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*Assignment of Error as Cross-Appellant*

*Assignment of Error*

The trial court erred when it dismissed the felony harassment charge without prejudice.

*Issues Pertaining to Assignment of Error*

Does a trial court err if it dismisses a felony charge without prejudice, as opposed to a dismissal with prejudice, upon the state's erroneous claim that the court's prior order suppressing evidence prevented the state from going forward with its case?

## STATEMENT OF THE CASE

### As Cross-Appellant

At about 12:30 p.m. on November 13, 2008, the defendant Tyler Scott Barnes entered the Washougal Branch of Washington Mutual Bank, walked up to one of the teller's booths, and asked for assistance with his account at that bank. RP 3-6. According to the teller, after a short conversation, the defendant became visibly upset and then said the following: "I am sick of everyone wanting to take my money; I am sick of having a bank account; I feel like going and getting a gun and shooting everyone." RP 4. Following this statement, the defendant walked out of the bank. *Id.* The teller then called the police. RP 3. After a few minutes, Sergeant Yamashita responded to the call and took a report from the teller. RP 4-5. In fact, Sergeant Yamashita was familiar with the defendant, having received prior dispatches involving claims against the defendant for assaultive behavior. RP 5.

About two hours after responding to the bank, Sergeant Yamashita located the defendant, who had walked out of a Napa Auto Parts store about one-half mile from the bank and got in his vehicle. RP 5-7, 21. As he did, Sergeant Yamashita walked up, ordered the defendant to get out of the car, and told him he was under arrest on a charge of felony harassment. *Id.* Sergeant Yamashita then placed handcuffs on the defendant and put him in the back of a patrol car. *Id.* Sergeant Yamashita then returned to the

defendant's vehicle and searched it incident to the defendant's arrest. RP 8-10. Prior to getting in the vehicle, she looked through the window and saw what she believed to be a hand gun case sitting on the front passenger seat. *Id.* Once inside the vehicle, Sergeant Yamashita seized the case, opened it, and found a 9mm pistol. *Id.* The record on appeal does not reveal whether or not the gun case was locked. RP 1-114. Sergeant Yamashita later determined that the defendant had a conviction for a misdemeanor domestic violence offense. CP 21.

By information filed November 17, 2008, the Clark County Prosecutor charged the defendant with one count of felony harassment and one count of second degree unlawful possession of a firearm. CP 1-2. About six weeks later, the state amended the information to add a count of attempted second degree assault, claiming that the defendant had intended to assault the bank teller with the pistol Sergeant Yamashita found in his car. CP 9-10. Three weeks later, the state filed a second amended information adding a firearm enhancement to the attempted second degree assault charge. CP 23-24.

Following the defendant's appearance on the information, his attorney filed a motion to suppress the firearm on an argument that Sergeant Yamashita's search of the defendant's vehicle violated the defendant's right to privacy under both Washington Constitution, Article 1, § 7, as well as

United States Constitution, Fourth Amendment. CP 38-41. The motion later came on for hearing with the state calling Sergeant Yamashita, and the defense calling two of its own witnesses. CP 49-52. During this hearing, the state did not produce or move the gun case into evidence. CP 50. Following argument by counsel, the court granted the motion to suppress. *Id.* The court later entered findings of fact and conclusions of law in support of its order suppressing the firearm. CP 54-57.

After an unsuccessful motion for reconsideration, the state later moved to dismiss all three counts of the information, arguing that the practical effect of the court's order of suppression left the state with insufficient evidence to proceed to trial. CP 58-66, 67, 68. In response, the court entered an order dismissing counts II and III with prejudice. CP 69-70. In the same order, the court dismissed count I without prejudice, over a defense objection that the suppression of the firearm did not prevent the state from proceeding forward on count I. RP 72-76. The state then filed timely notice of appeal, after which the defendant filed timely notice of cross-appeal. RP 71, 72-76.

#### **As Respondent**

As Respondent, the defendant accepts appellant's statement of the case except for the following. On page 4 of the Opening Brief of Appellant,

it states the following:

Sergeant Yamashita entered the defendant's vehicle and seized the gun case. (RP 10-11). The case was unlocked. (RP 11).

Opening Brief of Appellant, page 4.

In fact, page 11 of the verbatim report of proceedings, which was a portion of the direct examination of Sergeant Kim Yamashita, does not contain any claim that the gun case was unlocked. RP 11. Rather, the officer merely states that she opened the container. *Id.* This portion of the testimony stated as follows:

Q. And did you open the box?

A. Yes, I did.

Q. What was inside it?

A. It was a Taurus nine mil. I believe it was a nine millimeter - but it was a hand gun. Um-hum.

RP 9.

As far as respondent can tell, there is no factual reference in the record at all establishing that the gun container was unlocked. RP 1-114. Indeed, the only reference to the issue of whether or not the container was locked or unlocked comes from Finding of Fact No. 8, which stated as follows:

8. Both officers relying on a number of cases believed they had a right to search Mr. Barnes car because he was under arrest even though he wasn't in the car. They then searched the car including the

gun case. They opened the vehicle, seized the gun case, opened it, and found a gun in the case, which as far as the court can tell was unlocked. . . .

CP 56.

To the extent that this finding constitutes a factual determination by the court that the gun case was unlocked, Respondent assigns error to it because there is no evidence in the record to support it. RP 1-114.

## ARGUMENTS AS RESPONDENT

### **I. UNDER UNITED STATES CONSTITUTION, FOURTH AMENDMENT, AS INTERPRETED IN *ARIZONA v. GANT*, THE TRIAL COURT DID NOT ERR WHEN IT GRANTED THE MOTION TO SUPPRESS BECAUSE THE FIREARM WAS NOT EVIDENCE OF THE CRIME FOR WHICH THE DEFENDANT WAS ARRESTED.**

In *Arizona v. Gant*, 556 U.S. —, 129 S.Ct. 1710, — L. Ed. 2d — (2009), the United States Supreme Court addressed the parameters under which the police may, consistent with the Fourth Amendment, make a warrantless search of a vehicle following the arrest of the driver or a passenger. In this case, an Arizona Police Officer arrested the defendant for operating a motor vehicle with a suspended license. Following this arrest, the officer handcuffed the defendant and placed him in a nearby patrol vehicle. With the defendant still at the scene in the patrol car, the police then searched his vehicle incident to his arrest and found handguns and drugs in it. The defendant was later convicted of possessing these items. However, the Arizona Supreme Court reversed this conviction, holding that the search incident to arrest was not justifiable, since any concerns for officer safety or the possible destruction of evidence issue had ended when the defendant was arrested, handcuffed, and placed in a patrol car.

Following entry of the decision by the Arizona Supreme Court, the state filed a Petition for Writ of Certiorari, which the United States Supreme Court granted. Ultimately, the court affirmed the decision of the Arizona

Supreme Court, finding that the warrantless search violated the Fourth Amendment. The court held:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed.

*Gant v. Arizona*, page 18.

By this decision, the United States Supreme Court effectively overruled *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), or at least the subsequent interpretations of *Belton*, which held that an unrestricted search of the entire passenger compartment of a vehicle incident to the arrest of an occupant or recent occupant did not offend the Fourth Amendment.

The effect of the decision in *Gant* was to invalidate the majority of warrantless searches in Washington State undertaken pursuant to the decision of the Washington Supreme Court in *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). In this case, the Washington Supreme Court adopted a "bright line rule" for determining when the police could make a warrantless search of the passenger compartment of a vehicle upon the arrest of the driver. In *Stroud*, the court held:

During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

*State v. Stroud*, 106 Wn.2d at 152.

As a review of the holdings in *Gant* and *Stroud* reveals, there are many classes of searches taken under *Stroud* that are no longer valid under the Fourth Amendment. Indeed, the majority of searches considered valid under *Stroud* are now invalid under *Gant*.

In the case at bar, the state argues that the search of the defendant's vehicle did not violate the Fourth Amendment as interpreted in *Gant* because the police were searching for evidence of the crime for which they had arrested the defendant, and it was "reasonable to believe the vehicle contained evidence of the offense of arrest." As the above-quoted portion of *Gant* states, this is a specific exception under which a warrantless search of a vehicle is still allowed. The problem with the state's claim is that the defendant's possession of the firearm in his vehicle was not evidence of the crime for which the police arrested him. The following sets out this argument.

In the case at bar, the police arrested the defendant for one offense: felony harassment. This crime is defined in RCW 9A.46.020(2)(b)(ii) as

follows:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . .

. . . and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: . . . or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

RCW 9A.46.020.

Under this statute, the gravamen of the offense of felony harassment contains three elements: (1) that the defendant made an unlawful threat to kill another person immediately or in the future, and (2) that by words or conduct the defendant “place[d] the person threatened in reasonable fear that the threat will be carried out.” This offense is the juxtaposition of two disparate events. The first is a verbal statement by the defendant. The second is a reasonable belief by the person threatened that the threat would be carried out. In the case at bar, the state’s theory of the crime was that (1) the defendant made a verbal threat to kill in front of a bank employee, and (2)

that based upon the defendant's words and actions, the bank employee reasonably believed the defendant would make good on the threat. Thus, the crime was complete at the time the defendant left the bank. The fact that at some later time the defendant possessed a firearm was not known to the bank employee. Thus, it had no relevance to the bank employees belief that the defendant would carry out the threat, and it was not evidence of the crime charged. As a result, the search for the firearm was not valid under the decision in *Gant* because it was not evidence of the crime for which the police were arresting the defendant.

**II. UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AS INTERPRETED IN *STATE v. PATTON*, THE TRIAL COURT DID NOT ERR WHEN IT GRANTED THE MOTION TO SUPPRESS BECAUSE THE POLICE DID NOT FEAR THE CONCEALMENT OR DESTRUCTION OF THE FIREARM AT THE TIME THE POLICE SEIZED IT.**

Washington Constitution, Article 1, § 7, provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The portion of the Washington Constitution’s Bill of Rights is significantly different from the language of the Fourth Amendment to the United States Constitution, and has long been interpreted by the court of this state to afford more protection to individuals from searches and seizures by government than the Fourth Amendment to the United States Constitution. *See State v. Carter*, 127 Wn.2d 836, 904 P.2d 290 (1995); *see*

also *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990). In *State v. Patton*, No. 80518-1 (filed October 22, 2009), the Washington Supreme Court first addressed the issue of whether or not Washington Constitution, Article 1, § 7, provides more protection during vehicle searches than that provided by the Fourth Amendment as applied in the *Gant* decision. The following examines the decision in *Patton*.

In *Patton*, a police officer approached the defendant as he got out of his vehicle and approached the defendant, telling him that he was under arrest on an outstanding warrant. Upon hearing this, the defendant got out of his car and fled into his trailer. Once backup arrived, an officer entered the defendant's home, found him, put him in handcuffs, took him outside and placed him in the back of a patrol vehicle. At this point, the officer searched the defendant's vehicle incident to arrest and found methamphetamine. After being charged, the defendant moved to suppress, arguing that at the time he was arrested, he was not in the vicinity of his vehicle. Thus, the search was not valid under *Stroud*. The trial court agreed and suppressed the evidence.

Following dismissal of the drug charge, the state then sought review, and the Court of Appeals reversed, finding that for the purposes of an analysis under *Stroud*, the defendant was "under arrest" at the point that the officer approached him and stated that he was under arrest. Since this happened as the defendant was exiting his car, the search of the vehicle while

the defendant was handcuffed and in the back of the patrol vehicle was valid under *Stroud*. The defendant then sought and obtained review before the Washington Supreme Court, arguing that the search was improper under both Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

During the pendency of the case before the state supreme court, the United States Supreme Court issued its decision in *Gant*. The court then reversed the Court of Appeals and reinstated the trial court's order to suppress. However, the court did not base its decision on a conclusion that the police officer had violated the Fourth Amendment as interpreted in *Gant*. Rather, the court based its decision upon Washington Constitution, Article 1, § 7. In so holding, the court followed the rule that "[w]hen a party claims both state and federal constitutional violations, we turn first to our state constitution." *State v. Patton*, at page 4 (citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

In addressing the defendant's claims under Washington Constitution, Article 1, § 7, the court began its analysis by noting the following concerning warrantless searches and exceptions to the warrant requirement.

Our analysis under article 1, section 7 begins with the presumption that a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement. These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement.

*State v. Patton*, at 4 (citing *State v. Ladson*, 138 Wn.2d 343, 356, 979 P.2d 833 (1999)).

The court then reviewed automobile search exception and “the reasons that brought [it] into existence.” The court noted:

One such exception, and the one at issue here, is the automobile search incident to arrest exception. Officer safety and the risk of destruction of evidence of the crime of arrest are the reasons that brought this exception into existence. *State v. Ringer*, 100 Wn.2d 686, 693-700, 674 P.2d 1240 (1983). (reviewing historical development of search incident to arrest exception under federal and state law). Necessarily, these factors – also described as exigencies – limit the scope of the exception. Like all judicially created exceptions, the automobile search incident to arrest exception is limited and narrowly drawn, and it is the State’s burden to establish that it applies. *Parker*, 139 Wn.2d at 496.

*State v. Patton*, at 4-5.

At this point, the court undertook a lengthy examination of automobile search exception under *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), under *State v. Stroud, supra*, and under the numerous decisions that subsequently interpreted and expanded *Stroud*. See *State v. Patton*, pages 4-14. Following this analysis, the court declared the following standard for automobile searches under Washington Constitution, Article 1, § 7:

Today we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, ***and that these concerns exist at the time of the search.***

*State v. Patton*, at 15 (emphasis added).

A comparison of the standard for analyzing the validity of warrantless vehicle searches under the Fourth Amendment as applied in *Gant* to the standard for analyzing the validity of warrantless vehicle searches under Article 1, § 7, reveals one key distinction. Under Fourth Amendment as applied in *Gant*, the police may search the vehicle for evidence of the crime for which the defendant is arrested even after the defendant is handcuffed and placed in the back of a patrol vehicle. By contrast, under Article 1, § 7, as applied in *Patton*, once a defendant is handcuffed and placed in the back of a patrol vehicle, that defendant can no longer pose a risk or access evidence in the vehicle to destroy it. Thus, once a defendant is handcuffed and placed in the back of a patrol vehicle, the police may no longer make a warrantless search of the vehicle.

In the case at bar, the undisputed findings of fact entered by the court after the suppression motion reveal that the police did not attempt to search the defendant's vehicle until after the defendant was arrested, handcuffed, and placed in the rear of a patrol vehicle. Thus, the police had no concerns that the defendant could access weapons or destroy evidence "at the time of the search." Consequently, the trial court was correct when it ruled that the search in the case at bar violated the defendant's privacy rights under Washington Constitution, Article 1, § 7.

**III. UNDER THE DECISION IN *STATE v. STROUD*, THE TRIAL COURT DID NOT ERR WHEN IT GRANTED THE MOTION TO SUPPRESS BECAUSE THE STATE FAILED TO PROVE THAT THE FIREARM WAS IN AN UNLOCKED CONTAINER.**

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment 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). Thus, once a defendant meets the burden of production in proving the fact of either a warrantless arrest or a warrantless search, the burden shifts to the state to prove an exception to the warrant requirement. *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998).

As was previously mentioned, in *State v. Stroud*, *supra*, the Washington Supreme Court set a bright line rule that allowed the police to search the passenger compartment of vehicle and all unlocked containers upon the arrest of the driver or a passenger. Although this rule has been significantly limited by the United States Supreme Court’s decision in *Gant* and the Washington Supreme Court’s decision in *Patton*, *see discussion*

*supra*, the court in *Patton* did not expressly overrule the decision in *Stroud*.

Rather, the court stated as follows:

Today we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search. While we believe this holding is consistent with the core rationale of our cases, we also recognize that we have heretofore upheld searches incident to arrest conducted after the arrestee has been secured and the attendant risk to officers in the field has passed. Today, we expressly disapprove of this expansive application of the narrow search incident to arrest exception.

*State v. Patton*, No. 80518-1 filed 1/22/09 at 15.

Thus, to the extent a search of a vehicle would have been permitted under *Stroud* but not permitted under *Patton* or *Gant*, it is invalid. In addition, to the extent the search of a vehicle would not have been permitted under *Stroud*, that search remains invalid regardless of how that search would be viewed under *Patton* or *Gant*. As a result, absent some other justification, the police may still not search locked containers in a vehicle upon the arrest of a passenger absent a warrant or some other justification apart from the fact of the arrest.

In the case at bar, there is no question that the police made a warrantless search of the defendant's vehicle. In addition, there is no question that they found the firearm in question in a container in the vehicle. Since the burden was upon the state to prove that the warrantless search was

valid, the state bore the burden of proving that the container in which the police found the firearm was unlocked. It was not incumbent upon the defendant to prove that the container was unlocked because the burden of proof was on the state to prove the legality of the search. In the case at bar, the state failed to meet this burden.

The record in this case includes no evidence from which the court could conclude that the container was unlocked. Rather, as the court stated in its findings, it simply assumed that the container was unlocked, apparently because the defendant did not claim otherwise. In so holding, the court impermissibly shifted the burden of proof to the defense to prove the illegality of the warrantless search, instead of forcing the state to prove the legality of the officers' actions. Since the state presented no evidence that the container was unlocked, and since there is no evidence from which the court could conclude that container was unlocked, under the *Stroud* decision, the state failed to meet its burden to prove the legality of the search of the container. As a result, the trial court did not err when it granted the defendant's motion to suppress evidence.

#### **ARGUMENT AS CROSS-APPELLANT**

#### **IV. THE TRIAL COURT ERRED WHEN IT DISMISSED THE FELONY HARASSMENT CHARGE WITHOUT PREJUDICE.**

Under CrR 8.3(a), the trial court, upon motion by the state, may

dismiss a pending charge. This rule states:

(a) On Motion of Prosecution. The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

CrR 8.3(a)

Subsection (a) of CrR 8.3 does not state whether dismissals upon the state's motion should be with or without prejudice. However, subsection (c)(4), which deals with dismissals of criminal charges upon the defendant's motion, specifically limits the court to entering orders of dismissal without prejudice. This subsection states as follows:

(4) If the defendant's motion to dismiss is granted, the court shall enter a written order setting forth the evidence relied upon and conclusions of law. ***The granting of defendant's motion to dismiss shall be without prejudice.***

CrR 8.3(c)(4)(emphasis added).

The fact that the rule specifically limits dismissals made upon the defendant's motion to dismiss without prejudice, when seen in light of the fact that no such limitation is made upon dismissals made upon the state's motion, strongly indicates that dismissals upon the state's motion may be with or without prejudice.

As with most other motions, the decision whether or not to grant a state's motion to dismiss under CrR 8.3(a) lies within the sound discretion of the trial court. *State v. Koerber*, 85 Wn.App. 1, 931 P.2d 904 (1996). An

abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001). In the case at bar, the defendant argues that the trial court abused its discretion when it refused to dismiss count I with prejudice as opposed to without prejudice. The following sets out this argument.

In the case at bar, the state argued before the trial court that it did not have sufficient evidence to proceed against the defendant on the charge of felony harassment given the court's order suppressing the handgun the officer found in the defendant's vehicle. The problem with the state's claim is that the defendant's possession of the firearm in his vehicle was not evidence of the crime for which the police arrested him. Indeed, the officer arrested the defendant on the charge of felony harassment without even knowing that the firearm existed. This arrest was based upon the defendant's alleged statement to the bank teller, in conjunction with her alleged reasonable belief that the defendant would follow through with the threat. As a review of the felony harassment statute reveals, this crime is complete at the time the defendant utters the threat and the person who hears the threat reasonably believes it. This crime is defined in RCW 9A.46.020(2)(b)(ii) as follows:

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . and . . .

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: . . . or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

RCW 9A.46.020.

Under this statute, the gravamen of the offense of felony harassment contains three elements: (1) that the defendant made an unlawful threat to kill another person immediately or in the future, and (2) that by words or conduct the defendant “place[d] the person threatened in reasonable fear that the threat will be carried out.” This offense is the juxtaposition of two disparate events. The first is a verbal statement by the defendant. The second is a reasonable belief by the person threatened that the threat would be carried out. In the case at bar, the state’s theory of the crime was that (1) the defendant made a verbal threat to kill in front of a bank employee, and (2) that based upon the defendant’s words and actions, the bank employee reasonably believed the defendant would make good on the threat. Thus, the crime was complete at the time the defendant left the bank. The fact that at some later time the defendant possessed a firearm was not known to the bank

employee. Thus, it had no relevance to the bank employees belief that the defendant would carry out the threat, and it was not evidence of the crime charged.

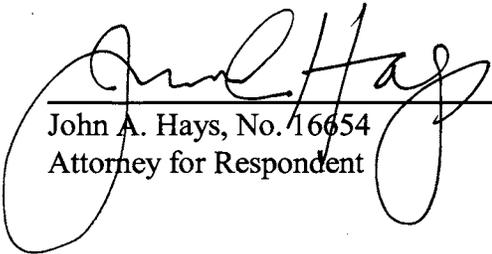
Since the suppression of the firearm had no effect upon the state's ability to prosecute the felony harassment charge, the state was in error when it claimed that it could not proceed upon this charge given the court's order suppressing the firearm. Similarly, the trial court's decision to dismiss without prejudice as opposed to dismissing with prejudice, was manifestly unreasonable. In other words, the court's refusal to dismiss with prejudice was based upon untenable grounds and constituted an abuse of discretion. As a result, if this court affirms the suppression of the firearm in the state's direct appeal, the court should then vacate that portion of the trial court's order that dismissed the felony harassment charge without prejudice and remand with instructions to dismiss with prejudice.

## CONCLUSION

The trial court did not err when it granted the defendant's motion to suppress the firearm the police found when they illegally searched the defendant's vehicle. The trial court did err when it dismissed the felony harassment charge without prejudice as opposed to dismissing the charge with prejudice. As a result, the court should affirm the decision of the trial court suppressing evidence, vacate the order of dismissal without prejudice, and remand to the trial court with instructions to dismiss with prejudice.

DATED this 31<sup>st</sup> day of December, 2009.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Respondent

## **APPENDIX**

### **WASHINGTON CONSTITUTION ARTICLE 1, § 7**

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

### **UNITED STATES CONSTITUTION, FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable 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.

### **RULE 8.3 DISMISSAL**

(a) On Motion of Prosecution. The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

(b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

(c) On Motion of Defendant for Pretrial Dismissal. The defendant may, prior to trial, move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged.

(1) The defendant's motion shall be in writing and supported by an affidavit or declaration alleging that there are no material disputed facts and setting out the agreed facts, or by a stipulation to facts by both parties. The stipulation, affidavit or declaration may attach and incorporate police reports, witness statements or other material to be considered by the court when

deciding the motion to dismiss. Any attached reports shall be redacted if required under the relevant court rules and statutes.

(2) The prosecuting attorney may submit affidavits or declarations in opposition to defendant's supporting affidavits or declarations. The affidavits or declarations may attach and incorporate police reports, witness statements or other material to be considered by the court when deciding defendant's motion to dismiss. Any attached reports shall be redacted if required under the relevant court rules and statutes.

(3) The court shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. In determining defendant's motion, the court shall view all evidence in the light most favorable to the prosecuting attorney and the court shall make all reasonable inferences in the light most favorable to the prosecuting attorney. The court may not weigh conflicting statements and base its decision on the statement it finds the most credible. The court shall not dismiss a sentence enhancement or aggravating circumstance unless the underlying charge is subject to dismissal under this section. A decision denying a motion to dismiss under this rule is not subject to appeal under RAP 2.2. A defendant may renew the motion to dismiss if the trial court subsequently rules that some or all of the prosecuting attorney's evidence is inadmissible.

(4) If the defendant's motion to dismiss is granted, the court shall enter a written order setting forth the evidence relied upon and conclusions of law. The granting of defendant's motion to dismiss shall be without prejudice.

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

STATE OF WASHINGTON,  
Respondent,

NO. 39627-1-II

vs.

AFFIRMATION OF SERVICE

TYLER BARNES,  
Appellant.

STATE OF WASHINGTON )  
County of Clark ) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On DECEMBER 31<sup>ST</sup>, 2009 , I personally placed in the mail the following documents

- 1. COMBINED BRIEF OF RESPONDENT/CROSS APPELLANT
- 2. AFFIRMATION OF SERVICE

to the following:

ARTHUR D. CURTIS TYLER BARNES  
CLARK COUNTY PROSECUTING ATTY 1500 F. STREET  
1200 FRANKLIN ST. WASHOUGAL, WA 98671  
P.O. BOX 5000  
VANCOUVER, WA 98666-5000

Dated this 31<sup>ST</sup> day of DECEMBER, 2009 at LONGVIEW, Washington.

Cathy Russell  
CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS