

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY C. CUNNINGHAM  
COURT

No. 40996-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

DAVID MILES MARTIN,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 09-1-01856-3  
The Honorable Ronald Culpepper, Judge

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OPENING BRIEF OF APPELLANT

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## **TABLE OF CONTENTS**

<b>I.</b>	<b>ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>II.</b>	<b>ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>III.</b>	<b>STATEMENT OF THE CASE.....</b>	<b>2</b>
	<b>A. PROCEDURAL HISTORY .....</b>	<b>2</b>
	<b>B. SUBSTANTIVE FACTS.....</b>	<b>3</b>
<b>IV.</b>	<b>ARGUMENT &amp; AUTHORITIES .....</b>	<b>5</b>
<b>V.</b>	<b>CONCLUSION .....</b>	<b>9</b>

## TABLE OF AUTHORITIES

### CASES

<u>State v. Acrey</u> , 148 Wn.2d 738, 64 P.3d 594 (2003) .....	5
<u>State v. Gavin</u> , 166 Wn.2d 242, 207 P.3d 1266 (2009) .....	5
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999) .....	9
<u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003) .....	8

### OTHER AUTHORITIES

Washington Constitution article I, section 7 .....	8
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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied Appellant's CrR 3.6 motion to suppress.
2. The trial court erred when it concluded that the police officers "manifested" an intent to arrest Appellant when they first contacted and detained Appellant.
3. The trial court erred when it concluded that Appellant was "arrested" when he was first contacted and detained by police officers, and that a subsequent search of Appellant's bag was therefore a valid search incident to arrest.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the trial court err when it found that the police officers "manifested" an intent to arrest Appellant where the officers testified that: (1) they drew their weapons because they were concerned that Appellant was armed; (2) they escorted Appellant into a nearby laundry room because it was well-lit and out of public view; and (3) they took Appellant into custody and placed him under arrest *after* they searched Appellant's bag? (Assignments of Error 1 & 2)
2. Did the trial court err when it found that the search of Appellant's bag was incident to arrest where the officers

specifically testified that they took Appellant into custody and placed him under arrest *after* they searched his bag?  
(Assignments of Error 1 & 3)

### III. STATEMENT OF THE CASE

#### A. PROCEDURAL HISTORY

The State charged David Miles Martin by Amended Information with: (1) unlawful possession of a controlled substance (methamphetamine) with intent to deliver, while armed with a firearm and within 1000 feet of a school (RCW 69.50.401, RCW 9.94A.510, .530, RCW 69.50.435); (2) unlawful possession of a firearm (RCW 9.41.101, .040); (3) unlawful possession of a controlled substance (forty grams or less of marijuana) (RCW 69.50.101, .4014); and (4) three counts of bail jumping (RCW 9A.76.170). (CP 53-56)

Martin moved to suppress physical evidence discovered during the search of his bag and car. (CP 27-36) Following a suppression hearing, the trial court found that the searches were proper, and denied Martin's motion. (HRP 100-06; CP 111-17)<sup>1</sup>

Martin submitted to a bench trial on stipulated facts. (HRP

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<sup>1</sup> The report of proceedings from the hearing and stipulated trial on May 26 and 27, 2010, will be referred to as "HRP." The report of proceedings from the sentencing hearing on July 2, 2010, will be referred to as "SRP."

107, 108-09; CP 44-51) The trial court found Martin guilty as charged.<sup>2</sup> (CP 121; HRP 122-23) The court imposed a standard range sentence totaling 134 months of confinement. (CP 85, 87-88; SRP 27) This appeal timely follows. (CP 110)

B. SUBSTANTIVE FACTS

Puyallup Police Officer Walter Anderson worked with confidential informant Alfredo Esparza for about 10 years on over 50 drug-related cases. (HRP 11, 17-18) On the night of April 2, 2009, Esparza called Officer Anderson and told him that a man named David Martin had methamphetamine, and that he could arrange a drug buy. (HRP 11-12, 12-13) Officer Anderson, Puyallup Police Detective Steven Pigman, and several other officers, went to Esparza's apartment to observe the transaction. (HRP 13, 20, 40)

Officer Anderson asked Esparza to call Martin, and then turned on the speaker so that the officers could listen in on the call. (HRP 14) Officer Anderson heard a man identify himself as David Martin, and heard the man say that was planning to purchase methamphetamine, and could later sell some to Esparza. (HRP

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<sup>2</sup> The court also found that Martin committed the crime of unlawful possession with intent to deliver while within 1000 feet of school grounds, but that he was not armed with a firearm at the time. (CP 118, 121; RP HRP 136-37)

114) After further discussion about price and quantity, Martin said that he was just a few blocks from Esparza's apartment, and he would bring Esparza the methamphetamine he currently had. (HRP 15-16)

Esparza gave the officers a description of Martin and his car, and told the officers that Martin was always armed with a pistol. (HRP 17, 19, 41) A short time later, the officers saw a car matching the description arrive and park in the alley behind Esparza's apartment building. (HRP 20-21, 42-43) Martin exited the car, retrieved something from the trunk, and approached the back door of Esparza's apartment. (HRP 20-21, 45)

When Martin reached the porch, Officer Anderson and Detective Pigman drew their weapons and opened the door. (HRP 21, 45) Martin immediately reached down and dropped what appeared to be a maroon camera bag onto the ground. (HRP 21-22, 46, 48) The officers conducted a weapons pat-down and then escorted Martin into a nearby laundry room. (HRP 22, 47) Detective Pigman retrieved the maroon bag and carried it into the laundry room. (HRP 47, 48, 63, 66)

Detective Pigman testified that he did not want to simply feel the bag because it might contain a weapon or syringe, and he did

not want to risk injury. (HRP 49) So Detective Pigman opened the bag, and found a magazine for a semi-automatic pistol, a digital scale, a bag of crystal methamphetamine, a bag of marijuana, empty plastic bags, and a silver spoon. (HRP 50) Detective Pigman then placed Martin under arrest and read him his Miranda warnings. (HRP 53)

Detective Pigman also asked for and obtained Martin's consent to search his car. (HRP 57-58) During the search, the officers found more drug-related paraphernalia, more ammunition, more marijuana, and a handgun. (HRP 59-60) Martin admitted that the drugs and gun were his, and admitted that he was planning to purchase and sell methamphetamine. (HRP 60-62)

#### **IV. ARGUMENT & AUTHORITIES**

A trial court's denial of a motion to suppress is reviewed to determine whether substantial evidence supports the factual findings and, if so, whether the findings support the conclusions of law. State v. Gavin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Whether trial court's findings support its conclusions of law is reviewed de novo. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

In this case, the trial court entered the following relevant

findings of fact:

14. The defendant was physically restrained and physically escorted into the residence where he remained in a laundry room with the two officers. The officers were concerned that if they remained outside, their anonymity and Esparza's status as an informant would be compromised.
15. The officers searched the defendant's person for weapons and found nothing.
16. Detective Pigman brought the maroon pouch into the laundry room and opened it because he reasonably believed it might contain a weapon. . . .
17. At this point, Detective Pigman handcuffed the defendant and formally advised him that he was under arrest.

(CP 113-14) Based on these findings, the court made the following

relevant conclusions of law:

1. The defendant was "arrested" for purposes of a search incident to arrest after the officers detained him at gunpoint and physically escorted him into the laundry room. The officers manifested an intent to take the defendant into custody and actually did so even though he was not told he was under arrest. No objectively reasonable person would have felt free to terminate the encounter and leave the officers' custody.
2. The officers had probable cause to arrest the defendant based on the phone call with Esparza and his arrival at Esparza's house. . . .

(CP 116; A complete copy of the court's written Findings of Fact and Conclusions of Law is attached in the Appendix.) The court concluded that the search of Martin's bag was a lawful search incident to arrest because Martin was "arrested" before the search,

even though the officers did not officially or verbally place Martin under arrest until after the search. (HRP 103-04) Neither the testimony of the officers nor the court's factual findings support this legal conclusion.

The officers did not "manifest[] an intent to take the defendant into custody[,] and they did not "physically restrain[]" and "physically escort[]" Martin "at gunpoint" because they were "actually" arresting him. (CP 113, 116) The officers were motivated by other factors. The officers drew their weapons out of a concern for their safety because Esparza told them Martin was always armed. (HRP 62-63, 69) The officers "wanted to secure" Martin in case he was armed. (HRP 33) The officers then escorted Martin into the laundry room because there was better light and because they wanted to avoid being seen, which might compromise Esparza's position as a confidential informant. (HRP 47; CP 113) The officers re-holstered their guns after the pat-down search revealed that Martin was not armed. (HRP 69) And Detective Pigman testified that he "placed Mr. Martin in custody" and under arrest *after* he searched the bag. (HRP 53, 64)

The testimony clearly establishes that the officers did not detain and escort Martin at gunpoint because they were placing him

under arrest. Their intent was to ensure that he was not armed, and then conduct a further investigation for evidence of possession or delivery of a controlled substance. Accordingly, the trial court's conclusion that Martin was "arrested" after the officers first detained him is not supported by the evidence.

Under article I, section 7 of the Washington Constitution, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003). "[T]he state constitution requires an actual custodial arrest before a search occurs. Otherwise, the search is in fact conducted without an arrest, and thus without authority of law existing at the time of the search." O'Neill, 148 Wn.2d at 585.

And probable cause for a custodial arrest is not enough. "There must be an actual custodial arrest to provide the 'authority' of law justifying a warrantless search incident to arrest under article I, section 7." O'Neill, 148 Wn.2d at 585.

Accordingly, the trial court's conclusion that Martin was "'arrested' for purposes of a search incident to arrest[,]" and that the search was therefore valid, is incorrect. (CP 116; HRP 103-04) Although the officers may have had probable cause to arrest Martin when they first contacted him outside Esparza's apartment, the

officers did not actually arrest Martin until after they searched his bag and found inside physical evidence indicating possession and intent to deliver methamphetamine.

The search of the bag was conducted without authority of law because a valid custodial arrest did not occur prior to the search of the bag. When an unconstitutional search occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). Therefore, all evidence obtained as a result of the search of Martin's bag and car, and Martin's custodial statements, should have been suppressed.

#### **V. CONCLUSION**

The trial court erred when it found that Martin was arrested prior to the search of his bag, and that the officers "manifested" an intent to arrest Martin even though they did not specifically inform him that he was under arrest. The officers' testimony directly contradicts the court's conclusions. And because the search was not done subsequent to an actual custodial arrest, it was not a valid search incident to arrest. The trial court's denial of Martin's motion to suppress should be reversed, and all evidence discovered during

and subsequent to the search of the maroon bag must be suppressed.

DATED: December 3, 2010

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM  
WSB #26436  
Attorney for David Miles Martin

**CERTIFICATE OF MAILING**

I certify that on 12/03/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) David Miles Martin #810599, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM, WSBA #26436

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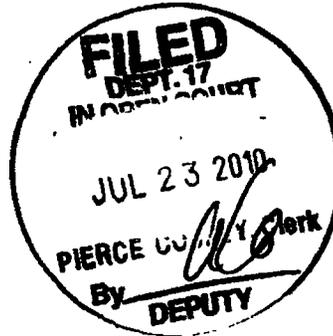
# **APPENDIX**

Findings of Fact and Conclusions of Law (CrR 3.5 and CrR 3.6)

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**SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY**

**STATE OF WASHINGTON,**

**Plaintiff,**

**CAUSE NO. 09-1-01856-3**

**vs.**

**DAVID MILES MARTIN,**

**Defendant.**

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
FOR HEARING PURSUANT TO CrR 3.5  
AND 3.6**

This matter came before the Honorable Ronald E. Culpepper for a hearing pursuant to CrR 3.5 and 3.6 on the 26th day of May, 2010. The court, having ruled orally that the statements of the defendant are admissible and that the defendant's motion to suppress is denied, now, therefore, sets forth the following Findings of Fact and Conclusions of Law as to its rulings.

**FINDINGS OF FACT**

1. On April 2, 2009, several police officers responded to the residence of Alfredo Esparza. The officers included Steve Pigman, Walter Anderson, Don Gill, Paul Crowe, and Ken Hill.
2. Puyallup Police Detective Steve Pigman and Puyallup Police Officer Walter Anderson are trained and experienced law enforcement officers who at the time were both assigned to narcotics-related investigations.

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09-1-01856-3

- 3. Esparza was a confidential informant whose handler was Officer Anderson. Officer Anderson had worked with Esparza since at least 1997 on more than 50 drug-related cases.
- 4. Esparza was a reliable, credible, and trustworthy informant.
- 5. Esparza informed the officers that the defendant, David Miles Martin, was on his way over to Esparza's house to sell methamphetamine.
- 6. At the officers' request, Esparza placed a telephone call on speakerphone to the defendant. A conversation ensued between Esparza and the defendant. This conversation was overheard by Officer Anderson. During the conversation, the defendant stated that he was on his way over to Esparza's house to pick up money so he could go buy a large quantity of methamphetamine. The defendant also stated that he was in possession of a limited quantity of methamphetamine. The defendant and Esparza *discussed* ~~haggled~~ over the price at which the defendant would sell the methamphetamine to Esparza. The conversation ended when the defendant indicated that he was a few blocks away.
- 7. Esparza described the defendant as a white male driving a gold Nissan Maxima with nice tire rims. Esparza also told the officers to be careful because the defendant was always "armed," carrying with him a 9mm Ruger handgun. Esparza appeared fearful of the defendant. Esparza also stated that the defendant usually stored drugs in his car trunk.
- 8. Detective Pigman and Officer Anderson had a reasonable concern for their safety based on Esparza's information and their training and experience that methamphetamine dealers routinely carry weapons for protection and that their behavior can be erratic.

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9. Approximately 15 minutes later, the defendant arrived in a tan Nissan Maxima and parked his vehicle in the alleyway behind Esparza's house. The defendant exited his vehicle, walked back towards the trunk, opened it and retrieved a maroon pouch, shut the trunk shortly thereafter, and walked towards the backdoor of Esparza's residence.
  10. It was nighttime when the defendant arrived. Lighting was poor in the alley and on the backside of Esparza's residence.
  11. As the defendant approached the backdoor, Detective Pignan and Officer Anderson exited. The officers were not wearing standard-issue police uniforms but were readily identifiable as police officers by SWAT issued vests they were wearing that had the word "POLICE" in large print on the front. Each officer also had a police badge visible. The officers identified themselves as police officers. The officers each raised their duty-issued firearms to eye level and pointed them at the defendant. They ordered the defendant to stop.
  12. At this point, the defendant removed his hands from his pocket. The defendant was holding a maroon pouch in his right hand and he dropped it to the ground. As the defendant did this, Officer Anderson thought the defendant was reaching for something with his hand. The officer repeatedly stated to the defendant, "don't do it."
  13. After dropping the maroon pouch, the defendant's mannerisms reflected to Detective Pignan that he did not want to be associated with the pouch.
  14. The defendant was physically restrained and physically escorted into the residence where he remained in a laundry room with the two officers. The officers were concerned that if they remained outside, their anonymity and Esparza's status as an informant would be compromised.

09-1-01856-3

1 15. The officers searched the defendant's person for weapons and found nothing.

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3 16. Detective Pigman brought the maroon pouch into the laundry room and opened it because  
4 he reasonably believed it might contain a weapon. The officer found the following inside  
5 the pouch: a hard firearm magazine clip loaded with 10 rounds of 9mm ammunition; a  
6 hard digital scale; a hard spoon; a bag with 16.4 grams of methamphetamine; a bag with  
7 .5 grams of marijuana; and several small unused plastic baggies.  
8

9 17. At this point, Detective Pigman handcuffed the defendant and formally advised him that  
10 he was under arrest.

11 18. Detective Pigman fully advised the defendant of his constitutional rights from a standard  
12 issue card provided to all law enforcement officers. The court takes judicial notice that  
13 this card contains a full and accurate reading of one's constitutional rights.  
14

15 19. The defendant understood his rights.

16 20. The defendant voluntarily waived his rights and agreed to speak with the detective.

17 21. The defendant at no point invoked his rights or expressed confusion regarding those  
18 rights.

19 22. The defendant's waiver was made without any form of threat, promise, or coercion.

20 23. The defendant was not under the influence of a mind-altering substance.

21 24. The defendant speaks and understands the English language.

22 25. Detective Pigman had a reasonable concern that the defendant might have a firearm in his  
23 vehicle. The detective therefore sought consent to search the Nissan Maxima. The  
24 detective read in full to the defendant a form entitled, "Puyallup Police Department  
25 Consent to Search." That form was admitted into evidence as exhibit \_\_\_\_.  
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27 26. The defendant understood his rights as listed in the form.  
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27. The defendant voluntarily consented to a search of his vehicle.

28. The defendant's consent was made without any form of threat, promise, or coercion.

There was no threat by the officers to obtain a search warrant and "tear up" the defendant's vehicle if he did not consent.

29. The defendant was present while Detective Pisman searched the vehicle. At no point did the defendant terminate or limit his consent.

30. Detective Pisman found the following inside the Nissan Maxima: in the glove box were 28 rounds of .45 caliber ammunition; in the driver's-side door pocket were two receipts for .32 caliber and 9mm ammunition; in the center console was a glass drug smoking pipe and a container with .2 grams of marijuana; and behind the driver's seat was a glass drug smoking pipe and a container with .2 grams of marijuana.

31. Detective Pisman also found a .32 caliber semi-automatic pistol in the Nissan Maxima.

The pistol was unloaded. The pistol was in a holster and sat between the driver's seat and the center console. The pistol was readily accessible to anyone sitting in the driver's seat.

32. No .32 caliber ammunition was recovered from the defendant or his vehicle.

33. Martin had a wallet on his person. Inside it was \$1360 in currency.

34. Martin admitted to Detective Pisman that the Nissan Maxima was his. He also admitted that he had been dealing narcotics for the past month. He admitted that he was on his way over to Esparza's house to pick up cash so he could go to his drug source and purchase a large quantity of methamphetamine. He admitted that he intended to sell methamphetamine to Esparza.

35. Esparza's house and the surrounding neighborhood, including the point at which Martin parked his vehicle, are all located in the City of Puyallup, in the State of Washington.

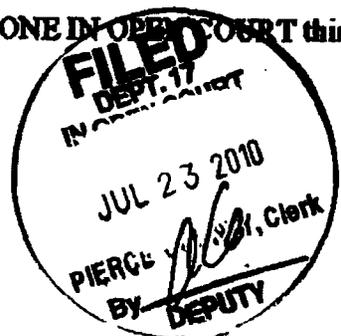
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- 36. Detective Pigman's testimony was credible.
- 37. Officer Anderson's testimony was credible.
- 38. The defendant's testimony was not credible.

CONCLUSIONS OF LAW

1. The defendant was "arrested" for purposes of a search incident to arrest after the officers detained him at gunpoint and physically escorted him into the laundry room. The officers manifested an intent to take the defendant into custody and actually did so. No objectively reasonable person would have felt free to terminate the encounter and leave the officers' custody. *even though he was not told he was under arrest RFE*
2. The officers had probable cause to arrest the defendant based on the phone call with Esparza and his arrival at Esparza's house. The officers had probable cause to believe the defendant had committed the crimes of unlawful possession of methamphetamine with intent to deliver and/or unlawful possession of methamphetamine and/or conspiracy to commit the crime of unlawful possession of methamphetamine with intent to deliver.
3. The defendant's statements to Detective Pigman are admissible. The defendant was properly advised of his constitutional rights. His decision to waive those rights was intelligently, knowingly, and voluntarily made.
4. The defendant provided valid consent to search his vehicle. His consent was intelligently, knowingly, and voluntarily made.

DONE IN OPEN COURT this 23 day of July, 2010.



*[Signature]*  
 Judge Ronald E. Culpepper

09-1-01856-3

Presented by:

*Jesse Williams*

**JESSE WILLIAMS**  
**Deputy Prosecuting Attorney**  
**WSB# 35543**

Approved as to Form:

*Jane Melby*

**Jane Melby**  
**Attorney for Defendant**  
**WSB# 24798**

*David Miles Martin*

**David Miles Martin**  
**Defendant**

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