

No. 39647-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

---

**STATE OF WASHINGTON,**

Respondent,

vs.

**JEFFREY JAMES PALERMO**

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
10 MAR 24 PM 12:27  
STATE OF WASHINGTON  
BY                       
CANDY

---

Appeal from the Superior Court of Washington for Lewis County

---

**RESPONSE BRIEF**

---

MICHAEL GOLDEN  
Lewis County Prosecuting Attorney

By: Lori Ellen Smith  
Deputy Prosecuting Attorney  
WSBA No. 27961  
Lewis County Prosecutor's Office  
345 W. Main Street, 2nd Floor  
Chehalis, WA 98532-1900  
(360) 740-1240

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE.....1

ARGUMENT.....11

**A. THE TRIAL COURT DID NOT ERR WHEN IT DENIED PALERMO'S MOTIONS TO SUPPRESS BECAUSE OFFICERS' INITIAL CONTACT WAS NOT A "SEIZURE" AND BECAUSE OFFICERS DEVELOPED PROBABLE CAUSE TO ARREST PALERMO UPON SEEING A PIPE CONTAINING BURNT MARIJUANA RESIDUE IN OPEN VIEW WHICH IN TURN PERMITTED A SEARCH OF THE VEHICLE PURSUANT TO THE "CRIME OF ARREST" EXCEPTION.....11**

CONCLUSION.....25

## TABLE OF AUTHORITIES

<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280(1997).....	12, 15
<u>State v. Brown</u> , 439 N.W.2d 792 (1989).....	22
<u>State v. Cardenas</u> , 146 Wn.2d 400, 47 P.3d 127 (2002).....	22
<u>State v. Cerrillo</u> , 122 Wn. App. 341, 93 P.3d 960 (2004).....	16
<u>State v. Gaddy</u> , 152 Wn.2d 64, 93 P.3d 872 (2004).....	19
<u>State v. George</u> , 146 Wn.App. 906, 193 P.3d 693 (2008).....	22
<u>State v. Gleason</u> , 70 Wn.App. 13, 851 P.2d 731 (1993).....	15
<u>State v. Harrington</u> , 167 Wn.2d 656, 222 P.3d 92 (2009).....	13, 19
<u>State v. Knox</u> , 86 Wn. App. 831, 939 P.2d 710 (1997).....	16
<u>State v. Lee</u> , 147 Wn.App. 912, 199 P.3d 445 (2008), <i>review denied</i> , 166 Wn.2d 1016, 210 P.3d 1019(2009).....	13
<u>State v. Lowrimore</u> , 67 Wn.App. 949, 841 P.J.2d 779 (1992).....	19
<u>State v. McKenna</u> , 91 Wn.App. 554, 958 P.2d 1017 (1998).....	19
<u>State v. Montague</u> , 73 Wn.2d 381, 438 P.2d 571 (1968).....	13
<u>State v. Mote</u> , 129 Wn.App. 276, 120 P.3d 596 (2005). ....	14, 15, 17
<u>State v. Neeley</u> , 113 Wn.App. 100, 53 P.3d 539 (2002).....	19, 22,23
<u>State v. Nettles</u> , 70 Wn.App. 706, 855 P.2d 699 (1993). ....	15
<u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	<i>passim</i>
<u>State v. Rankin</u> , 151 Wn.2d 689, 92 P.3d 202(2004).....	12, 13, 17
<u>State v. Snapp</u> , 153 Wn.App. 485, 219 P.3d 971 (2009).....	24
<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514(1996).....	13
<u>State v. Valdez</u> , 157 Wn.2d 761, ___ P.3d ___(2009).....	24, 25

State v. Williams, 62 Wn.App. 748, 815 P.2d (1991).....21, 22

State v. Young, 135 Wn.2d 498, 957 P.2d 681 (1998)..... passim

**Statutes**

RCW 10.31.100 .....19

RCW 69.50.412 .....21

**Treatises**

Wayne R. LaFave, 4 *Search & Seizure*, § 9.3(a) (3d ed. 1996 & Supp. 2004).....16

**FEDERAL CASES**

Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) ..... *passim*

United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). .....14, 17

## STATEMENT OF THE CASE

On August 13, 2008, Officer Mike Lowrey was on patrol in the 100 block of Chestnut in Centralia, Washington. RP 4. Officer Lowrey was in uniform, driving a black Impala marked with interior lights but no overhead lights. RP 20. Officer Lowrey noted that the vicinity of the 100 block of Chestnut is known for its frequent drug trafficking, gang issues, thefts, and is "one of the higher crime areas in Centralia as a whole." RP 5, 16. On the date in question, it was dark enough for streetlights and vehicle lights to be on. RP 5. Officer Lowrey turned onto Chestnut, and saw a vehicle containing several occupants parked on the south side of Chestnut. RP 5,6. The vehicle did not appear to be running and the persons inside were sitting "pretty close together." RP 5,6. Officer Lowrey said, "I cruise that street, it would be fair to say 50 times a night. And to find people huddled inside a car that's not running with the lights off and everything else is unusual." RP 18. Officer Lowrey also said that noticing the vehicle, "[w]ithout the vehicle running in a high crime area that most of --or not most, a large amount of our gang activity is centered in that one block. Also, 701 South Tower which is right above, right to the south of all those cars is an extremely high drug area." RP 17. Officer Lowrey decided to stop

and talk to the individuals inside the vehicle, just to "chat with them and see what was going on." RP 18. Officer Lowrey parked behind the subject vehicle. RP 17.

Officer Lowrey then walked up to the parked vehicle "to contact the occupants to see what was going on and that was it." RP 6. Officer Lowrey contacted the Defendant, Mr. Palermo, who was sitting in the driver's seat of the vehicle. RP 6,7. There was a female seated in the back seat in the center of the back seat. RJP 7. There was a passenger in the front passenger seat, Cory Aldrich, who was wearing "a lot of red in color which is significant for some of the gang issues that happen around here." RP 7. There was also a large backpack between Aldrich's feet. RP 7. Officer Lowrey said that Aldrich "had been messing around with the backpack the whole time." RP 24. Officer Lowrey asked the passenger to keep his hands out of the backpack. RP 26.

Officer Lowrey asked Palermo what they were doing. Officer Lowrey then told the occupants about the area, that is is a high crime area "with the drugs at the Whites and gang stuff that's been going on lately. Get a lot of car prowls, vehicle prowls, I'm just making sure this is your vehicle and you guys aren't going through somebody else's vehicle." RP 20. The person in the

driver's seat, Mr. Palermo, said the vehicle belonged to his mother, and said that "they weren't doing anything." RP 8. About a minute later, Officer Lowrey's brother, Officer Doug Lowrey, arrived on scene. RP 8.

When Officer Lowrey had dispatch run the plate number of the vehicle, it was not registered to Palermo's mother, as Palermo had told the officer. RP 9. Officer Lowrey confronted Palermo about this, and Palermo said maybe the vehicle was under his aunt's name, but that he couldn't remember her name. RP 9. Officer Lowrey then told Officer Doug Lowrey that "something wasn't right" and that he needed to check the registration. RP 9.

After arriving at the location, Officer Doug Lowrey went to the passenger side of the vehicle and identified Cory Aldrich. Officer Lowrey then asked dispatch to run the name of Cory Aldrich, and dispatch responded that Aldrich had multiple outstanding warrants. RP 9. Officer Doug Lowrey then arrested Aldrich on the warrants. RP 10. While taking Aldrich into custody, Officer Doug Lowrey told Officer Lowrey there was a glass pipe containing burnt marijuana residue under the driver's (Palermo's) right leg. RP 10, 32, 33. Officers then asked the remaining occupants of the vehicle to step out of the vehicle. RP 10, 32.

Officer Lowrey then saw a "pipe, glass marijuana pipe" on the driver's seat right where the driver's right leg would have been. RP 10, 11. Officer Lowrey said Palermo was placed into custody because "there is marijuana in the pipe, burned marijuana in the pipe"--seen when Officer Lowrey picked up the pipe. RP 32,33. Officer Lowrey said, "I know what marijuana residue is, both fresh and burnt due to classes." RP 33. Mr. Palermo told officers that the pipe was his "and that he had some marijuana on him as well." RP 11. Officer Lowrey placed Mr. Palermo under arrest for possession of marijuana. RP 34. Officer Lowrey found marijuana on Palermo's person during a search of Palermo's person incident to his arrest. RP 11,34. Officer Lowrey arrested Palermo for possession of marijuana. RP 34. Officer Lowrey then searched Palermo's person, and found additional marijuana and another glass pipe with a white or gray residue inside it. RP 34, 35. Palermo was placed under arrest. RP 32.

Prior to Officer Lowrey's being alerted about the pipe, he had not told any of the occupants in the vehicle that they were not free to leave or that they were under arrest. RP 11, 36. Officer Lowrey did not touch Mr. Palermo, or otherwise seize him in any physical manner. RP 11, 47. Officer Lowrey said that he used a

"conversational" tone of voice when speaking to Mr. Palermo. RP 36. Officer Lowrey's vehicle did not have its emergency lights activated. RP 11. The officers did not draw their firearms at all during the encounter. RP 12, 47. Nor did Officer Lowrey hear Officer Doug Lowrey say that the occupants were not free to leave prior to noticing the pipe. RP 12. Officer Lowrey said that he would not have arrested Palermo prior to discovery of the marijuana pipe. RP 37. Officer Lowrey said that before discovering the pipe, if Mr. Palermo had chosen to exit the vehicle and leave the scene, Officer Lowrey would not have stopped him from doing so. RP 38.

Officer Doug Lowrey went to the location that evening because over his radio he heard Officer Lowrey advise dispatch that he was going to be out with an occupied vehicle in the 100 block of West Chestnut. RP 40. Officer Doug Lowrey went to assist because he was fairly close to the area. RP 40. Officer Doug Lowrey said the area is a very high crime area with a lot of drug activity, arsons, robberies, and a lot of gang activity. RP 42. Officer Doug Lowrey said that he walked up to the vehicle, just to have a "social conversation about, hey, what's going on, how are you guys doing, what's going on here, what are you guys up to tonight." RP 44. Officer Doug Lowrey thought he recognized the

person in the passenger seat, so he said, "you look familiar, what's your name?" RP 44. He told me, "Cory Aldrich." RP 44. Doug Lowrey thought that Officer Lowrey heard Aldrich give his name, so Officer Lowrey asked dispatch to run Aldrich's name. RP 44. When Officer Doug Lowrey heard that Aldrich had warrants (through his ear piece), he arrested him. RP 45,53. When Mr. Aldrich got out of the vehicle, Officer Doug Lowrey saw a glass pipe sticking out from the right side of Mr. Palermo's leg. RP 45. He then told Officer Lowrey about the pipe. RP 46. Officer Doug Lowrey said that when he spoke to the occupants of the vehicle, he spoke in a "calm, respectful voice." RP 46. He said neither he, nor his brother Officer Lowrey, told anyone that they were not free to leave, or to remain in the vehicle. RP 47,48.

Mr. Palermo testified at the suppression hearing. Palermo said that when Officer Lowrey came up to the driver's side door, the door was open. RP 55. He said Officer Lowrey asked them what they were doing there. RP 56. Palermo agreed that he told Officer Lowrey that the vehicle belonged to his (Palermo's) mother. RP 56. Palermo said that Officer Lowrey told the passenger to keep his hands away from the backpack. RP 57. When told that the vehicle was not in his mother's name, Palermo said maybe it was in his

aunt's name, but he didn't know his aunt's last name. RP 59.

Because of the way Officer Lowrey had parked, Palermo felt that he was "blocked in." RP 60. Palermo said he did not feel like he was "free to go." RP 60. Palermo said he did not feel like he was "free to go." RP 60. Palermo said he thought that Officer Lowrey would stop him if he tried to leave in the vehicle. RP 61. Palermo said when the second officer arrived, he did not feel that he could refuse to answer his questions. RP 62. Palermo said, "...when you're being stopped by an officer, I thought it was considered fleeing the scene if you tried to leave." RP 66. Officers did not have the overhead lights or siren activated when they pulled up behind him. RP 66. Palermo was not asked to hand over his license or registration. RP 67. Palermo agreed that the officers did not draw their weapons or threatened them. RP 67.

In denying Palermo's motion to suppress, the trial court reasoned as follows.

THE COURT: I'm denying the motion to suppress. There are two grounds here . . . . The first is that Officer Lowrey told the defendant to hold on while I check this out. I reject that. Officer Lowrey said he didn't say it. The testimony was way too fuzzy on that point and so I reject that occurred.

As far as being blocked in, he said he left a foot in front of himself and three to four feet behind him. That's what he said. That means he had four to

five feet. If you are trying to pull out of a parking spot, four to five feet is ample to pull out any kind of a vehicle, including a pickup truck; this was a regular car. To the extent there are disputed facts, I resolve those in favor of the state.

The contact here now, the reason for it, the contact was a social contact as defined by the case law. The defendant may have thought he was being detained, but subjective belief does not control, it must be objectively reasonable. And based on the factors that we are to consider, any belief here that he was detained is not objectively reasonable. [RP 79]

Now, it may very well be that people say, I should cooperate with the police. There's a good deal of difference between that and feeling that you are being detained. And the question arises, well, he never told him he was free to leave. Well, I can see exactly what would happen if he said that, well, so before this, he wasn't free to leave. So no matter what he says or doesn't say at that point, you can make a construct that the individual was in custody in some fashion or detained in some fashion. [T]hat's just not the case in my view hear [sic]. This only became custodial after the arrest of Cory Aldrich and the search incident to that arrest. And the order --this wasn't argued--but the order to get out of the vehicle is reasonable under the circumstances and that's when the discovery of the first pipe occurred in plain view.

But there is a second basis here. It also really hasn't been discussed much, although there's been some reference to it, and that is that I question if in fact there is a challenge to the search here because of orders given or not given to Mr. Aldrich, I don't think Mr. --in fact I'm certain that Mr. Palermo does not have standing to raise anything that happened with Mr. Aldrich as a defense here. It may be there is a question, we didn't hear it litigated, as to whether Mr. [RP 80] Aldrich could be able to raise this, but it

doesn't matter since this defendant can't assert Mr. Aldrich's rights, legally has no standing to assert someone else's rights to challenge the search and seizure. In fact, Mr. Aldrich was free to leave had he wanted to under the case law as has been cited here as a passenger in the vehicle that was not stopped by the officers. Of course, then once the warrant was found, Mr. Aldrich was detained, search of the vehicle incident to arrest ensued, that's when it was all discovered.

So my finding is that to the extent you're relying on Mr. Aldrich, any command or statement made to Mr. Aldrich, can't raise those, lack of standing. And the contact between Mr. Palermo and either or both officers was social in nature and he was not detained when viewed objectively.

RP 81. The trial court thus denied Palermo's first motion to suppress.

On July 10, 2009, the trial court held another suppression hearing, in response to Palermo's second motion to suppress-- apparently based upon the United States Supreme Court's opinion in Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). RP 87. However, the case relied upon in the defense's oral argument at the hearing appears to again be State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003)--a case relied upon for determination of the "seizure" issue discussed at the first suppression hearing. No additional facts were elicited at this hearing. Instead, the parties relied upon the factual record from the

first suppression hearing to decide the legal issues raised in the second motion to suppress. RP 88,89. The trial court denied Palermo's second motion to suppress as well. RP 100. The trial court set out its reasoning as follows:

THE COURT: I'm going to deny the motion to suppress. I don't think --I'm not going to base it all on State v. O'Neill. To me, that just defies common sense that an officer saying he sees what he believed to be residue on a cook spoon, which is drug paraphernalia, can't make an arrest for possession, doesn't say that. They're going to have to be a lot more specific than that. They go on to say, we disagree, to talk about the timing of the arrest versus the search. If this were going to make a sweeping change in the law, which that definitely would be, they would do something other than write a compound sentence saying, we disagree. They clearly are referring to the time of arrest versus search.

I also disagree with . . . [defense counsel] the [sic] police reports submitted associated with the motion and the response are there for me to consider. This is a second motion. I don't believe if it was an issue at the first motion, I don't know that that was briefed or argued, or it was key to any one decision, and I don't remember specifically whether the officer testified about it or not, but the police reports indicate that's what he said. If it wasn't asked and answered, it's because it wasn't an issue. I'm going to consider that and deny the motion to suppress.

RP 101. The court set the matter for entry of findings and a stipulated facts bench trial. At the August 18, 2009, hearing, Mr. Palermo objected to findings of fact 1.3 and 1.4, and to conclusions of law 2.1,2.2,2.3, and 2.4. RP 105. The trial court entered the

findings as proposed by the State. RP 105. Then, based upon the stipulated facts, found Palermo guilty of possession of a controlled substance (methamphetamine) and unlawful use of drug paraphernalia. RP 105. Palermo was sentenced and filed a timely appeal. Palermo's sentence was stayed pending the outcome of this appeal. RP 113.

### ARGUMENT

**A. THE TRIAL COURT DID NOT ERR WHEN IT DENIED PALERMO'S MOTIONS TO SUPPRESS BECAUSE OFFICERS' INITIAL CONTACT WAS NOT A "SEIZURE" AND BECAUSE OFFICERS DEVELOPED PROBABLE CAUSE TO ARREST PALERMO UPON SEEING A PIPE CONTAINING BURNT MARIJUANA RESIDUE IN OPEN VIEW WHICH IN TURN PERMITTED A SEARCH OF THE VEHICLE PURSUANT TO THE "CRIME OF ARREST" EXCEPTION.**

Palermo claims that the trial court erred when it denied both of his motions to suppress evidence. The State disagrees.

First, the officers' initial social contact with Palermo asking the occupants of the vehicle what they were doing was not a "seizure." Second, probable cause to arrest Palermo developed when officers saw a marijuana pipe with burnt marijuana residue in open view lying under Palermo's leg in the vehicle-- at which time Palermo spontaneously admitted that the "marijuana pipe" belonged to him. This gave officers probable cause to arrest Palermo for use of paraphernalia/possession of marijuana. Upon

arresting Palermo for these crimes, officers could search the vehicle under the "crime of arrest" exception set out in Gant. Palermo's arrest also permitted a search of Palermo's person--at which time officers found not only additional marijuana, but also an additional pipe containing methamphetamine residue. Accordingly, as more fully argued below, the trial court did not err when it denied Palermo's motions to suppress.

***Officers' Initial Social Contact With Palermo Was Not a Seizure.***

Contrary to Palermo's claims, the record here shows that officers' initial contact with Palermo was a mere social contact by the officers--not a "seizure."

Article I, section 7 of the Washington constitution grants greater protection to individual privacy rights than the Fourth Amendment. See, e.g., State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202(2004); O'Neill, 148 Wn.2d at 584. Whether a seizure occurred is a mixed question of law and fact. State v. Armenta, 134 Wn.2d 1,9,948 P.2d 1280(1997). The individual asserting a seizure in violation of article I, section 7 bears the burden of proving that there was a seizure. State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). What the police said and did and what the defendant said and did are questions of fact. State v. Montague, 73

Wn.2d 381, 389, 438 P.2d 571 (1968). What legal consequences flow from those facts is a question of law. State v. Lee, 147 Wn.App. 912, 916, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016, 210 P.3d 1019(2009). A trial court's factual findings are entitled to great deference, but whether those facts ultimately constitute a seizure is a question of law that the reviewing court reviews *de novo*. State v. Thorne, 129 Wn.2d 736, 921 P.2d 514(1996).

Under Article I, section 7, of the Washington constitution, a seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009) *quoting Rankin*, 151 Wn.2d at 695 (other citations omitted). In contrast, "an encounter between a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away." Harrington, 167 Wn.2d at 661-662. This standard is a "purely objective one, looking to the actions of the law enforcement officer. . . ." Harrington at 663(emphasis added) (citing Young, 135 Wn.2d at 501). "The relevant question is whether a reasonable

person in the individual's position would feel he or she was being detained." State v. Mote, 129 Wn.App. 276, 283, 120 P.3d 596 (2005)**Error! Bookmark not defined.** However, "[t]he reasonable person standard does not mean that when a uniformed law enforcement officer, with holstered weapon and official vehicle, approaches and asks questions, he has made such a show of authority as to rise to the level of a Terry stop." Id.(citation omitted). Whether a person has been restrained by a police officer must be determined based upon the *interaction* between the person and the officer. Not only is the nature of the officer's subjective suspicion generally irrelevant to the question whether a seizure has occurred, under *Terry* there are sound reasons why it should be irrelevant to that question. See O'Neill, supra.

Not every encounter between a police officer and private individuals constitutes a seizure, however. United States v. Mendenhall, 446 U.S. 544, 554-55, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)**Error! Bookmark not defined.** Indeed, even Article I, section 7 permits "social contacts" between police and citizens. Young, 135 Wn.2d at 511(effective law enforcement requires not only passive police observation but also police interaction with citizens on the streets). This is because, "[p]olice officers must be

able to approach citizens and permissively inquire into whether they will answer questions as part of their 'community caretaking' function." State v. Nettles, 70 Wn.App. 706, 712, 855 P.2d 699 (1993). Thus, "a police officer who, as part of his community caretaking function, approaches a citizen and asks questions limited to eliciting that information necessary to perform that function has not 'seized' the citizen." State v. Gleason, 70 Wn.App. 13,16, 851 P.2d 731 (1993).

Furthermore, an officer's social contact with an individual in a public place with a request for identifying information, without more, is not a seizure or an investigative detention. Young, 135 Wn.2d at 511. This is true even when the officer subjectively suspects the possibility of criminal activity but does not have adequate suspicion justifying a Terry stop.<sup>1</sup> With respect to pedestrians, the Court has stated that a police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention. State Armenta, 134 Wn.2d at 11. *This same rule applies to individuals who are in parked vehicles in a public place. See Note*, 129

---

<sup>1</sup> Terry v. Ohio, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)(officer may briefly detain a person if the officer's suspicion is based upon specific, articulable facts).

Wn.App. at 289(occupants in vehicles parked in public places are like pedestrians for purposes of article I, section 7 seizure analysis). Indeed, "the distinction between a pedestrian and the occupant of a vehicle dissipates when a vehicle is parked in a public place." *Id.*, citing O'Neill, 148 Wn.2d at 579. See also Wayne R. LaFave, 4 *Search & Seizure*, § 9.3(a), at 96-98 (3d ed. 1996 & Supp. 2004)(compilation of cases from federal and state jurisdictions and concluding that "if an officer merely walks up to a person standing or sitting in a public place (or, indeed, who is seated in a vehicle located in a public place) and puts a question to him, this alone does not constitute a seizure")(footnotes omitted). See also, State v. Cerrillo, 122 Wn. App. 341, 93 P.3d 960 (2004)**Error! Bookmark not defined.** (men sleeping in parked truck were not seized when police officers woke the men up, asked to see the driver's identification, and then advised the driver not to move the vehicle until he sobered up); State v. Knox, 86 Wn. App. 831, 833, 939 P.2d 710 (1997), *overruled on other grounds by O'Neill, supra* (no seizure took place when an officer approached a vehicle parked on a ferry and asked the sleeping driver repeatedly to roll down the window); Bailey, \_\_\_ Wn.App. \_\_\_, 224 P.3d 852, 856 (2010)(no seizure found where officer asked pedestrian defendant whether he

had a minute to talk, where he was going, and whether he would provide identification).

Circumstances that can indicate a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Young, 135 Wn.2d at 512, quoting Mendenhall, 446 U.S. at 554. In sum, "the key inquiry is whether the officer either uses force or displays authority in a way that would cause a reasonable person to feel compelled to continue the contact." Bailey, supra, citing Rankin, 151 Wn.2d at 695. "Absent such circumstances, inoffensive contact between the police and a private citizen cannot, as a matter of law, amount to a seizure of that person." Mote, 129 Wn.App. at 283. During a "consensual" encounter, an officer seeks the voluntary cooperation of an individual by asking noncoercive questions. Rankin, 161 Wn.2d at 717.

In the present case, officers approached Palermo using a conversational tone of voice, they did not physically touch Palermo during the initial contact, nor did they approach with lights and siren activated. Thus, Palermo's argument that he was "seized" during

the officers' initial contact is not supported by the record or current law. Here, Officer Lowrey was on routine patrol in a neighborhood known for its high crime rate. RP 5. Officer Lowrey saw a parked vehicle on a public street with three persons inside who were huddled together. RP 5, 6.; CP 54,55. Upon seeing the parked vehicle, Officer Lowrey pulled in behind the parked vehicle--parking "a minimum of 10 feet" behind the vehicle. CP 55; RP 6 (emphasis added). Officer Lowrey approached the parked vehicle *without* a show of force and without activating emergency lights or siren. RP 6. Officer Lowrey then walked to the driver's side window of the parked vehicle just to ask the occupants what they were doing and "what was going on." RP 8,18; CP 55. Officer Lowrey saw that Mr. Palermo was sitting in the driver's seat of the vehicle. RP 55. Cory Aldrich was in the passenger seat, and an unidentified female was in the rear passenger seat. RP 55. When Officer Lowrey asked the occupants what they were doing, Mr. Palermo said they were not doing anything. RP 55. Officer Lowrey did not tell the occupants of the vehicle to "wait" or that they were not free to leave. RP 30. Officers did not display their weapons, or use a stern tone of voice or physically touch anyone inside the vehicle upon their initial contact. "In the absence of some such evidence,

otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." Harrington, 157 Wn.2d at 664 (citations omitted). Law enforcement does not "seize" a person by merely approaching that person and engaging him in conversation. Id.; Cerillo, supra. There was no seizure here during officers' initial contact with the occupants of the parked vehicle.

The facts here show that Officer Lowrey's initial contact with Palermo in order to ask what he was doing was not a seizure. And Palermo's claim that he could not leave because his vehicle was "blocked in" is a misrepresentation of the facts. The record shows that Officer Lowrey expressly stated that he parked at least ten feet behind Palermo's vehicle. RP 6. Thus, the trial court's finding that there was plenty of room for Palermo to leave the scene was correct. RP 79. In sum, the trial court did not err when it found that Palermo was not "seized" upon officers' initial contact, and Palermo's claims to the contrary are not persuasive.

***Probable Cause to Arrest Palermo for Cannabis Offense***

Although officers' initial social contact with Palermo was not a "seizure," officers nonetheless developed probable cause to arrest Palermo upon seeing the marijuana pipe containing burnt

marijuana residue lying in open view between Palermo's leg and the seat--at which time Palermo admitted that the marijuana pipe was his, and further admitted he had additional marijuana on his person. RP 11, 32,33,34.

Probable cause exists when there are facts or circumstances sufficient to establish a reasonable belief that a crime has been committed. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). It is true that mere possession of drug paraphernalia is not a crime. State v. McKenna, 91 Wn.App. 554, 563, 958 P.2d 1017 (1998); State v. Lowrimore, 67 WN.App. 949, 959, 841 PJ.2d 779 (1992). However, possession of drug paraphernalia in circumstances that suggests it was used to ingest a controlled substance is a misdemeanor. Neeley, 113 Wn.App. at 107. In general, an officer can only arrest a person for a misdemeanor occurring in his or her presence. RCW 10.31.100. Nonetheless, RCW 10.31.100(1) does permit an officer to arrest an individual who commits a misdemeanor outside his or her presence *if the crime involves the use or possession of cannabis*. Id; Neeley, 113 Wn.App. at 107; RCW 10.31.100(1).

For example, RCW 10.31.100(1) states, in pertinent part, .... [a] police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only

when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property **or involving the use or possession of cannabis**, or involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070 or 9A.52.080, **shall have the authority to arrest the person.**

Id. (all emphasis added); See also RCW 69.50.412, which gives a detailed definition of the various types of drug paraphernalia.

Subsection (b) of that statute lists a series of factors that may be considered in determining whether an object is drug paraphernalia:

(b) In determining whether an object is drug paraphernalia under this section, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

RCW 69.50.102(1)(b). In the present case, Palermo admitted the marijuana pipe was his. RP 11, 32-24. Furthermore,

*[p]ossession of drug residue in a pipe can appropriately be charged as possession of a controlled substance because there is no minimum amount of drug which must be possessed in order to sustain a conviction. State v. Williams, 62 Wn.App. 748, 751, 815 P.2d 825 (1991). To prove possession of drug paraphernalia, the State had to prove not only that [the defendant] possessed the pipe but also that*

he used it in a drug-related activity. RCW 69.50.412(1).

State v. George, 146 Wn.App. 906, 919, 193 P.3d 693 (2008)(emphasis added). Thus, marijuana residue inside a pipe can properly be charged as possession of marijuana, because there is *no minimum amount* that must be possessed. Id. See also State v. Williams, 62 Wn.App. 748, 815 P.2d (1991)(the existence of residue of controlled substances on an object will support an inference that the object is drug paraphernalia).

Additionally, under the "open view" doctrine, contraband that is viewed when an officer is standing at a lawful vantage point is not protected. State v. Neeley, 113 Wn.App. 100, 109, 53 P.3d 539 (2002). If an officer is lawfully present at a vantage point and detects something by using one or more of his senses, no search has occurred. Id.(quoting State v. Cardenas, 146 Wn.2d 400, 408, 47 P.3d 127 (2002)). The open view exception applies to contraband that an officer sees from outside the window of a vehicle. Neeley, 113 Wn.App. at 109(quoting State v. Lemus, 103 Wn.App. 94, 103, 11 P.3d 326 (2000)). It also includes items seen by an officer on the floor in the backseat of a vehicle. State v. Brown, 439 N.W.2d 792 (1989); O'Neill, 148 Wn.2d at 582.

"Although the open view observation does not constitute a search,

the information gained from the observation may provide probably cause for . . . a warrantless arrest." Neeley, supra, citing State v. Bobic, 140 Wn.2d 250, 254, 255, 996 P.2d 610 (2000).

In the present case, officers saw from outside the vehicle a pipe containing burnt marijuana residue in open view inside the vehicle. RP 10, 32,33. The pipe was lying under Palermo's leg. RP10,11, 32. The pipe was in open view. RP 10,11. Palermo admitted the pipe was his and further admitted he had additional marijuana on his person. RP 11. Officers thus developed probable cause to believe that Palermo committed the crime of unlawful use of drug paraphernalia *and* possession of marijuana. RCW 69.50.102(1)(b).

Furthermore, while it is true that searches of a vehicle incident to arrest have been severely restricted after the relatively-recent United States Supreme Court's decision in Arizona v. Gant--and its Washington progeny--such a search is still allowed under some circumstances. One such circumstance is where facts show that evidence of the "crime of arrest" might be found in the vehicle. As the Gant Court stated, "we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the

crime of arrest might be found in the vehicle.” Arizona v. Gant 129 S.Ct. at 1719(citations omitted); State v. Valdez, 157 Wn.2d 761, \_\_\_ P.3d \_\_\_(2009). An example of application of this exception under Washington law is seen in State v. Snapp, 153 Wn.App. 485, 493-497, 219 P.3d 971 (2009). In Snapp, this Court upheld a search of the vehicle under Gant because in Snapp the officer "searched Snapp's vehicle for evidence related to the crime for which he arrested [the defendant]." Snapp at 497. Similar to the instant case, Snapp also discussed unlawful use of drug paraphernalia. Id.

The "crime of arrest" exception discussed in Snapp also applies here. After arresting passenger Cory Aldrich, officers saw in open view a pipe with burnt marijuana residue lying on the seat under Palermo's leg. RP 11. Palermo admitted the marijuana pipe was his. RP 11,32,33. Palermo further admitted he had additional marijuana on his person. Id. Officers had also earlier seen the passenger digging around in a backpack, and there was an additional unarrested passenger in the back seat that officers had to contend with. RP 25,26,27. Thus, arresting Palermo for use of paraphernalia/possession of marijuana put the facts of this case squarely under the ruling in Snapp, and the exception in Gant, so

that officers here could search the vehicle for evidence related to the crime for which Palermo was arrested. Gant, supra; Snapp, supra. Accordingly, even though Gant and its progeny apply here, the facts of this case fall under the "crime of arrest" vehicle search exception. Gant, supra; Valdez, supra; Snapp, supra. The trial court thus did not err when it denied Palermo's motions to suppress, and his conviction should be affirmed.

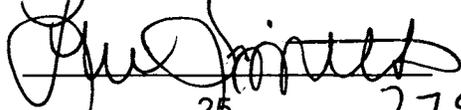
#### CONCLUSION

Officers' initial contact with Palermo while he sat in a parked vehicle on a public street was a social contact--not a seizure. However, when officers saw a marijuana pipe containing burnt marijuana residue lying under Palermo's leg in open view, and Palermo admitted the pipe was his, officers developed probable cause to arrest Palermo for unlawful use of paraphernalia and possession of marijuana. These crimes in turn allowed officers to search the vehicle pursuant to Gant's "crime of arrest" exception. Accordingly, the trial court did not err when it denied Palermo's motions to suppress, and his conviction should be affirmed.

RESPECTFULLY SUBMITTED THIS 22nd day of March, 2010.

MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTING ATTORNEY

by:

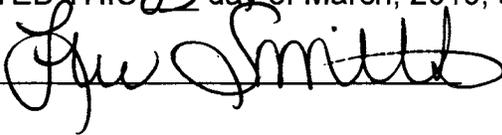
  
25 27961

**DECLARATION OF SERVICE BY MAIL**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on a copy of this response brief was served upon the Appellant by placing said document in the United States mail, postage prepaid, addressed to Appellant's attorney as follows:

Peter B. Tiller  
P.O. Box 58  
Centralia, WA 98531

DATED THIS 23 day of March, 2010, at Chehalis, WA.

  
\_\_\_\_\_

FILED  
COURT OF APPEALS  
DIVISION III  
10 MAR 24 PM 12:27  
STATE OF WASHINGTON  
BY  DEPUTY