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COURT OF APPEALS

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40640-3-II

STATE OF WASHINGTON

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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

State of Washington
Respondent

v.

JONATHAN P. JONES
Appellant

40640-3-II

On Appeal from the Superior Court of Clallam County

Cause No. 09-1-00197-8

The Honorable Ken Williams

BRIEF OF APPELLANT

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B. STATEMENT OF THE CASE

While driving in the City of Port Angeles at 8:30 in the morning of May 19, 2009, Jonathan Jones had the misfortune to encounter police Corporal Jesse Winfield. 10/8 RP 5-6.¹ Winfield had recently been demoted back to patrol duty after ten years as a detective. 10/8 RP 10.

Jones and the car in front of him stopped at the “T” intersection of C Street and Lauridsen Blvd. 10/8 RP 8, 24. After stopping, Jones signaled a left turn, and when it was safe to do so, he turned left. 10/8 RP 8, 25. Winfield regarded this as a violation of the 100-foot minimum turn signal statute. 10/RP 8. Winfield did not signal Jones to stop, but instead followed him eastbound on Lauridsen.² Winfield noticed tinting on the windows of Jones’s car. 10/8 RP 8-9. Winfield could not say how dark the tinting was. He carried a measuring device in his car but did not use it in this case, opting instead just to eyeball the tint. 10/8 RP 10, 40. Winfield regarded himself as something of an expert on window tint violations. He had measured window tinting more than 100 times during his prior stint as a patrol officer in the 1990’s. 10/8 RP 9-10. He

¹ The proceedings are reported in three volumes containing individual, separately paginated sections for each hearing date. Cites are designated “month/day RP page#.”

² Winfield could not say at what point he himself signaled before turning. 10/8 RP 26, 31.

admitted, however, that it would not be the first time he had been mistaken when eyeballing window tints. 10/8 RP 10. Substituting his own subjective standard for the tint-measuring device, Winfield divined that Jones's tinting was "clearly illegal" because Winfield could not discern the race or gender of the vehicle's occupants. 10/8 RP 11. (The State did not suggest a legitimate reason why the race and gender of passing motorists might be of interest to Winfield. Not profiling, surely.)

Winfield thought the windshield and rear window were tinted, but the exhibit photographs show that only the front side windows were tinted. 10/8 RP 27-28; Ex. 2 & 3. Winfield's own report confirmed that only the driver's and passenger side windows were tinted. 10/8RP 28-29.

Jones turned off of Lauridsen after signaling a right turn south onto Newell Road. His signal distance was again less than 100 feet. 10/8 RP 9. On Newell, Jones turned right into the parking lot of an apartment complex that was less than 100 feet from the corner of Lauridsen and Newell. 10/8 RP 33. Winfield did not see Jones enter the parking lot, but saw him pulling up and parking in front of apartment A-2. 10/8 RP 12, 32, 34. The sole passenger, a Ms. Drain, got out of the car and went into the apartment. 10/8 RP 12, 17, 34.

Winfield did not activate his emergency equipment or try to stop Jones, even though he thought the turn onto Lauridsen, the window tinting

and the turn onto Newell all were infractions. 10/8 RP 7, 11-12, 30-31. Instead, Winfield pulled in right behind Jones's car, blocking it so that it could not back out. When Jones got out of the car, Winfield called out that he wanted to talk about the window tint. Jones said the car was not his and kept walking. 10/8 RP 34-35. Winfield repeated that he wanted Jones to stop and talk. Jones stopped. 10/8 RP 35.

Winfield described Jones's demeanor as "not nervous but not relaxed." 10/8 RP 14. He kept looking around and trying to edge toward the apartment and could not or would not comply with Winfield's repeated demand to keep his hands out of his pockets. 10/8 RP 14, 16. This behavior started to concern Winfield. "There was [sic] many indicators of somebody who may be going through fight or flight. I was not sure what was going on there. I had many factors causing me concern with the way he was behaving." 10/8 RP 15. Asked to explain "fight or flight," Winfield thought it was: "Decision — when you are threatened by circumstances, decision what you are going to do, whether you are going to fight or run." 10/8 RP 15.³ Winfield believed his training and

³ In reality, "fight or flight" does not refer to an indecisive state of mind. It describes a complex of physiological responses following a sudden rush of adrenaline that primes an organism to defend itself in a panic situation. First described by Cannon, Walter, *BODILY CHANGES IN PAIN, HUNGER, FEAR, AND RAGE*. New York: Appleton (1929). http://en.wikipedia.org/wiki/Fight-or-flight_response#cite_note-2.

experience enabled him to discern when somebody was thinking about not complying. If they were nervous, that meant they most likely were wanted, had a suspended license, had drugs in their pocket or “something going on that you don’t know about. [Jones’s] indicators were extremely consistent with people I have dealt with before who are going to run or fight when I take them into custody.” 10/8 RP 15-16. Winfield asked Jones his name and requested his driver’s license. 10/8 RP 35. His suspicions were sharpened by Jones’s “very generic name.” 10/8 RP 16. Winfield regarded his interaction with Jones as a traffic stop. 10/8 RP 13.

Jones could not produce a license, so Winfield called the name into dispatch and learned that Jones had a suspended license. 10/8 RP 35-36. He told Jones he was under arrest for DWLS. He handcuffed Jones and searched him incident to the arrest before putting him in the patrol car. 10/8 RP 16-17. Even after handcuffing Jones and during the search, Winfield had yet to decide “what his custody status would be, whether he was going to jail, whether he was going to be cited, those things[.]” 10/8 RP 18-19. During the search, Winfield found what he called a ‘snooze container’ in Jones’s pocket and another container, both of which contained of methamphetamine. 10/8 RP 18.

At the CrR 3.6 hearing, Winfield testified that Jones’s turn signals violated RCW 46.61.305. He said that whether or not he enforced the

100-foot requirement was entirely subjective. Winfield believed he was able to discern when a driver was a tourist and thus to be excused. 10/8 RP 43-44. In the last two years, Winfield had filed maybe two window-tint infractions, and those were to motorists who failed to comply with a previously-issued fix-it ticket. 10/8 RP 46, 48. Likewise, Winfield had issued zero 100-foot signal infractions in the past two years. He did not pull Jones over. 10/8 RP 49. He did not issue a citation or give Jones notice to appear in court. He did not issue a fixit ticket. 10/8 RP 45-46.

Jones challenged the legality of the search and seizure and moved to suppress the methamphetamine. A CrR 3.6 hearing was held on October 8, 2009. On October 22, the court entered written findings and conclusions that the stop was lawful and admitted the evidence. CP 50-54.

Jones was convicted by jury of possession of methamphetamine. CP 24. He appeals. CP 8.

C. **ARGUMENT**

1. THE RECORD DOES NOT SUPPORT ALL THE MATERIAL CrR 3.6 FINDINGS, AND THE FINDINGS DO NOT SUPPORT ALL THE CONCLUSIONS.

This Court reviews suppression findings for substantial evidence in the record. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008);

State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). A trial court's erroneous determination of facts, unsupported by substantial evidence in the record, are not binding on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313, 316 (1994). The relevant record in which the evidence must be found is the record of the CrR 3.6 hearing. This is clear from the plain language of CrR 3.6, which requires the court to enter written findings "at the conclusion of the hearing."⁴ The findings must inform the defendant as to the reasons for the suppression decision at the time it is made. *State v. Agee*, 89 Wn.2d 416, 421, 573 P.2d 355 (1977), citing *Roberts v. Ross*, 344 F.2d 747, 751 (3^d Cir. 1965). Hearing-based findings are also necessary to permit this Court to engage in meaningful review. *Agee*, 80 Wn.2d at 421. The findings must in turn support the conclusions of law, which are reviewed de novo. *Id.*; *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Jones challenges the following findings:

- *The suspect told the officer his name was "John Jones."* Finding 7, CP 51-52. The record of the CrR 3.6 hearing does not support this. Winfield testified merely that Jones gave a "very generic

⁴ Suppression Hearings-Duty of Court. At the conclusion of a hearing, upon a motion to suppress physical, oral or identification evidence the trial court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) the court's findings as to the disputed facts; and (4) the court's reason for the admissibility or inadmissibility of the evidence sought to be suppressed. CrR 3.6.

name.” 10/8 RP 17. There is no evidence that Jones did not give his true name, which is Jonathan Jones.

- *Corporal Winfield asked the defendant... for his middle name and date of birth.* Finding 8, CP 52. This is pure fabrication. The record of the CrR 3.6 hearing contains no evidence supporting this.
- *After Winfield removed a tin box from Jones’s pocket, Jones “said, ‘It’s full of drugs.’”* Finding 8, CP 52. The record of the CrR 3.6 hearing contains no hint of this. The State did not offer this evidence until months later at a CrR 3.5 hearing preceding the trial in February, 2010. 2/23 RP 17.
- *Winfield discovered a “large bag” filled with methamphetamine.* Finding 8, CP 52. Winfield did not say the bag was large. 10/8 RP 19.

Jones also challenges the following conclusions of law:

- *The window tint constituted a violation of the traffic laws.*
Narrative Conclusions of Law, CP 53. The record and the court’s findings do not establish any such violation. Winfield testified merely to his subjective guesses regarding the tinting. Accordingly, the court found only that the tinting “probably” was unlawful. Finding (2), CP 51. The State did not cite to the tinting

statute or to any specific provision of the statute, under several of which Jones's window tinting could very well have been lawful. The State's failure to demonstrate any traffic violation is discussed at Issue 2, page 11.

- *“Had the officer been using the stop for pretextual purposes, he probably would have used his lights to investigate.”* 10/8 RP 49-50; CP 53. This is a conclusion of fact, not of law. Moreover, it is entirely without support in the record and is purely speculative, even argumentative. The State's failure to meet Jones's pretext challenge is discussed at Issue 3, page 16.

Based on the evidence actually presented at the CrR 3.6 hearing, Winfield seized Jones unlawfully, and the trial court erred in denying suppression of the resulting evidence. Reversal of the conviction is required.

2. JONES WAS UNLAWFULLY SEIZED.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fourteenth Amendment applies the Fourth Amendment to the states. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961). Wash. Const. art. 1, § 7 provides: “No

person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision provides greater protection than the Fourth Amendment. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

Warrantless seizures and searches are per se unreasonable and violate the Fourth Amendment and Const. art. 1, § 7. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Our courts ‘jealously’ guard the few ‘carefully drawn exceptions’ to the warrant requirement.” *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The State bears the heavy burden to show a search falls within one of these recognized exceptions. *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002). The State must establish the exception by clear and convincing evidence. *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990). The State did not do that here.

An art. 1, § 7 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 to remain. *Rankin*, 151 Wn.2d at 695, citing *State v. O’Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). The officer’s subjective suspicions and intent are irrelevant unless they are reflected in his or her actions. *O’Neill*, 148 Wn.2d at 574-77. If a seizure is unlawful, all subsequently acquired

evidence is fruit of the poisonous tree and must be suppressed. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

Corporal Winfield first seized Jones when he pulled up behind his parked car and blocked his egress. *State v. Stroud*, 30 Wn. App. 392, 396, 634 P.2d 316 (1981). In *State v. Bennett*, 62 Wn. App. 702, 709, 814 P.2d 1171 (1991), for example, suspects were seized when a police car blocked their egress from a parking lot. After Jones got out of the car, Winfield seized him again by ordering him to stop and talk. *Gatewood*, 163 Wn.2d at 540.

Both these seizures violated the Fourth and Fourteenth Amendments and Const. art 1, § 7. It is not clear what warrant exception, if any, Corporal Winfield was invoking here.

This Was Not a Terry Stop: The police may conduct a brief stop to detain an individual for investigation without a warrant upon reasonable suspicion the person is engaged or about to be engaged in criminal conduct or a traffic violation. *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Winfield had no articulable suspicion that Jones was engaged in criminal conduct. Winfield testified that he thought he had seen traffic infractions, but he did not conduct a traffic stop.

This Was Not a Traffic Stop: The police may stop motorists to enforce traffic laws. RCW 46.61.021(1). When a motorist commits a misdemeanor violation, an officer may pull him over and serve him with a traffic citation and notice to appear in court. But he may not detain him for longer than is reasonably necessary “to issue and serve a citation and notice.” RCW 46.64.015(1).

Here, Winfield testified that he observed traffic infractions but did not invoke the alleged infractions when he detained Jones. Had Winfield been enforcing the traffic laws, he would have issued a citation and notice for the turn-signal violations. Arguably, Winfield had articulable grounds to detain Jones to measure the suspect window tinting and issue a citation or warning for that. But Winfield did not do this.

Jones did not commit any infraction: The State argued that Winfield’s inability to determine the race and gender of the occupants of Jones’s car gave rise to probable cause of a window tint violation. This, together with the signaling infraction, supposedly amounted to lawful grounds for Winfield to detain Jones to “talk about the infractions.” The facts and the law defeat this argument.

(i) Jones did not violate RCW 46.61.305:

When signals required — Improper use prohibited. (1) No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided. (2) A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning. (3) No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

RCW 46.61.305.

The prosecutor conceded that the first turn at the T-intersection may have been lawful. 10/8 RP 52. But she insisted that the short signal at the turn from Lauridsen onto Newell was an infraction. *Id.*

The purposes of the 100-foot signal are to warn approaching traffic and to alert following drivers not to try to pass. *See, State v. Brown*, 119 Wn. App. 473, 475-76, 81 P.3d 916 (2003), citing cases. Neither of these situations exists at a T-intersection. Previous decisions addressing RCW 46.61.305 have been collision cases in which a driver caused a collision by trying to make an unsignaled left turn into a driveway in the middle of a block. *Brown*, 119 Wn. App. at 476. Here, Jones turned after stopping at a T-intersection, where following drivers were also stopped and were on

notice of his inevitable stop and turn, and where there was no on-coming traffic.

Jones asks the Court to take judicial notice that the police do not enforce the 100-foot-signal statute in similar situations — when drivers slow down or stop when approaching a red traffic light, for example. It is presumed that drivers following can see the red light. Likewise, at a T-intersection, everyone behind knows the driver ahead has no choice but to stop and turn one way or the other. Moreover, unless the approach is exceptionally narrow, affected drivers can tell from the turner's position in the roadway which way he will go. High and center for left; close to the right edge for right. Defense counsel argued this below. 10/8 RP 54.

(ii) Jones did not violate the tint statute:

The pertinent provisions of this statute are:

No film sunscreening or coloring material that reduces light transmittance to any degree may be applied to the surface of the safety glazing material in a motor vehicle unless it meets the following standards for such material:

(a) The maximum level of net film sunscreening to be applied to any window, except the windshield, shall have a total reflectance of thirty-five percent or less, and a light transmission of twenty-four percent or more, where the vehicle is equipped with outside rearview mirrors on both the right and left. Installation of more than a single sheet of film sunscreening material to any window is prohibited.

(b) **[A]ny vehicle identified by the manufacturer as a truck, ... may have net film sunscreening applied on any**

window to the rear of the driver that has less than twenty-four percent light transmittance, if the light reflectance is thirty-five percent or less and the vehicle is equipped with outside rearview mirrors on both the right and left.

(d) A greater degree of light reduction is permitted on all windows and the top six inches of windshields of a vehicle operated by or carrying as a passenger a person who possesses a written verification from a licensed physician that the operator or **passenger must be protected from exposure to sunlight for physical or medical reasons.**

(f) When film sunscreening material is applied to any window except the windshield, outside mirrors on both the left and right sides shall be located so as to reflect to the driver a view of the roadway, through each mirror, a distance of at least two hundred feet to the rear of the vehicle.

RCW 46.37.430(5) (emphasis added.)

While RCW 46.37.430(5) prohibits certain types of suncreening material, it does not prohibit “the use of shaded or heat-absorbing safety glazing material in which the shading or heat-absorbing characteristics have been applied at the time of manufacture of the safety glazing material and which meet federal standards for such safety glazing materials. RCW 46.37.430(6). Subsection (5) also does not prohibit:

The use of shaded or heat-absorbing safety glazing material in which the shading or heat-absorbing characteristics have been applied at the time of manufacture of the safety glazing material and which meet federal standards for such safety glazing materials.

RCW 46.37.430(6)(a) (emphasis added.)

The State offered no evidence that Jones's tinting was not within lawful limits. The State did not show what the transmission and reflectivity percentages of Jones's tinting were and did not show either that the vehicle was not a truck equipped with tinting by the manufacturer, or that the tinting was not lawful by reason of medical necessity. The seizure of Jones cannot be justified as a legitimate traffic stop on this record.

In summary, this was neither a *Terry* nor a traffic stop. Winfield did not pull Jones over, but simply followed him onto private property and blocked his egress. Winfield did not serve Jones with a citation and notice to appear. He did not say he was stopping Jones to enforce any traffic regulation. He did not investigate the window tint. He did not issue a warning. He just said he wanted to talk to Jones about his window tinting.

This Was Not a Social Contact: An officer may simply invite a citizen to stop and chat. However, if the officer restrains the individual's freedom to walk away, the person is seized. *State v. Nettles*, 70 Wn. App. 706, 709-10, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010 (1994).

Here, for all Jones could tell from Winfield's conduct, Winfield merely wanted to discuss a personal interest in his window tinting. But Jones clearly indicated he was not interested in engaging with Winfield

socially. He responded curtly that the car was not his and tried to move away.

Accordingly, regardless of what Corporal Winfield thought he was doing, he unlawfully seized Jones and all evidence obtained during the seizure must be suppressed.

3. THE STOP WAS PRETEXTUAL.

The record strongly suggests that Winfield stopped Jones on a hunch that an investigation and search might turn up evidence of some crime or other.

When a police officer observes someone engaged in unlawful behavior, probable cause exists to stop the individual. *State v. Larson*, 93 Wn.2d 638, 641, 611 P.2d 771 (1980). But when the officer stops the individual not to enforce the law, but to conduct an unrelated criminal investigation, the stop is a pretext. *Ladson*, 138 Wn.2d at 349. Pretextual stops violate Const. art. 1, § 7, “because they are seizures without ‘authority of law.’” When determining whether a given stop is pretextual, the court considers the totality of the circumstances. *Id.* at 358-59.

Here, something about Jones or Jones’s car piqued Corporal Winfield’s interest, and he followed for a few blocks waiting for Jones to commit an infraction. But Jones turned into a private parking lot having

committed nothing more than a couple of short turn signals and operating a vehicle with window tints that Winfield thought best not to subject to objective measurement with the device he carried in his patrol car.

Winfield did not conduct a traffic stop by informing Jones he was detaining him to issue a citation (or a warning) and notice to appear in court (or fix the problem.) This suggests that Winfield knew the only remotely articulable grounds for a traffic stop would not hold water. Instead of either addressing the supposed infractions or leaving Jones alone, Winfield began harassing Jones and manufactured an entirely subjective reason to call in his identification and see what dispatch might turn up.

The prosecutor argued that the stop could not have been pretextual because Winfield could not see the occupants of the car he was following. 10/8 RP 52. This makes no sense.

As defense counsel responded,⁵ the stop clearly was pretextual because Winfield arbitrarily enforced the absolute letter of the law and ignored the spirit of the law. The defense argued that Jones signaled and turned safely at both intersections, and that Winfield's report and testimony were inconsistent regarding the window tinting. The

⁵ This was the defense's CrR 3.6 motion. The record suggests no reason why the State went first.

photographic evidence (Ex. 2, 3) established that Winfield could see perfectly well through the rear window of the car. Jones argued that Winfield was looking for an excuse to pull him over in order to investigate whether he was wanted for anything. Winfield was “clearly on a fishing expedition.” 10/8 RP 54.

On rebuttal, the prosecutor repeated that pretext only applies if the officer is familiar with the defendant or the vehicle. 10/8 RP at 56. The court asked the prosecutor: Would your argument be different if Corporal Winfield had testified, ‘in my experience people who darken their windows have something to hide?’ The State acknowledged: “Possibly, but that was not the testimony.” 10/8 RP 56. This may have not been what Corporal Winfield said, but it is what his testimony clearly conveyed. Moreover, Winfield did not know, even as he handcuffed and searched Jones, what his “custody status” was going to be. 10/8 RP 18-19. In other words, Winfield was anticipating that Jones’s pockets would turn up defensible grounds for this unwarranted intrusion into Jones’s privacy and tranquility.

The prosecutor offered no authority for the argument that pretext cannot occur unless the officer is previously acquainted with the suspect. 10/8 RP 52. The court correctly ignored this rationale. CP 3-5. Whether

or not an officer has previously encountered the suspect has no logical bearing on whether or not the stop is pretextual.

The court did find evidence against pretext in Winfield's decision not to activate his emergency lights and pull Jones over. 10/8 RP 49-50; CP 53. Again, the perceived logical connection is a mystery. Departing from the standard protocol for conducting a stop is at least equally consistent with the officer's covering his tracks and creating grounds to deny this was a seizure.

Suppression is the Proper Remedy: If a traffic stop is unlawful, evidence obtained in a subsequent search is fruit of the poisonous tree and must be suppressed. *Brown*, 119 Wn. App. at 475-76, citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Evidence that is seized without authority of law is not admissible in court. *State v. Day*, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). In Washington, suppression is not meant to punish the police but to preserve our courts from being tarnished by becoming "knowingly complicit in an unconstitutional exercise of power." *Id.*

Suppression is the appropriate remedy here.

4. JONES'S Demeanor DID NOT MAKE THE SEIZURE LAWFUL.

Winfield testified that people who appear nervous in the presence of the police should be investigated for warrants, suspended license, possession of drugs “something going on that you don’t know about and that Jones’s “indicators were extremely consistent with people I have dealt with before who are going to run or fight when I take them into custody.” 15-16.

This is not the law in Washington. Nervousness is not a justification for an art 1, § 7 privacy violation. *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008); *State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995). The record must establish some showing that the stop was not “arbitrary or harassing.” *Setterstrom*, 163 Wn.2d at 626.

The record here suggests no legitimate reason for detaining or investigating Jones. Winfield’s conduct was the epitome of ‘arbitrary and harassing.’

5. JONES WAS UNLAWFULLY SEARCHED.

Winfield searched Jones incident to his arrest for driving with a suspended license. This is a recognized exception to the warrant requirement. *State v. O’Neill*, 148 Wn.2d 564, 585, 62 P.3d 489 (2003). Under art. 1, § 7, however, a lawful arrest is a prerequisite to a lawful

search. *Id.*; *State v. Radka*, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004); *State v. Parker*, 139 Wn.2d 486, 497, 987 P.2d 73 (1999). If a police officer unconstitutionally seizes an individual before his arrest, the exclusionary rule requires suppression of the evidence obtained from the illegality. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

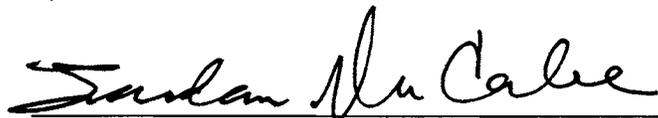
As discussed above, Jones was unlawfully seized from the outset of Winfield's interaction with him. Moreover, Winfield testified that he did not know, even as he handcuffed and searched Jones, what his "custody status" was going to be. 10/8 RP 18-19. In other words, Winfield was anticipating that Jones's pockets would turn up defensible grounds for this unwarranted intrusion into Jones's privacy and tranquility.

Therefore, the search was not incident to a lawful arrest and nothing Winfield found in Jones's pockets is admissible.

C. CONCLUSION

For these reasons, the Court should reverse Mr. Jones's conviction and vacate the judgment and sentence.

Respectfully submitted this 22nd day of July, 2010.



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