicle had what appeared to be a Washington State dealer's license plate on the back of the vehicle where a regular license plate would be." CP 127. The court concluded these "inconsistent" facts amounted to "an objectively reasonable basis to perform a traffic stop of the defendant's vehicle." CP 129-30.

Contrary to the trial court's conclusion, the presence of an expired license number on the front license plate of a car, and an apparently valid dealer license plate affixed to the back of the car, do not raise a reasonable, articulable suspicion of a registration violation. That is because it is entirely legal for an authorized person to drive a car with an expired license plate, as long as a valid dealer license plate is attached to the rear of the vehicle. RCW 46.70.090. Deputy Maier testified that the dealer plate appeared genuine and he did not discover it was invalid until after he stopped Mr. Scalara, arrested him, and searched the car. 3/17/08RP 67. Further, he had no basis to conclude Mr. Scalara was not authorized to use a dealer license plate. Finally, the officer observed Mr. Scalara commit no other traffic violations. Therefore, the traffic stop violated Mr. Scalara's state and federal constitutional right to be free from unreasonable seizures.

Generally, "[f]ailure to renew an expired registration before operation on the highways of this state is a traffic infraction." RCW 46.16.010(3). But a person may operate an automobile that has an expired registration, as long as a valid dealer's license plate is attached to the car, and the person driving the car is authorized to use the dealer's license plate and carries a vehicle dealer

identification card to that effect. RCW 46.70.090; WAC 308-66-160(3). Here, Deputy Maier had no basis to conclude, prior to the stop, that Mr. Scalara was not utilizing the dealer license plate in a manner authorized by statute.

"The intent of the dealer plate law is to allow dealers to use plates on dealer inventory vehicles that are held and are, in fact available for sale." Washington State Department of Licensing, Vehicle Dealer & Manufacturer Manual 12 (Jan. 2007), available at <http://www.dol.wa.gov/business/vehiclevesseldealer/DirMan04.pdf>. Common sense dictates that the display of a dealer plate pursuant to statute is intended to identify the dealer as the party responsible for the vehicle regardless of the presence or expiration status of the previously issued license plates.

Here, the court made no findings that would support a reasonable inference that Mr. Scalara was not complying with the dealer license plate law. An automobile bearing a dealer's license plate may be operated by "[a] dealer, corporate officer, member of a limited liability company; or spouse of the dealer corporate officer, or member of a limited liability company; or an employee of a dealer," as long as that person carries "a vehicle dealer identification card." WAC 308-66-160(3). Dealer license plates

may be used: (1) "[t]o demonstrate motor vehicles held for sale or lease;" (2) "[o]n motor vehicles owned, held for sale or lease, and which are in fact available for sale or lease by the firm when operated by an officer of the corporation, partnership, or proprietorship or by their spouses, or by an employee of the firm;" (3) "[o]n motor vehicles being tested for repair;" (4) "[o]n motor vehicles being moved to or from a motor vehicle dealer's place of business for sale;" (5) "[o]n motor vehicles being moved to or from motor vehicle service and repair facilities before sale or lease; and (6) "[o]n motor vehicles being moved to or from motor vehicle exhibitions within the state of Washington, if any such exhibition does not exceed a period of twenty days." RCW 46.70.090(3).

There was no factual basis for Deputy Maier to conclude Mr. Scalara was not a dealer, corporate officer, or spouse or employee of a dealer, or that he was not driving the car for one of the purposes authorized by statute.

Furthermore, there was no basis to conclude the license plate was not affixed to the car properly. The statute specifies the dealer plate must "be attached to the rear of the vehicle only." RCW 46.70.090 (1). Here, the trial court found the plate was affixed to "the back of the vehicle where a regular license would

be." CP 127. The placement of the plate on the rear of the vehicle therefore complied with the statute.

Deputy Maier testified he was "accustomed to seeing dealer plates affixed to the vehicle, either attached to the trunk lid or rear plate is still visible, and the same as the front plate. Not covering the existing license plate." 3/17/08RP 23. But nothing in the statute or regulations requires that a dealer plate be affixed in a manner that does not obscure the existing plate. To the contrary, since the dealer plate is meant to identify the dealer as the party responsible for the vehicle regardless of the existence or registration status of the previously issued plates, affixing the dealer plate in a manner that obscures the existing rear plate is consistent with the statutory purpose.

The officer was aware of no other articulable facts that raised a reasonable suspicion that Mr. Scalara was not complying with the dealer plate law. Although the trial court found that Deputy Maier "noticed that the vehicle was also full of miscellaneous items," CP 127, this does not raise a reasonable suspicion of a registration violation. An officer or employee of a dealership, or his or her spouse, may use a vehicle affixed with a dealer plate "to transport the dealer's own tools, parts, and equipment of a total

weight not to exceed five hundred pounds." RCW 46.70.090(3)(b). Here, the trial court made no finding that the "miscellaneous items" Deputy Maier observed in the vehicle were not the kinds of items the statute authorizes a person using a dealer plate to carry in the vehicle. "In the absence of a finding on a factual issue [this Court] must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." State v. Byrd, 110 Wn. App. 259, 265, 39 P.3d 1010 (2002) (quoting State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997)). Because the trial court did not find the presence of the "miscellaneous items" in the car was a basis for the traffic stop, this Court must presume the State failed to carry its burden of proof on this issue.

To the contrary, the record indicates the trial court specifically found the presence of the "miscellaneous items" in the car was *not* a basis for the traffic stop. The trial court found Deputy Maier performed the traffic stop only in order "to inquire about the inconsistent licensing status of the vehicle." CP 127. Indeed, Deputy Maier repeatedly testified that the only reason why he stopped the car was due to "the expired registration and the dealer plate on the back to verify that." 3/17/08RP 24, 29-30, 66. Mr. Scalara also testified that Deputy Maier told him he pulled him over

due to the expired tabs. 3/18/08R 135-36. In its oral ruling, the court acknowledged this testimony, finding

the officer had no other agenda other than the stated reason for pulling over the car which was expired registration. Both the officers were consistent in indicating that that was the initial factor that brought the attention of this vehicle to the officers. The defendant himself, when he was asked why he was pulled over, the answer was consistently because of the expired tabs or registration.

3/18/08RP 220.

The trial court ruled Deputy Maier was authorized to perform the traffic stop due to presence of "the expired tabs alone."

3/18/08RP 221-22. But as discussed, that ruling is erroneous. It is entirely consistent with the dealer license plate statute and regulations for a person authorized to use a dealer plate to drive a car with expired tabs, as long as the car is affixed with a valid dealer plate. Deputy Maier had no basis to conclude, prior to the stop, that the dealer plate was invalid or that Mr. Scalara was not authorized to use it. Because Deputy Maier had no articulable basis to conclude Mr. Scalara was violating the registration laws, the traffic stop violated his state and federal constitutional right to be free from unreasonable seizures.

c. The traffic stop was invalid, because an officer may not stop a vehicle merely to ensure the driver is complying with the dealer license plate law. Deputy Maier testified he decided to stop the Turismo because it had an older-style Washington license plate on the front with an expired license plate number from 1999. 3/17/08RP 21. Although he also noticed the car had an apparently valid dealer license plate on the back, this did not assuage his suspicions. Instead, he viewed the presence of the dealer plate on the back as "inconsistent" with the expired plate on the front. 3/17/08RP 21-24, 49-50; CP 127. The deputy testified he stopped the car in order to investigate the inconsistency, as he had "no way to run a dealer plate through Department of Licensing to validate who the owner of that plate is." 3/17/08RP 50-51, 58-59. Consistent with this testimony, the trial court found Deputy Maier stopped the car in order "to inquire about the inconsistent licensing status of the vehicle." CP 127.

The record therefore shows that the reason why Deputy Maier stopped the car was merely to check the Turismo's registration status. But as discussed, a police officer may not stop a car merely to check its registration status, unless the officer has a reasonable and articulable basis to conclude the registration is

invalid. Prouse, 440 U.S. at 661, 663. Here, the presence of an expired license plate on the front of a car, in combination with an apparently valid dealer license plate on the back, do not alone raise a reasonable suspicion of a registration violation. Even though the officer may have no other means of checking the validity of a dealer license plate, the officer may not stop the vehicle merely to ensure the dealer plate is valid.

This Court has recognized these principles in regard to the use of "trip permits," which are analogous to dealer license plates. In Byrd, a police officer noticed that the car in which Byrd was riding had a "trip permit" in the rear window but she could not tell if it was valid. 110 Wn. App. at 261. After the officer ran the license plate number and learned the car's registration had expired, she stopped the car in order to examine the trip permit and for no other reason. Id. On appeal, the State conceded that because driving with a trip permit is legal in Washington, see RCW 46.16.160(2), a stop merely to check the validity of a trip permit is invalid. Id. at 262. The stop therefore violated Byrd's constitutional right to be free from unreasonable seizures.

"Trip permits" are analogous to dealer license plates. Like a dealer license plate, a "trip permit" allows a person to drive a car

that does not have a current Washington license registration. RCW 46.16.160. In fact, trip permits are sometimes interchangeable with dealer license plates, as they may be used by dealers to demonstrate inventory vehicles when a dealer plate is "not available for use." Washington State Department of Licensing, Vehicle Dealer & Manufacturer Manual, *supra*, at 20. Therefore, just as a police officer may not stop a car merely to check the validity of a trip permit, an officer may not stop a car merely to check the validity of a dealer license plate.

Courts from other jurisdictions agree that a police officer may not stop a car merely to verify the validity of a dealer plate or dealer tag, even where the officer has no other means of verifying the validity of the plate, and even if the officer knows that such plates are often stolen or misused. Again, the officer must be aware of specific, articulable facts indicating that the particular driver's use of the dealer plate is unlawful. *See, e.g., United States v. Wilson*, 205 F.3d 720 (4th Cir. 2000) (officer not authorized to stop car merely to check validity of temporary paper license tag, even though officer could not read expiration date on tag); *People v. Hernandez*, 45 Cal. 4th 295, 196 P.3d 906, 86 Cal. Rptr. 3d 105 (2008) (officer not authorized to stop car with missing license plates and temporary

operating permit displayed in window simply because officer believed such permits are often forged or otherwise invalid); People v. Nabong, 115 Cal. App. 4th Supp. 1, 9 Cal. Rptr. 3d 854 (2004) (officer not authorized to stop car with expired registration tag, where officer had no reason to believe temporary registration properly displayed in rear window was invalid, even though officer was aware that such temporary stickers are often invalid); Bius v. State, 254 Ga. App. 634, 563 S.E.2d 527 (2002) (officer not authorized to stop car merely to check validity of "drive-out tag"); State v. Childs, 242 Neb. 426, 495 N.W.2d 475 (Neb. 1993) (officer not authorized to stop car merely to check validity of "In Transit" stickers displayed in windows); State v. Aguilar, 141 N.M. 364, 155 P.3d 769 (N.M. Ct. App. 2007) (officer not authorized to stop car with missing license plate merely to verify validity of "temporary dealer tag" displayed in window that appeared valid on its face, even though car was on road at 2 a.m. and officer was aware that dealer tags are often stolen or misused); State v. Manley, 2002 Ohio 3902, 2002 Ohio App. LEXIS 4121 (Ohio Ct. App. 2002) (officer could not stop car merely to verify dealer plate, even though officer had no other means to verify the plate's validity); State v. Butler, 343 S.C. 198, 539 S.E.2d 414 (2000) (officer not authorized

to stop car merely to check validity of "temporary paper tag," even though officer was aware that cars bearing such tags are often unregistered, uninsured, or stolen, and officer had no other means of verifying validity of temporary tag); State v. Lord, 2006 WI 122, 297 Wis.2d 592, 723 N.W.2d 425 (Wis. 2006) ("[A] law enforcement officer cannot infer wrongful conduct based solely on the display of a temporary license plate").

Here, Deputy Maier stopped Mr. Scalara's car in order to investigate the registration status of the vehicle, but the deputy had no reasonable, articulable basis to conclude Mr. Scalara was violating the dealer license plate law. Therefore, the officer unreasonably intruded into Mr. Scalara's constitutional right to privacy.

d. All of the evidence seized from the Turismo must be suppressed. If police, for an investigatory purpose, unconstitutionally stop a person, evidence obtained as a result of the seizure must be suppressed as "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Article 1, section 7 also requires exclusion of evidence obtained in violation of its terms. State v. White, 97 Wn.2d 92, 111, 640 P.2d 1061 (1982). Thus, because the stop of the Turismo was

unconstitutional, all of the evidence seized from the search of the car must be suppressed.

2. THE SEARCH OF THE CAR INCIDENT TO MR. SCALARA'S ARREST VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY

a. The search incident to arrest of Mr. Scalara's car was unconstitutional, where Mr. Scalara was handcuffed and safely seated in the backseat of the patrol car throughout the entire search. Warrantless searches are presumptively unreasonable, and will be deemed improper absent a valid exception based upon an emergency. Chimel v. California, 395 U.S. 752, 764-65, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); U.S. Const. amend. 4; Const. art. 1, § 7.

The individual right to privacy as guaranteed by the Washington Constitution grants greater protection to individuals against warrantless searches of their vehicles than does the Fourth Amendment. State v. Webb, 147 Wn. App. 264, 195 P.3d 550 (2008). The prosecution bears the burden of establishing the "search incident to arrest" exception. Id. at 270.

Under the Fourth Amendment, a lawful search of a vehicle incident to the arrest of the driver requires an actual need to

prevent access to weapons or evidence within the arrestee's immediate control. Chimel, 395 U.S. at 762; see New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (defining permissible scope of automobile search incident to arrest where destruction of evidence likely); State v. Stroud, 106 Wn.2d 144, 153, 720 P.2d 436 (1986) (search of unlocked containers permissible incident to arrest where person next to car).

In Chimel, the court identified the exigencies permitting a search incident to arrest as (1) "the need to seize weapons and other things which might be used to assault an officer or effect an escape," and (2) "the need to prevent the destruction of evidence of the crime-things." 395 U.S. at 764. The scope of a search "must be "strictly tied to and justified by' the circumstances which rendered its initiation permissible." Id. at 761-62 (quoting Terry v. Ohio, 392 U.S. 1, 29, 88 S.Ct. 1868, 20 L.Ed.2d 88(1968)).

In Arizona v. Gant, 162 P.3d 640, 642-43 (2007), cert. granted, 128 S.Ct 1443 (2008), the Arizona Supreme Court analyzed an issue undecided by Chimel, Belton, or other United States Supreme Court cases, regarding whether vague concerns of officer safety or purely speculative concerns about the destruction of evidence justify the warrantless search of an automobile. The

Gant court ruled that Supreme Court precedent establishes a bright line rule regarding the scope of a search incident to arrest, but does not always permit a search of a vehicle for every arrest. Id. at 645-46. Instead, there must be a permissible basis for such a search predicated on the required exigency arising out of the individual circumstances. Id.

Under the more rigorous strictures of the Washington Constitution, a person's proximity to the vehicle is a necessary element the State must prove in order to establish a valid search incident to arrest. Webb, 147 Wn. App. at 269-70. In Webb, the court found unconstitutional a search incident to arrest where the record did not show the arrestee's distance from the car at the time of the search and the arrestee was handcuffed. Id.

Similarly, in State v. Quinliven, 142 Wn. App. 960, 969, 176 P.3d 605, rev. denied, 164 Wn.2d 1031 (2008), the arrestee parked his truck and locked the door before he was arrested at the curb. The court found the truck was not in the defendant's "immediate control" because it was locked and when the police took the car keys, he could not readily access it.

Likewise, in State v. Rathbun, 124 Wn. App. 372, 375, 101 P.3d 119 (2004), the defendant ran 40 to 60 feet from his car as the

police approached. The court ruled the car search invalid because the car was not in the arrestee's immediate control at the time of the arrest. The court also rejected the prosecution's argument that the defendant's flight provided a ground to believe he might access the car. By leaving the car and moving a distance away, "the exigencies supporting a vehicle search incident to arrest no longer exist." Id. at 378.

If an individual "could suddenly reach or lunge into the compartment for a weapon or evidence, the police may search the compartment incident to his arrest." State v. Johnston, 107 Wn. App. 280, 285-86, 28 P.3d 775 (2001), rev. denied, 145 Wn.2d 1021 (2002); see also State v. Porter, 102 Wn. App. 327, 333, 6 P.3d 1245 (2000) ("At the time the police initiated the arrest, Charles was 300 feet from Porter's van. At such a distance Charles had no opportunity to destroy evidence or obtain a weapon from inside the van."); State v. Perea, 85 Wn. App. 339, 340-41, 932 P.2d 1258 (1997) (where car locked at time arrest, invalidating search incident to arrest). In Johnston, the defendants walked by their car before their arrest, but "the record does not show ready access to, or "immediate control" of, the car's passenger

compartment; [therefore] . . . the facts needed to invoke the search-incident exception have not been proved.” 107 Wn. App. at 288.

The particular requirements of article 1, section 7 underlie the Washington courts’ analysis of the scope of the search incident to arrest. In Washington, a search incident to arrest is invalid unless it follows a lawful arrest. State v. O’Neill, 148 Wn.2d 564, 584-85, 62 P.3d 489 (2003); Quinliven, 142 Wn. App. at 967-68. Thus, the validity of a warrantless search is not measured by events transpiring prior to the arrest, but rather, whether, following the arrest, the individual remains in a proximity to the vehicle such that the police have appropriate concerns over officer safety and the destruction of evidence as to justify a warrantless search of an arrested person.

Here, Deputy Maier conducted an extensive search of the interior of Mr. Scalara's car incident to his arrest for driving with a suspended license. 3/17/08RP 66, 68; 3/18/08RP 96. But Mr. Scalara remained handcuffed and inside the patrol car throughout the entire search; he was cooperative and did not pose any threat to the officers' safety. CP 128; 3/17/08RP 60; 3/18/08RP 96-97. Because Mr. Scalara was not close enough to the Turismo during

the search to reach into its interior, the search exceeded the scope of a permissible search incident to arrest.

b. The evidence seized during the search of the car must be suppressed. All of the evidence seized in the unlawful search incident to arrest must be suppressed as "fruit of the poisonous tree." Wong Sun, 371 U.S. 471; White, 97 Wn.2d 92.

3. THE TWO CONVICTIONS FOR POSSESSION OF STOLEN PROPERTY VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY

Mr. Scalara was charged and convicted of two counts of possession of stolen property in the second degree, pertaining to two separate checks seized from the Turismo, each check belonging to the same person. CP 1-5 (Information); CP 92-93, 99 (Jury instructions); 3/12/08RP 27 (Bill of particulars); 3/20/08RP 119-20, 128-30 (Deputy Maier trial testimony); 3/25/08RP 353-54 (Deputy prosecutor closing argument). But continuous and simultaneous possession of multiple items of stolen property amounts to only a single possession. Therefore, prosecuting and convicting Mr. Scalara twice for the crime, where he committed only a single offense, violated his constitutional right to be free from double jeopardy.

a. The State may not prosecute and convict a person twice where he commits only a single unit of the crime. The Double Jeopardy Clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. 5.<sup>3</sup> Washington’s constitution provides that no individual shall “be twice put in jeopardy for the same offense.” Const. art. 1, § 9. The state constitutional prohibition against double jeopardy offers the same scope of protection as its federal counterpart. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

Double jeopardy principles prohibit prosecution of multiple charges under the same statute if the defendant commits only one unit of the crime. United States v. Bell, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955); State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998). When an individual is charged with multiple counts of the same offense, the court must determine the “unit of prosecution” the Legislature intended as the punishable act under the statute. United States v. Universal C.I.T. Credit Corp., 344 U.S.

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<sup>3</sup> The Fifth Amendment’s double jeopardy protection is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

218, 221, 73 S.Ct. 227, 229, 97 L.Ed 260 (1952); Adel, 136 Wn.2d at 634.

The unit of prosecution set forth in the statute will be either an act or a course of conduct. Universal C.I.T. Credit, 344 U.S. at 221-22; Adel, 136 Wn.2d at 634. Where the statute defines the crime as a course of conduct, prosecutors may not divide the crime into "a series of temporal or spatial units." Adel, 136 Wn.2d at 635 (quoting Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)).

The Legislature must "clearly and without ambiguity" intend to turn a series of similar transactions into multiple offenses. Adel, 136 Wn.2d at 634-35 (citing Bell, 349 U.S. at 84). The Legislature must state its intent to create multiple offenses in "language that is clear and definite." Universal C.I.T. Credit, 344 U.S. at 221-22.

If the Legislature's intent is not clear, this Court must apply the "rule of lenity" and resolve the ambiguity in favor of concluding there was only one offense. Adel, 125 Wn.2d at 634-35; Bell, 349 U.S. at 83-84; Universal C.I.T. Credit, 344 U.S. at 221-22.

Although Mr. Scalara did not raise a double jeopardy challenge below, he may raise the issue for the first time on appeal,

as it is a manifest error affecting a constitutional right. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000); RAP 2.5.

b. Mr. Scalara committed only a single unit of the crime, where his possession of two separate checks was simultaneous and continuous. Mr. Scalara was charged and convicted of two counts of possession of stolen property in the second degree pursuant to RCW 9A.56.140(1) and RCW 9A.56.160(1)(a). CP 1-5, 92-93, 99. Possession of stolen property is defined as:

knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140(1); CP 92-93, 99 (Jury instructions). The value of the property possessed determines the degree of the crime. RCW 9A.56.150-.170.

Where the State charges a continuous, simultaneous possession of various items of stolen property, the unit of prosecution is a single possession. State v. McReynolds, 117 Wn. App. 309, 339-40, 71 P.3d 663 (2003). In McReynolds, defendants were convicted of multiple counts of possession of stolen property, where they possessed multiple items belonging to various

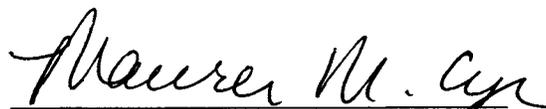
individuals over the same two-week period. Id. at 332-33. Under those circumstances, the charges encompassed a single continuous course of conduct. Id. at 339-40.

Here, as in McReynolds, Mr. Scalara was convicted multiple times for a single, simultaneous and continuous possession of multiple separate items of property. His two convictions therefore violated the prohibition against double jeopardy and one of the convictions must be reversed and dismissed.

F. CONCLUSION

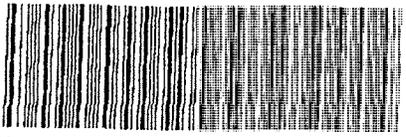
Both the stop of Mr. Scalara's automobile and the search of the car incident to arrest violated his state and federal constitutional right to be free from unreasonable searches and seizures. The evidence seized in the search must therefore be suppressed. In addition, Mr. Scalara's two convictions for possession of stolen property, where he committed only a single offense, violated the constitutional prohibition against double jeopardy and one of the convictions must be reversed and dismissed.

Respectfully submitted this 19th day of March 2009.



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Washington Appellate Project - 91052  
Attorneys for Appellant

## **APPENDIX**



07-1-02724-8 29646393 FNFCL 04-28-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-02724-8

vs.

MICHAEL JOHN SCALARA,

FINDINGS AND CONCLUSIONS ON  
ADMISSIBILITY OF EVIDENCE  
PURSUANT TO CrR 3.6 and  
ADMISSIBILITY OF STATEMENTS  
PURSUANT TO CrR 3.5

Defendant.

THIS MATTER came on before the Honorable John R. Hickman on the 17th day of March, 2008, on the defendant's motion to suppress/dismiss pursuant to CrR 3.6 and also for a hearing on the admissibility of the defendant's statements pursuant to CrR 3.5. The defendant was present and represented by his attorney, Jane Pierson. The State was present and represented by Deputy Prosecuting Attorney Rosalie Martinelli. The court heard testimony, observed the demeanor and manner of witnesses, heard argument, and read pleadings submitted by the parties. The court was duly advised in all matters. The court, having rendered an oral ruling thereon, herewith makes the following Findings and Conclusions as required by CrR 3.6 and CrR 3.5.

THE UNDISPUTED FACTS

1. On May 17, 2007, at approximately 7:00pm, Pierce County Sheriff's Deputy Douglas Maier, who was on routine patrol in the City of University Place, observed a vehicle at a

1 stoplight. The license plate on the front of the vehicle was an old-style Washington plate.  
 2 Deputy Maier entered the license number into his mobile records system, which revealed  
 3 that the license has been expired since 1999. Deputy Maier then noticed that the vehicle  
 4 had what appeared to be a Washington State dealer's license plate on the back of the  
 5 vehicle where a regular license place would be. Deputy Maier also noticed that the  
 6 vehicle was also full of miscellaneous items.

7 2. Deputy Maier routinely enters license plate numbers into the computer that he has in his  
 8 patrol car. Deputy Maier testified that this is common practice for all law enforcement  
 9 officers in his department and that he enters as many as 50-100 license plate numbers per  
 10 shift. The return on the license number will reveal the licensing status of a vehicle and  
 11 whether or not it is stolen.

12 3. Deputy Maier was accompanied by Deputy Jason Bray, who was a new recruited deputy  
 13 with the Pierce County Sheriff's Department.

14 4. Deputy Maier performed a traffic stop of the vehicle to inquire about the inconsistent  
 15 licensing status of the vehicle. The vehicle yielded to the traffic stop.

16 5. The location of the traffic stop was an area surrounded by several businesses. It is not a  
 17 high crime area. Traffic was moderate.

18 6. Prior to conducting the traffic stop, Deputy Maier had not previously or otherwise noticed  
 19 the defendant or the defendant's vehicle.

20 7. When Deputy Maier contacted the driver, he requested that the driver provide his driver's  
 21 license, registration, and insurance. The driver was the sole occupant of the vehicle. The  
 22 driver, later identified as the defendant, Michael Scalara, provided only a poorly  
 23 laminated copy of a dealer's license card. The defendant mentioned working for a  
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dealership and stated that he had permission to have the dealer's license plate. After another request by the deputy, the defendant provided his driver's license which had a hole punched in it signifying that it was not valid. Deputy Maier was informed by his records division that the defendant's driving privilege was, in fact, suspended in the third degree.

8. The defendant was arrested for driving while his license was suspended. He was handcuffed and led to the patrol vehicle.

9. Deputy Bray then read the defendant his Miranda warnings using his pre-printed department issued card.

10. After being read his Miranda warnings, the defendant stated that he understood his rights and that he would be willing to speak with the deputies.

11. The defendant does not dispute that he was properly read his Miranda warnings. The defendant has been ~~arrested before and has been~~ read his Miranda warnings on several prior occasions. The defendant did not ask for an attorney.

12. The defendant was placed into the back of the patrol vehicle.

13. Deputy Maier then searched the defendant's vehicle. Inside the vehicle were several items of clothing, speakers, and miscellaneous items. Deputy Maier found a black bag that resembled a CD carrying case underneath pieces of clothing and a back seat that was folded down. The bag was not locked.

14. The defendant was inside the patrol vehicle during the entire time Deputy Maier searched his vehicle.

15. Deputy Maier opened the bag and discovered several documents. These documents included financial documents belonging to several individuals other than the defendant.

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1 Also in the black bag were numerous vehicle titles with names and addresses of people  
2 other than the defendant. Deputy Maier also found various documents relating to vehicle  
3 transactions, some of which were blank and some of which were filled out. Deputy  
4 Maier also located several documents in the black bag that had the defendant's name and  
5 address on them. Other items found were personal items such as jewelry.

6 16. Included in the documents belonging to other people were several bank checks, some of  
7 which were blank and some of which were filled out. One document that was located  
8 appeared to be a receipt for a vehicle signed by Duanne Hay.

9 17. Deputies then seized the license plates on the vehicle. While doing so, the deputies  
10 realized that the dealer's license plate on the back of the vehicle was made of cardboard  
11 and was obviously counterfeit.

12 18. Deputy Maier contacted the defendant while the defendant was seated in the patrol car  
13 and asked him about the documents that were located in the black bag. The defendant  
14 gave Deputy Maier differing versions of where and how he came into possession of the  
15 documents. During the conversation, Deputy Maier asked the defendant questions and  
16 the defendant answered them. Deputy Maier was the only police officer to speak with the  
17 defendant. Deputy Bray did not question the defendant.

18 19. After much discussion with Deputy Maier about his actions, the defendant later stated  
19 that he did not want to speak to police any further.

### 21 THE DISPUTED FACTS

22 1. The defendant testified that Deputy Maier could not have been physically able to view his  
23 license plates from the deputy's stated location.

2. The defendant testified that by having a dealer's license plate on the back of his vehicle, it was his understanding that he could not be pulled over by police.

**FINDINGS AS TO DISPUTED FACTS**

1. Deputy Maier's testimony was credible.

**REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE**

- 1 Deputy Maier had an objectively reasonable basis to perform a traffic stop of the defendant's vehicle.
- 2. Deputy Maier had a proper subjective intent in performing a traffic stop of the defendant's vehicle. The stop was not a pretext to conduct an otherwise unwarranted criminal investigation.
- 3. The search of the defendant's vehicle was a lawful search done incident to the defendant's arrest.
- 4. Evidence recovered pursuant to the search is admissible at trial.
- 5. Deputy Bray properly read the defendant his Miranda warnings after the defendant was arrested.
- 6. The defendant's subsequent statements to Deputy Maier were made knowingly, intelligently, and voluntarily and are admissible at trial.

DONE IN OPEN COURT this 25 day of April, 2008.

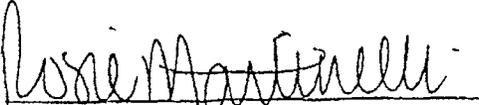


*[Handwritten Signature]*  
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 JUDGE  
**JOHN R. HICKMAN**

07-1-02724-8

Presented by:

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 ROSIE MARTINELLI  
 Deputy Prosecuting Attorney  
 WSB # 25078

Approved as to Form Only:

  
 JANE PIERSON  
 Attorney for Defendant  
 WSB # 23085

> DEFENDANT TAKES EXCEPTIONS  
 TO THE CONCLUSIONS OF LAW

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON, )  
 )  
RESPONDENT, )  
 )  
v. )  
 )  
MICHAEL SCALARA, )  
 )  
APPELLANT. )

NO. 37956-2-II

BY MARIA RILEY  
STATE OF WASHINGTON  
DENITY

09 MAR 20 AM 11:51

FILED  
COURT OF APPEALS  
DIVISION II

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19<sup>TH</sup> DAY OF MARCH, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR PIERCE COUNTY PROSECUTING ATTORNEY 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] MICHAEL SCALARA 239414 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF MARCH, 2009.

X \_\_\_\_\_  
*grw*

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