

NO. 41202-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RYAN MICHAEL WARD,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
11 JUN 21 PM 12:31
BY _____
DEVER

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John P. Wulle, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
A. ASSIGNMENTS OF ERROR.....	1
Issues pertaining to assignments of error.....	1
B. STATEMENT OF THE CASE.....	2
1. Procedural History	2
2. Substantive Facts	3
C. ARGUMENT.....	8
BECAUSE POLICE HAD NO REASONABLE SUSPICION THAT WARD WAS CONNECTED TO ANY CRIMINAL ACTIVITY OR WAS ARMED AND PRESENTLY DANGEROUS, THE DETENTION AND SEARCH VIOLATED HIS FOURTH AMENDMENT PROTECTIONS.	8
1. The initial detention was unlawful.....	8
2. The search was not supported by a reasonable suspicion that Ward was armed and dangerous.	13
3. The evidence should have been suppressed as the fruit of an unlawful custodial interrogation.	15
D. CONCLUSION.....	19

TABLE OF AUTHORITIES

Washington Cases

<u>State v. Broadnax</u> , 98 Wn.2d 289, 654 P.2d 96 (1982)	9, 10, 11, 12, 13
<u>State v. Flores-Moreno</u> , 72 Wn. App. 733, 866 P.2d 648, <u>review denied</u> , 124 Wn.2d 1009 (1994)	9
<u>State v. Harris</u> , 106 Wn.2d 784, 725 P.2d 975 (1986), <u>cert. denied</u> , 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987)	16
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	8
<u>State v. Kinzy</u> , 141 Wn.2d 373, 5 P.3d 668 (2000)	9
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999)	8
<u>State v. Lane</u> , 77 Wn.2d 860, 467 P.2d 304 (1970)	18
<u>State v. Short</u> , 113 Wn.2d 35, 775 P.2d 458 (1989)	16
<u>State v. Solomon</u> , 114 Wn. App. 781, 60 P.3d 1215 (2002)	17
<u>State v. Spotted Elk</u> , 109 Wn. App. 253, 34 P.3d 906 (2001)	18
<u>State v. Thompson</u> , 93 Wn.2d 838, 613 P.2d 525 (1980)	8

Federal Cases

<u>Arkansas v. Sanders</u> , 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)	8
<u>Dunaway v. New York</u> , 442 U.S. 200, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979)	9
<u>Michigan v. Summers</u> , 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)	9, 10
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	16

<u>Rhode Island v. Innis</u> , 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).....	17
<u>Terry v. Ohio</u> , 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).....	8
<u>Thompson v. Keohane</u> , 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).....	17
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	19
<u>Ybarra v. Illinois</u> , 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) ..	13, 14

Statutes

RCW 69.50.4013(1).....	2
RCW 69.50.412(1).....	2

Constitutional Provisions

U.S. Const., amend. IV	8
Wash. Const., art. 1, § 7.....	8

A. ASSIGNMENTS OF ERROR

1. The trial court erroneously concluded that police had authority to detain appellant during execution of a search warrant.

2. The trial court erroneously concluded that the circumstances justified a pat-down search of appellant.

3. The trial court erroneously concluded that appellant's statement was not the product of custodial interrogation.

4. The physical evidence discovered as a result of the unlawful detention and search should have been suppressed.

Issues pertaining to assignments of error

1. As police prepared to execute a search warrant at an apartment, they encountered appellant and two other people in the common hallway of the apartment complex near the target apartment. Police took appellant to the ground and handcuffed him. Where there was no evidence connecting appellant to the target apartment other than his presence in the common area with one of the apartment's occupants, was his detention unlawful?

2. Appellant cooperated fully with police as they ordered him to the ground and handcuffed him, he correctly identified himself, he had no outstanding warrants, and he made no suspicious moves or threatening gestures. Nonetheless, he was searched for weapons on the basis that he

was standing near the target apartment. Where police had no reasonable suspicion that appellant was armed and presently dangerous, was the search unlawful?

3. After appellant was handcuffed and identified, a police officer told him he would be searched and asked if he had any weapons or anything illegal on his person. Appellant was not advised of his constitutional rights before this question. He responded that he had a pen in his pocket, and the officer removed the pen, finding it contained heroin residue. Where no reasonable person would have felt free to end the police encounter, and the officer's question was likely to elicit an incriminating response, should appellant's statement have been suppressed as the product of custodial interrogation?

4. Should the pen containing heroin residue have been suppressed as the product of the unlawful detention and search?

B. STATEMENT OF THE CASE

1. Procedural History

On March 8, 2010, the Clark County Prosecuting Attorney charged appellant Ryan Michael Ward with possession of a controlled substance and unlawful use of drug paraphernalia. CP 1; RCW 69.50.4013(1); RCW 69.50.412(1). Ward moved to suppress evidence obtained after an unlawful detention and search, but the Honorable John P. Wulle denied his

motion. CP 5-8, 29-35. Ward then waived his right to a jury trial and entered a stipulation of facts. CP 16-19. The court entered findings of fact and conclusions of law and found Ward guilty of possession of heroin. CP 24-28. It dismissed the paraphernalia charge and imposed a sentence of 30 days on the possession charge. CP 38. Ward filed this timely appeal. CP 46.

2. Substantive Facts

On October 30, 2009, a warrant was issued authorizing the search of a Vancouver apartment for evidence of possession of a controlled substance with intent to deliver. 1RP¹ 6. The warrant also authorized the search of three occupants of the apartment: Jesse Hubbell, Kayla Striebeck, and John Doe. John Doe was described as a white male, 18 years old, five feet nine inches tall, weighing 150 pounds, with brown hair, and a tattoo of two feet on his left forearm and a tattoo of a rose on his right shoulder. 1RP 7. At a pre-search briefing, the officers who participated in serving the warrant were shown photographs of Hubbell and Striebeck and given the description of John Doe. 1RP 8, 21-22, 25.

Detective Eric Swenson was a member of the search team. 1RP 26. As the team headed up the stairs of the apartment complex, Swenson

¹ The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—7/30/10; 2RP—9/13/10.

saw a man and a woman smoking outside the apartment. 1RP 29. Another member of the search team saw Hubbell standing outside the apartment, but Swenson did not. 1RP 41, 58. Swenson identified himself and the others as police officers and ordered the man and woman to the ground. While another officer took control of the woman, Swenson took hold of the man's arm, took him to the ground, and handcuffed him. 1RP 27, 59.

The man was cooperative and complied with Swenson's orders. 1RP 32. He had a cell phone in his hand, and he asked Swenson to be careful of it as he took him to the ground. 1RP 32. When Swenson asked the man's name, he identified himself as Ryan Ward. Ward said he had identification in his wallet, and Swenson removed the wallet from Ward's pocket and confirmed his identification. 1RP 33. Swenson ran a warrants check and determined Ward had no outstanding warrants. 1RP 33. In a pat down search, Swenson found the outside shell of a plastic pen. The end of the pen had been melted, and it contained residue consistent with heroin. 1RP 33, 37-38. Swenson asked Ward if he used the pen to smoke heroin, and Ward said he used it to smoke "Oxy." 1RP 38.

Ward was then advised of his Miranda rights and questioned further about the object in his pocket. CP 26. He was booked on

possession of a controlled substance. 1RP 51. After laboratory analysis, the residue in the pen was found to contain heroin. CP 27.

Ward moved to suppress all evidence obtained as a result of the stop, detention, arrest, and search. CP 5-8. At the suppression hearing, evidence established that Ward was not the John Doe referred to in the warrant. 1RP 7. That man was identified as Joseph Drummond, who was found in the apartment after the officers entered, while Swenson was detaining Ward. 1RP 7, 47.

Swenson testified at the hearing that he ordered Ward and the woman to the ground because it was possible they were standing in front of the target apartment. 1RP 30. He did not recognize them and did not know who they were, but he thought it was possible Ward might be the John Doe they were looking for, based solely on his proximity to the apartment. 1RP 29, 34, 49. Swenson acknowledged, however, that Ward was in a common area and no closer to the target apartment than to the neighboring apartment. 1RP 34. Swenson did not testify that Ward met the description he had of John Doe. Moreover, once he had Ward in handcuffs, he made no attempt to determine if Ward had a tattoo on his forearm, as the John Doe described in the warrant did. 1RP 45-46.

Swenson did not identify any reason for believing Ward was armed and dangerous, but he testified that while Ward was still handcuffed, he

told Ward he was going to pat him down for weapons to make sure he was not armed. 1RP 33, 49. Before conducting the search, Swenson asked Ward if he had anything dangerous or illegal on his person. 1RP 33. Ward said he had a pen in his pocket, and when Swenson did the pat down, he felt a cylindrical object in Ward's pocket. 1RP 33. Swenson said he removed the pen because in his experience he has found objects shaped like pens that were actually weapons. 1RP 33.

Ward argued that the initial detention was unlawful because the State failed to show any connection between him and the target apartment. 1RP 74. Ward's presence in the common area of the apartment complex was not a sufficient basis for Swenson to believe Ward was the John Doe described in the warrant, and Swenson made no attempt to check Ward's arm for tattoos. 1RP 75-76. The subsequent search was unlawful because there was no evidence Ward was armed or dangerous or committing a crime. 1RP 77.

The trial court denied Ward's motion to suppress. The court concluded that the initial detention was lawful because officers executing a search warrant have authority to temporarily detain persons who are present on the premises to determine whether they are connected to the criminal activity. The court reasoned that since Ward was outside the apartment with Hubbell, and since the warrant authorized the search of

Hubbell and a John Doe, it was reasonable for Swenson to believe Ward was connected to the apartment. CP 33. The court also concluded that because of the uncertainty about other persons in the apartment, it was reasonable to handcuff Ward while entry was being made, to assure officer safety. CP 33-34.

The court further concluded that, although Ward was in handcuffs and was lawfully detained, he was not in custody for purposes of Miranda requirements. CP 34. Thus, the court determined that Swenson did not have to advise Ward of his Miranda rights before asking whether he had anything illegal or dangerous on his person. The court concluded that Ward's response that he had a pen was not the product of custodial interrogation and was not coerced. CP 34. The court felt that Ward's statement that he had a pen gave Swenson reason to believe Ward was armed and dangerous and justified seizure of the pen. CP 34.

The court also concluded that since the warrant named three people, three people were found in the hallway outside the apartment, and there were potentially more people inside the apartment, it was reasonable for the officers to believe the people outside the apartment posed a threat to officer safety. It was therefore reasonable for Swenson to ask if Ward had any illegal or dangerous items and pat Ward down for weapons. CP 34-35.

C. ARGUMENT

BECAUSE POLICE HAD NO REASONABLE SUSPICION THAT WARD WAS CONNECTED TO ANY CRIMINAL ACTIVITY OR WAS ARMED AND PRESENTLY DANGEROUS, THE DETENTION AND SEARCH VIOLATED HIS FOURTH AMENDMENT PROTECTIONS.

1. The initial detention was unlawful.

Both the federal and state constitutions prohibit unreasonable police seizures. Terry v. Ohio, 392 U.S. 1, 16-19, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); U.S. Const., amend. IV; Wash. Const., art. 1, § 7. “All seizures of the person, even those involving only brief detentions, must be tested against the Fourth Amendment guaranty of freedom from unreasonable searches and seizures.” State v. Thompson, 93 Wn.2d 838, 840, 613 P.2d 525 (1980). Warrantless searches and seizures are unreasonable unless they fall within one of the “jealously and carefully drawn exceptions” to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)).

Although this case arose out of the execution of a search warrant, the warrant did not authorize the search or seizure of Ward. It is undisputed that Ward was not the “John Doe” described in the warrant; that person was located in the apartment when the warrant was executed.

1RP 7, 47. Thus, the State must prove some other justification for Ward's detention and search. See State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000)(State bears the burden of proving warrantless seizure falls within exceptions to warrant requirement), cert. denied, 531 U.S. 1104 (2001).

Generally, an official seizure of a person must be supported by probable cause, even if no formal arrest is made. Dunaway v. New York, 442 U.S. 200, 208, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979); State v. Broadnax, 98 Wn.2d 289, 293, 654 P.2d 96 (1982), abrogated on other grounds by Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). Exceptions to this general rule are narrowly drawn and carefully circumscribed. Broadnax, 98 Wn.2d at 293.

One such exception is the detention of the occupants of a residence which is the subject of a search warrant. A valid warrant to search for drugs "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted," even if the occupant is initially found outside the home. Michigan v. Summers, 452 U.S. 692, 705, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981); State v. Flores-Moreno, 72 Wn. App. 733, 739, 866 P.2d 648, review denied, 124 Wn.2d 1009 (1994). Thus, in Flores-Moreno, detention of the defendant was lawful where he was found in the driveway of the residence to be searched and matched the description of the occupant named in the warrant, giving

police adequate reason to believe he was the occupant. Flores-Moreno, 72 Wn. App. at 739-40.

In this case, however, Ward was not an occupant of the apartment to be searched. He was not found in the target apartment but in a common area, no closer to the target apartment than the neighboring apartment. 1RP 34. Unlike the driveway of a house, the common hallway of an apartment complex is not so associated with the residence for which a warrant is issued as to give rise to reasonable suspicion that anyone in the hallway is connected to the criminal activity occurring inside. See Summers, 452 U.S. at 703-04 (“The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.”); Broadnax, 98 Wn.2d at 300 (“an occupant's constructive control over the premises which is the subject of a search warrant provides a sufficient connection with the suspected illegal activities to permit a detention of that individual.”).

The court below concluded that since Ward was with one of the people named in the warrant, and since the warrant also described a John Doe, it was reasonable for the officers to detain Ward. CP 33. The court was mistaken. There was no evidence to support a reasonable suspicion that Ward was John Doe. The warrant gave a fairly detailed description of

the person being sought, and the officers were briefed on that description prior to executing the warrant. 1RP 7, 22. Swenson did not testify that he believed Ward matched that description. Rather, he said he detained Ward because he was near the target apartment. 1RP 30, 49. Ward's presence in the area is insufficient justification for an official seizure:

[P]ersons not directly associated with the premises and not named in the warrant cannot be detained or searched without some independent factors tying those persons to the illegal activities being investigated. In other words, "mere presence" is not enough; there must be "presence plus" to justify the detention or search of an individual, other than an occupant, at the scene of a valid execution of a search warrant.

Broadnax, 98 Wn.2d at 300-01. In order to protect persons innocently in the presence of a known or suspected criminal, some additional circumstance must give rise to a reasonable inference that the person detained knows of or is connected to the criminal activity. Broadnax, 98 Wn.2d at 302.

In Broadnax, police had a warrant to search a residence for narcotics, but the warrant did not name any individuals to be seized or searched. When police entered the residence, they found the occupant of the residence and a visitor, Thompson, in the living room. Police ordered Thompson to place his hands on his head. He was subsequently searched, and police found heroin in his pocket. Broadnax, 98 Wn.2d at 292-93. On

illegal activity in the apartment, and his detention was unlawful. See Broadnax, 98 Wn.2d at 302-03.

2. The search was not supported by a reasonable suspicion that Ward was armed and dangerous.

Even if Ward's proximity to Hubbell was sufficient to justify his detention, the search of his person was unlawful. Ward correctly identified himself, and Swenson confirmed that he had no outstanding warrants. IRP 33. If Swenson was acting on the belief that Ward might be the John Doe they were authorized to search, he could have attempted to confirm that suspicion by looking at Ward's forearm for the tattoo John Doe was described as having. He did not do that. IRP 45. Rather, he decided to pat Ward down for weapons, merely because he was present when the warrant was being executed. IRP 49.

It is well established that an individual's mere presence at a place that is the subject of a search warrant does not justify a search of his or her person. Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); Broadnax, 98 Wn.2d at 295. Before police may search an individual for weapons, there must be a reasonable suspicion, directed at the person to be frisked, that the person is armed and presently dangerous, even if that person happens to be at the location where a narcotics search is taking place. Ybarra, 444 U.S. at 93-94.

In Ybarra, police had a warrant to search a tavern and its bartender for evidence of narcotics. When executing the warrant, the police also detained several patrons on the premises and patted them down for weapons. Ybarra, 444 U.S. at 88. One of the patrons, Ybarra, was found to have a cigarette pack containing heroin in his pocket. Ybarra, 444 U.S. at 89. The Supreme Court held that the search warrant for the tavern did not authorize the police to invade the individually possessed Fourth Amendment protections of the tavern's patrons. Ybarra, 444 U.S. at 92.

Ybarra's mere presence in the tavern did not establish probable cause to search or seize him. Nor was the pat down a reasonable frisk for weapons under Terry v. Ohio, because such a search must be preceded by a reasonable belief that the person to be patted down is presently armed and dangerous. Ybarra, 444 U.S. at 92-93. The officers did not recognize Ybarra as a person with a criminal history, and they had no reason to believe he was inclined to assault them. His hands were empty, and he acted in a non-threatening manner. These circumstances did not justify a suspicion that Ybarra was armed and dangerous. Ybarra, 444 U.S. at 93. The Court noted that Terry does not authorize a generalized cursory search for weapons, even when the person to be searched happens to be on the premises where a narcotics warrant is being executed. Ybarra, 444 U.S. at 93-94.

As in Ybarra, there were no facts giving rise to a reasonable suspicion that Ward was armed and dangerous. Ward gave no indication that he was armed or inclined to assault the police. He complied immediately when ordered to the ground. Ward correctly identified himself and had no outstanding warrants. Swenson determined before the search that the object Ward was holding when the police approached was a cell phone, and Ward was handcuffed as soon as he was detained. While the trial court focused on the generalized possibility of danger to officers executing the warrant as a justification for the search, there was no reason to suspect that Ward in particular was armed and dangerous.

3. The evidence should have been suppressed as the fruit of an unlawful custodial interrogation.

After handcuffing Ward, removing his identification from his wallet, and confirming that he had no outstanding warrants, Swenson told Ward he was going to pat him down and asked if he had any weapons or anything illegal on his person. Ward responded that he had a pen in his pocket. 1RP 37. The court below concluded that Ward's admission that he was carrying a pen justified the search, because Swenson reasonably concluded that a pen might be an object that could potentially be used as a weapon. CP 34.

First, Ward's possession of a pen did not give rise to a reasonable suspicion that he was presently dangerous. Although Swenson testified that a pen could potentially be used as a weapon, he pointed to no facts or circumstances indicating a reasonable belief that Ward would use the pen in that manner. As mentioned before, Ward was cooperative and compliant, he made no suspicious moves, and he was handcuffed.

Equally troubling is the court's conclusion that Ward was not in custody for the purposes of Miranda requirements when Swenson asked if he had anything illegal, and thus his statement about the pen was not the product of custodial interrogation and not coerced. CP 34. To the contrary, Ward was in custody and he was not advised of his constitutional rights before being interrogated. His statement and any evidence obtained as a result of that statement should therefore have been suppressed.

A suspect must be advised of his Fifth Amendment rights before an agent of the State may conduct a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). A suspect is in custody, triggering Miranda safeguards, "as soon as a suspect's freedom of action is curtailed to a ... 'degree associated with formal arrest.'" State v. Short, 113 Wn.2d 35, 40, 775 P.2d 458 (1989) (quoting State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987)). Whether the

defendant was in custody is a mixed question of fact and law. State v. Solomon, 114 Wn. App. 781, 878, 60 P.3d 1215 (2002)(citing Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)), review denied, 149 Wn.2d 1025 (2003). The factual inquiry determines the circumstances surrounding the police contact, and the legal inquiry determines whether, given the facts, a reasonable person would have felt free to terminate the interrogation and leave. Id.

Here, there is no dispute as to the facts. Detective Swenson took Ward to the ground, handcuffed him, removed his wallet and identification from his pocket, and told him he would be searched. 1RP 32-33; CP 31. Swenson testified that Ward was not free to leave from the time he was handcuffed², and in fact no reasonable person would have felt free to end the encounter and walk away. The court erroneously concluded that Ward was not in custody for the purposes of Miranda requirements.

Moreover, Swenson's question to Ward constituted interrogation. The Supreme Court has defined interrogation as "questioning...reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). An officer may, before giving Miranda warnings, ask questions that are solely for officer or public safety purposes. State v. Lane, 77 Wn.2d 860, 862-63, 467 P.2d 304

² 1RP 41.

(1970). For example, where the officer had good reason to believe the suspect was armed and dangerous, asking whether he had a gun was not interrogation but was related solely to officer safety. Lane, 77 Wn.2d at 861-63. But Miranda warnings are required if the officer's question goes beyond the scope of a precautionary inquiry regarding weapons. State v. Spotted Elk, 109 Wn. App. 253, 259, 34 P.3d 906 (2001)(officer's question whether arrestee had anything on her person he needed to be concerned about constituted custodial interrogation which necessitated Miranda warnings).

Here, Swenson did not merely act in the interest of safety by asking Ward if he had any weapons. He also asked Ward if he had anything illegal. 1RP 37; CP 31. This question was undoubtedly likely to elicit an incriminating response, and it constitutes interrogation. Because Ward was not given his Miranda warnings, his statement elicited by the custodial interrogation is inadmissible in evidence. See Spotted Elk, 109 Wn. App. at 260-61.

Ward's statement that he had a pen in his pocket cannot be used to justify the search. Not only was the statement obtained in violation of Miranda, but it failed to create a reasonable suspicion that Ward was armed and presently dangerous. The search was unlawful, and the pen containing heroin residue, seized during the unlawful search, should have

been suppressed. Wong Sun v. United States, 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Without the physical evidence, there is insufficient evidence to support Ward's conviction for possession of a controlled substance, and his conviction must be vacated and the charge dismissed.

D. CONCLUSION

Both the initial detention and the subsequent pat-down search violated Ward's Fourth Amendment right to be free from unreasonable searches and seizures. All evidence obtained as a result of these constitutional violations must be suppressed, and consequently the charge against Ward must be dismissed.

DATED this 20th day of January 2011.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

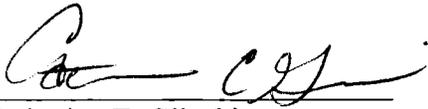
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Ryan Michael Ward*, Cause No. 41202-1-II directed to:

Philip A. Meyers
Attorney at Law
PO Box 5000
Vancouver, WA 98666-5000

Ryan Michael Ward
1022 SE 131st Ave
Vancouver, WA 98683

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
January 20, 2011

COURT OF APPEALS
DIVISION II
11 JAN 21 PM 12:31
STATE OF WASHINGTON
BY  DEPUTY CLERK