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I. ASSIGNMENTS OF ERROR

1. Mr. Nichols was unlawfully arrested because Officer Thiry lacked either a warrant or probable cause to make the arrest.
2. The fellow officer rule does not apply because Officer Thiry was off duty and working another job; he was not working in unison with the on-duty officers to whom the dispatch was directed.
3. Even if the fellow officer rule applied, the combined information of the police officers was insufficient to establish probable cause at the time of Mr. Nichols' arrest.
4. The statements made by Mr. Nichols and all other evidence obtained as a result of the unlawful arrest must be suppressed.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where an off-duty officer overhears a police radio dispatch to a suspected court order violation in progress, does that unverified dispatch information constitute sufficient, reliable, information on which to immediately effectuate an arrest? (Assignment of Error Number One.)
2. Does the fellow officer rule apply when an off-duty officer is not working in concert with other on-duty officers? (Assignment of Error Number Two.)
3. Does probable cause exist where, at the time of the arrest, the police collectively knew only that an unverified 911 caller had reported that her ex-boyfriend

was violating a no contact order by following her vehicle? (Assignment of Error Number Three.)

4. Is the proper remedy suppression of the evidence obtained as the result of Mr. Nichols' unlawful arrest? (Assignment of Error Number Four.)

III. STATEMENT OF THE CASE

1. *Procedural History*

On August 21, 2008, the Appellant/Defendant, Michael Howard Nichols, was charged by Information with one count of Domestic Violence Court Order Violation, pursuant to RCW 26.50.110(5). CP 1, 3. A hearing pursuant to CrR 4.5 was held on March 5, 2009 in which the trial court ruled that Mr. Nichols' statements were admissible. RP 1 23-24.¹ On March 9, 2009, Mr. Nichols proceeded to jury trial. He was convicted as charged. CP 38.

On April 10, 2009, Mr. Nichols received a standard range sentence of nine (9) months based on an offender score of 0. CP 42-54. A timely Notice of Appeal was filed on April 15, 2009. CP 58.

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No Findings and Conclusions regarding the CrR 3.5 hearing have been entered to date.

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2. *Facts Pertaining to Arrest*

City of Tacoma Police Officer Jeff Thiry was working off-duty as a School Resource Officer at Mt. Tahoma High School at approximately 8:00 a.m. on February 7, 2008. RP 1, 11; RP 2, 43. While working his off-duty job, Officer Thiry was “monitoring Tacoma police radio, south frequency.” RP 2 45. He “overheard” dispatch advise on-duty patrol units of a suspected violation of a court order in progress. RP 2 45. Dispatch described two vehicles, one following the other, that were reportedly involved.

Officer Thiry immediately fled to his patrol car in pursuit. He caught up to the two suspected vehicles at South 74th and Lakewood Drive. RP 1 12; RP 2 45. Officer Thiry identified the license plate number of a vehicle Mr. Nichols was driving as one of the suspected vehicles. He was unable to see the license place number of the car directly in front of Mr. Nichols’ vehicle, but believed that car to be a white Toyota Camry.

Officer Thiry observed the vehicle Mr. Nichols was driving change lanes and turn left onto Lakewood Drive. He followed,

activated his emergency equipment, and effectuated a “normal” “regular” “traffic stop.” RP 1 13; RP 2 46-47. Upon contact, the driver, Mr. Nichols, blurted out “I’m not following anybody.” RP 1 13; RP 2 47. Without investigating the matter, Officer Thiry “immediately” Mirandized, handcuffed, and arrested Mr. Nichols. RP 1 13-16; RP 2 48-49. After his arrest, Mr. Nichols gave some potentially incriminating responses to Officer Thiry’s questions.

Mr. Nichols told Officer Thiry that he was on his way to work, and then stated that he was going to an interview on Portland Avenue. Office Thiry confronted Mr. Nichols with his recollection that Portland Avenue was located in the opposite direction, a substantial distance away. RP 1 15. Mr. Nichols then responded that he had something else to do first. RP 2 54. After his arrest, Mr. Nichols was also cited for driving on a suspended license. RP 2 54.

Following Mr. Nichols’ arrest, Officer Joe Bundy arrived on the scene. RP 2 50. Officer Bundy was on patrol and had been dispatched to the 911 call. The 911 caller was a woman who claimed her ex-boyfriend was violating a court order by following her vehicle. RP 2

59. Officer Bundy interviewed the woman at the scene. Her name was Sharon Commandest. He did not speak with Mr. Nichols. RP 2 59. During trial, Officer Bundy was shown an Order for Protection of Sharon Commandest which prohibited Mr. Nichols from contacting her. This was the first time Officer Bundy had seen the order. RP 2 62-63.

3. *Summary of Trial Testimony*

Officer Bundy testified that dispatch advised him that a 911 caller had reported she was being followed by someone who Officer Bundy seemed to recall was an ex-boyfriend. RP 2 59. The caller, Sharon M. Commandest, was already at the scene when Officer Bundy arrived, and Mr. Nichols had been arrested. RP 2 60. Ms. Commandest told Officer Bundy that she was afraid Mr. Nichols would run her off the road and assault her. She stated that she had received a restraining order against Mr. Nichols. RP 2 61. Officer Bundy then verified through “records” that a restraining order existed and that Ms. Commandest was the petitioner. RP 2 61. Officer Bundy testified that Ms. Commandest showed him some digital photos that she claimed to

have just taken of a man who appeared to be Mr. Nichols, who was driving a vehicle next to hers. Officer Bundy did not recall that the photographs were time/date stamped. RP 2 66. Ms. Commandest refused to give Officer Bundy the memory card to the camera. She said she would bring it to him later, but later she claimed the camera had been stolen or lost. RP 2 67, 72.

Sharon Commandest and Mr Nichols were involved in an acrimonious custody lawsuit regarding their four year old daughter. RP 2 69. She testified that on the date in question she was driving a Subaru Legacy. RP 2 75. Later, she testified that it could have been a Toyota Camry. RP 2 90. While driving to work on 72nd Street and Pacific Avenue she saw Mr. Nichols driving past her heading in the opposite direction. RP 2 70. Ms. Commandest saw Mr. Nichols make a U-turn. According to her testimony, Mr. Nichols drove up next to the right side of her car and signaled her to roll down her window. RP 2 71. She immediately called 911 and then “began clicking her camera” to take photos of him. RP 2 72-73. Ms. Commandest testified that she was attempting to lose Mr. Nichols, to no avail. This went on until she

reached 74th and Lakewood Drive. RP 2 71.

Mr. Nichols testified that on February 7, 2008, he was returning home to take his high blood pressure medication, because he had forgotten to take it before leaving, when he was pulled over. He was not following anyone. RP 2 84-85. Mr. Nichols was making a left hand turn towards his apartment building when he saw the patrol car. Mr. Nichols resided at the Terrace Apartments in Lakewood, which is about three blocks from where he was arrested. RP 2 85. He testified that at the time he felt “confused,” “distracted,” and “distraught” because not only had he forgotten to take his medication, but he also didn’t have his driver’s license. RP 2 87. Patty Hestla, who is the officer manager of the Terrace Apartments in Lakewood, verified that Mr. Nichols was residing there on February 7, 2008. RP 3 103-105.

IV. ARGUMENT

MR. NICHOLS’ WARRANTLESS ARREST WAS UNLAWFUL BECAUSE IT WAS NOT SUPPORTED BY PROBABLE CAUSE.

Probable cause determinations are reviewed de novo. *State v. Jackson*, 82 Wn.App. 594, 604, 918 P.2d 945 (1996). Because a

probable cause to arrest challenge implicates the constitutional right of privacy under the Fourth Amendment to the United States Constitution and Article 1, § 7 of the Washington Constitution, it may be raised for the first time on appeal. *State v. Gaddy*, Wn.App. 702, 60 P.3d 116 (2002), affirmed 152 Wn. 2d 64, 93 p.3d 872 (2004). Here, Mr. Nichols challenged the admission of his statements, and a full evidentiary hearing was held in which the facts pertaining to Mr. Nichols' arrest were considered. Mr. Nichols did not, however, specifically contest the admission of his statements on probable cause grounds. The issues concerning his unlawful arrest are, nonetheless, reviewable, and the lower court record is sufficiently complete to permit such review.

a. The off-duty officer did not possess sufficient knowledge that Mr. Nichols had committed a crime at the time he arrested Mr. Nichols.

A lawful custodial arrest must be based on either an arrest warrant or upon probable cause, under both the United States Constitution and the more protective scope of Article 1, § 7 of the Washington Constitution. *Graham v. Connor*, 490 U.S. 386, 388, 109

S. Ct. 1865, 104 L.Ed.2d 443 (1989); State v. O'Neill 148 Wn.2d 564, 585, 62 P.2d 489 (2003) (“authority of law” mandatory prerequisite for arrest under Washington Constitution); State v. Rankin, 151 Wn.2d 689, 694, 76 P.3d 217 (2003) (well-settled”) that the Washington Constitution, Article 1, § 7 provides greater protection to individual privacy than the Fourth Amendment; U.S. Constitution Amendments IV, XIV; Washington Constitution Article 1, § 7.

“Probable cause exists when the arresting officer is aware of facts or circumstances, based on *reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed.*” State v. Gaddy, 152 Wn. 2d 64, 70, 93 P.3d 872 (2004) (citing State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)).

Probable cause is determined by the facts and circumstances “within the officer’s knowledge at the time of the arrest.” State v. Mance, 82 Wn.App. 539, 542-43, 918 P.2d 527 (1996) (quoting State v. Fricks, 91 Wn. 2d 391, 398, 588 P.2d 1328 (1979)).

In the case at bar, Mr. Nichols was arrested “immediately” upon Officer Thiry’s contact with him. RP 1 13-16; RP 2 48-49. Mr.

Nichols was Mirandized, handcuffed, and taken into custody even though Officer Thiry testified that at that point he was only conducting a routine “traffic stop.” RP 1 13; RP 2 46-47. Officer Thiry had not interviewed a single witness. He based his arrest solely on the limited dispatch information he had “overheard” while working at his off-duty job. RP 2 45. Dispatch had advised on-duty patrol officers of a suspected violation of a court order, and had described the vehicles allegedly involved. This simply was not sufficient reliable information from which a reasonable officer could conclude that a crime had been committed by Mr. Nichols.

b. The fellow officer rule does not save the unlawful arrest.

Under the Fourth Amendment, an officer may arrest a person based on information gathered by a fellow officer, when the fellow officer and the arresting officer are working as a unit, even when the facts supporting probable cause are not known to the arresting officer at the time of arrest. *State v. Maesse*, 29 Wn.App. 642, 647, 629 P.3d 1349, review denied, 96 Wn.2d 1009 (1981). This doctrine is described in *Maesse* as providing,

in those circumstances where police officers are acting together as a unit, cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect.

29 Wn.App. At 647.

When relying upon the knowledge of other officers, the government must later demonstrate that the cumulative knowledge of the police agency amounted to probable cause at the time of the arrest.

United States v. Meade, 110 F.3d 190, 193 (1st Cir. 1997); see Mance,

82 Wn.App. At 542-543.

In Maesse, several fire department officials and police officers were at the scene of a suspicious fire, investigating the fire's cause. 29 Wn.App. At 644. A fire inspection directed another officer to arrest a suspect. *Id.* The arresting officer had learned some but not all of the facts that established the probable cause for the arrest, but he arrested the suspect based on the other officer's directive. *Id.* at 644-45.

The Maesse Court relied upon the "fellow officer rule" as articulated by federal courts to hold that the arresting officer did not need to know why there was probable cause when the officers were working together, at the scene of the crime, and the first officer told the

arresting officer to make an arrest. *Id.* at 645-46. Maesse also noted that several Washington cases permit an officer to conduct a warrantless arrest when the officer is directed to arrest a person via a radio communication or other information from police headquarters. *Id.* at 647. The arrest based on transmitted information is valid as long as the officer who directed the arrest had probable cause, even if the arresting officer lacked personal knowledge of the grounds for arrest. *Id.* At 648; see also Alvarado, 56 Wn.App. At 458.

Several Washington cases have relied upon the “fellow officer rule” as articulated by federal case law as the rationale for permitting an arrest based on information outside the arresting officer’s knowledge. See State v. Maesse, 29 Wn.App. 642, 647, 629 P.3d 1349, review denied, 96 Wn.2d 1009 (1981); State v. Alvarado, 56 Wn. App. 454, 457-58, 783 P.2d 1106 (1989), review denied, 114 Wn.2d 1015 (1990) (arrest based on communication from two officers possessing probable cause); Torry v. City of Tukwila, 76 Wn.App. 32, 39-40, 882 P.2d 799 (1994). These cases have not directly analyzed the scope of the “fellow officer rule” in the context of the Washington

Constitution. Maesse, 29 Wn.App. At 647-48; Alvarado, 56 Wn.App. At 458; see also Torry, 76 Wn.App. at 40 (declining independent state law analysis where civil right action must be based on federal law).

There is no question, however, that the Washington Constitution more strictly protects the right to be free from governmental intrusion than the Fourth Amendment, and this protection has been extended to issues concerning probable cause to arrest. State v. Gaddy, *Supra*. “Article 1, § 7 provides greater protection of a person’s right to privacy than the Fourth Amendment.” O’Neill, 148 Wn.2d at 484. No independent Gunwall analysis necessary to prove the broader protections afforded in Washington.² State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007).

The case at bar is distinguishable from Maesse because, here, not only was Officer Thiry off-duty, but more importantly, the on-duty officers did not tell him prior to the arrest that they possessed probable

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The six Gunwall factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matter of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 52, 61-62, 720 P.2d 808 (1986).

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cause to order his arrest. 29 Wn.App. At 647. Similarly, in Alvarado, an observing officer, at the scene, communicated over the radio that the defendant should be arrested based upon information learned in the joint narcotics investigation. 56 Wn.App. At 456. The Alvarado officers were working together at the scene of the crime, unlike the situation in the case at bar where Officer Thiry was working an off-duty job when he autonomously undertook the capture and arrest of Mr. Nichols. Officer Thiry testified to no prior communications with Officer Bundy or any other on-duty patrol unit that was dispatched to the scene.

Even assuming for the sake of argument that Officer Thiry could be considered working in unison with the on-duty officer(s), Officer Bundy's knowledge was also insufficient to establish probable cause at the time Mr. Nichols was arrested. Officer Bundy had not yet interviewed Sharon Commandest; he never interviewed Mr. Nichols. RP 2 59. The record does not show that Officer Bundy had yet established the name of the 911 caller, let alone verified that person's identity. The trial court noted that Officer Bundy had not seen the

Order of Protection until he testified at trial. RP 2 62-63.

During his trial testimony Officer Bundy alluded to confirming with the officer who had stopped Mr. Nichols that there was probable cause to arrest, to verifying through “records” that a valid restraining order existed, and to verifying that the petitioner of the restraining order was Sharon Commandest. According to Officer Bundy’s own testimony, however, all of this was done after he interviewed Ms. Commandest, which was well after Mr. Nichols was arrested. RP 2 61.

In sum, singularly or collectively, the police did not possess probable cause to arrest Mr. Nichols at the time of his arrest. Mr. Nichols’ arrest was, therefore, unlawful.

c. The remedy is suppression of Mr. Nichols’ statements and all other evidence acquired as the result of the unlawful arrest.

Where there has been a violation of the Fourth Amendment, courts must suppress evidence discovered as a direct result of the seizure/search as well as evidence which is derivative of the illegality, the “fruits of the poisonous tree.” Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed 307 (1939); Wong Sun v. United States, 317 U.S. 18, 41, 63 S.Ct. 610, 87 L.Ed. 707 (1942); United States v. Nichols, 481 F.2d 107, 111 (5th Cir. 1973).

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States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963). Article 1, § 7 also requires exclusion of evidence obtained in violation of its terms. State v. Barker, 143 Wn. 2d 915, 25 P.3d 423 (2001); State ex rel. McDonald v. Whatcom County District Court, 92. Wn. 2d 35, 593 P.2d 546 (1979).

Officer Thiry's actions led to an illegal arrest. The statements Mr. Nichols made to Officer Thiry as well as Officer Thiry's testimony regarding the unlawful arrest of Mr. Nichols must be suppressed, and the case remanded to determine whether sufficient grounds exist to proceed absent the unlawfully acquired evidence.

V. CONCLUSION

For all of the foregoing reasons and conclusions the appellant, Michael H. Nichols, respectfully requests that this Court determine that all evidence, including but not limited to Mr. Nichols' statements and Officer Thiry's trial testimony, be suppressed as the result of the unlawful arrest, and that this case be remanded to the Superior Court to proceed consistent with its' opinion.

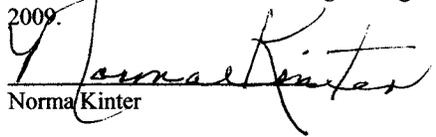
Respectfully Submitted this 23rd day of October, 2009.



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CERTIFICATE OF SERVICE

The undersigned certifies that on October 23, 2009, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, true and correct copies of this Opening Brief with transcripts, and by United States mail a true and correct copy of this Opening Brief to appellant Michael H. Nichols, 815 South 13th Street, Tacoma, Washington 98405. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on October 23, 2009.


Norma Kinter

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