

**Court of Appeals No. 41949-1-II**

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

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**DWAYNE WRIGHT,**

**Defendant/Appellant.**

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**OPENING BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 10-1-02034-1  
The Honorable Rosanne Buckner, Presiding Judge**

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## **I. ASSIGNMENTS OF ERROR**

1. Mr. Wright was unlawfully arrested for possession of drug paraphernalia.
2. The search of Mr. Wright's vehicle with Timber the drug-sniffing dog was an unlawful search.
3. All evidence discovered after the search of Mr. Wright's vehicle by the dog was tainted and inadmissible.
4. There were insufficient untainted facts contained in the complaint for the search warrant to support a finding that probable cause existed to search Mr. Wright's vehicle.
5. The State presented insufficient admissible evidence to convict Mr. Wright of unlawful possession of methamphetamine with intent to deliver, unlawful possession of heroin, and unlawful possession of a firearm where all evidence Mr. Wright committed those crimes was discovered pursuant to the search of the vehicle under authority of the unlawfully issued search warrant.
6. Mr. Wright received ineffective assistance of counsel which deprived him of a fair trial.
7. The condition of Mr. Wright's community placement that he have no contact with "drug possessors, users, or sellers" unconstitutionally infringes on Mr. Wright's freedom of association.
8. Error is assigned to the trial court's Reasons for Admissibility or Inadmissibility of the Evidence insofar as the trial court found that "Deputy Nordstrom's warrant was based upon probable cause and, therefore, his search of the vehicle and its contents was proper."

## **II. ISSUES PRESENTED**

1. May Mr. Wright challenge the lawfulness of his arrest and the search of his vehicle by Timber for the first time on

appeal? (Assignments of Error Nos. 1, 2, 3, 4, 5, and 8)

2. May police conduct a warrantless search of a vehicle after the arrest of the driver of that vehicle where the driver has been secured in the back of a police car? (Assignments of Error Nos. 2, 3, 4, and 5)
3. May Mr. Wright challenge the probable cause to issue the search warrant for the first time on appeal? (Assignments of Error Nos. 1, 2, 3, 4, 5, and 8)
4. May Mr. Wright challenge the search of his vehicle pursuant to the search warrant for the first time on appeal? (Assignments of Error Nos. 1, 2, 3, 4, and 8)
5. May police officers lawfully use a drug-detection dog to conduct a search of a vehicle for drugs without a warrant? (Assignment of Error No. 1)
6. Did the complaint for the warrant to search Mr. Wright's vehicle contain sufficient facts independent of the results of Timber's search of Mr. Wright's vehicle to establish probable cause to search Mr. Wright's vehicle? (Assignments of Error Nos. 1, 2, 3, and 8)
7. Was the evidence discovered during the search of Mr. Wright's vehicle pursuant to the search warrant admissible where the evidence was discovered pursuant to the unlawful search of Mr. Wright's vehicle by Timber and Mr. Wright's unlawful arrest for possession of drug paraphernalia? (Assignments of Error Nos. 1, 2, 3 and 4)
8. Was the evidence discovered during the search of Mr. Wright's vehicle pursuant to the search warrant admissible where the warrant was issued without probable cause? (Assignments of error Nos. 1, 2, 3, and 8)
9. Did the State present sufficient admissible evidence to convict Mr. Wright of unlawful possession of methamphetamine with intent to deliver, unlawful possession of heroin, and unlawful possession of a firearm

where all evidence Mr. Wright committed those crimes was discovered pursuant to the search of the vehicle under authority of the unlawfully issued search warrant and was, therefore, inadmissible? (Assignments of Error Nos. 1, 2, 3, 4, and 8)

10. Did the State present sufficient admissible evidence to prove beyond a reasonable doubt that Mr. Wright was armed with a firearm where all evidence Mr. Wright possessed a firearm was inadmissible? (Assignments of Error Nos. 1, 2, 3, 4, and 5)
11. Did Mr. Wright receive effective assistance of counsel where his trial counsel failed to challenge the search of Mr. Wright's vehicle by Timber, failed to challenge the validity of the warrant, and failed to challenge the lawfulness of the search of Mr. Wright's vehicle pursuant to the warrant? (Assignments of Error Nos. 1, 2, 3, 4, and 6)
12. May a trial court prohibit an individual convicted of drug possession crimes from having contact with an undeterminable class of people? (Assignment of Error No. 7)

### **III. STATEMENT OF THE CASE**

#### *Factual and Procedural background*

On March 5, 2010, Deputies Cooke and Shaw stopped green Honda, later determined to be driven by Mr. Dwayne Wright, for having a nonfunctioning rear license plate light. RP 201-208, CP 5-6. The vehicle stopped about 100 feet east of Pacific Avenue on 143<sup>rd</sup>, in front of the Kreative Kids day care on the corner of 143<sup>rd</sup> and Pacific Avenue. RP 256-257. Deputy Shaw walked to the driver's window of Mr. Wright's vehicle and Deputy Cooke walked to the passenger side window. RP 209.

Mr. Wright was the only occupant of the vehicle. RP 209.

Upon contacting Mr. Wright, Deputy Cooke observed a piece of a broken glass smoking pipe in a storage cubby near the steering wheel. RP 40, 210, 234, 263, CP 5-6. The broken pieces formed part of a bulb at the end of a pipe. RP 240. Mr. Wright saw Deputy Shaw looking at the pipe and closed the storage cubby lid. RP 210. Deputy Shaw recognized the pipe as being of a type commonly used to smoke narcotics. RP 210. Deputy Shaw asked Mr. Wright who owned the pipe and Mr. Wright responded that the pipe was not his. RP 17.

Deputy Cooke observed a metal lock box on the passenger seat of the Honda. RP 39. Deputy Cooke asked Mr. Wright what was in the box and Mr. Wright responded by shrugging. RP 162.

Both Deputy Shaw and Deputy Cooke observed keys on Mr. Wrights lap, one of which appeared to be a shaved key of a type commonly used to steal vehicles. RP 17, 39. Deputy Shaw asked Mr. Wright about the shaved key and Mr. Wright responded that a friend had given it to him. RP 17, 161-162, 172.

The deputies order Mr. Wright out of the Honda and arrested him for possession of drug paraphernalia and possession of burglary tools. RP 19, 40. After Mr. Wright was arrested, Deputy Cooke conducted a records

check of Mr. Wright and determined that Mr. Wright's driver's license was suspended in the third degree. RP 40.

Mr. Wright's person was searched incident to his arrest. CP 5-6. The search of Mr. Wright's person revealed a glass smoking pipe with a "significant amount of white crystalline residue" and \$565 in Mr. Wright's pockets. CP 40-41, CP 5-6. The "money was folded in smaller denominations consistent with money received over the course of numerous drug-related transactions." RP 40-41, CP 5-6.

Deputy Cooke observed a telephone in the Honda that displayed the text message, "If you still want to do the deal with dem pills, call me." RP 167.

After Mr. Wright had been arrested and placed in a patrol vehicle Deputies Shaw and Cooke requested a narcotics K-9 respond to the scene. RP 21, 220-221, 41. The Deputies believed that there were drugs in the Honda and they wanted the drug dog to confirm their suspicions before they got a warrant. RP 270. Officer Cusick arrived with Timber, a drug-sniffing dog. RP 21, CP 5-6. Officer Cusick deployed Timber to search the interior of Mr. Wright's vehicle and told Deputies Cooke and Shaw that Timber had given strong indications that narcotics were present in the cubby storage area and in the lockbox located on the passenger seat of the vehicle. RP 21, 41, CP 5-6, 7-26.

Mr. Wright was transported to jail and the Honda was impounded in order to obtain a search warrant for the Honda. RP 21-22, CP 7-26. Mr. Wright was booked and released from custody and was allowed to keep the money found on his person because the police were not processing Mr. Wright for possession of a narcotic with intent to distribute. RP 285. At the time Mr. Wright was arrested and processed, the only evidence the police had seen was the drug pipe and the money. RP 285. At the time of his arrest on March 5, 2010, Mr. Wright had previously been convicted of a felony. CP 131.

On March 5, 2010, Pierce County Deputy Sheriff Christian Nordstrom was contacted by Deputies Cooke and Shaw and asked to obtain a search warrant for Mr. Wright's Honda. RP 293-296.

On March 16, 2010, Deputy Nordstrom applied for and was granted a warrant to search Mr. Wright's vehicle. RP 296, CP 7-26.

On March 18, 2010, Deputy Nordstrom executed the search warrant for Mr. Wright's vehicle. RP 297. Deputy Nordstrom located the lockbox on the passenger seat and discovered that it was locked with a combination lock. RP 299-300. Deputy Nordstrom used a screwdriver to break open the lock box. RP 300.

Inside the lockbox, Deputy Nordstrom found a digital scale similar to those used to weigh drugs, two bags and a plastic container with

methamphetamine inside, a loaded .40 caliber pistol, and a piece of tar heroin. RP 300-311. Deputy Nordstrom also found a letter to Mr. Wright from the Washington State Department of Licensing inside the box. RP 332.

The total amount of methamphetamine found in the bags was 13.2 grams. RP 377-383. The piece of tar heroin weighed 12.5 grams.

Deputy Nordstrom located three bags of marijuana in the trunk of Mr. Wright's Honda. RP 334. The largest bag of marijuana weighed 47.6 grams and was one-and-a-half time the size of the other two bags. RP 387-389.

Deputy Nordstrom located a school bus stop at the corner of 143<sup>rd</sup> Street and Pacific. RP 345. At trial, Mr. Joel Stutheit, the assistant director of the Bethel School District transportation department, testified that there were school bus stops at the corner of A street south and 146<sup>th</sup> street and at the Kreative Kids day care. RP 366-369.

Deputy Nordstrom testified that the size of the methamphetamine shards found in the lock box were larger than an average individual would use and that this suggested, to him, that the person who possessed them was a dealer. RP 324, 340.

On May 12, 2010, Mr. Wright was charged with one count of unlawful possession of methamphetamine with intent to deliver while

armed with a firearm, one count of unlawful possession of marijuana with intent to deliver while armed with a firearm, one count of unlawful possession of heroin, one count of unlawful possession of a firearm in the second degree, one count of driving with a license suspended in the third degree, and one count of unlawful use of drug paraphernalia. CP 1-4.

On November 8, 2010, Mr. Wright moved to suppress all evidence seized in this case on the basis that the stop of his vehicle was pretextual. CP 7-26.

On January 27, 2011, the State filed a response to Mr. Wright's motion to suppress and argued that the stop of Mr. Wright's vehicle was not pretextual and that Mr. Wright's vehicle was stopped pursuant to a lawful traffic stop for a burnt out license plate light. CP 27-32.

Also on January 27, 2011, the State amended the charges against Mr. Wright to add the aggravating factor that the marijuana and methamphetamine were possessed with intent to deliver with 1000 feet of a school bus stop. CP 33-36.

On January 31, 2011, Mr. Wright moved to dismiss the school zone enhancements. CP 37-62.

On February 8, 2011, Mr. Wright filed a declaration in support of his motion to dismiss the enhancements. CP 63-66.

Also on February 8, 2011, the State filed a supplemental declaration for determination of probable cause in regards to the school bus stop enhancements. CP 67. The State also filed a response to Mr. Wright's motion to dismiss the school zone enhancement. CP 68-73.

The court heard argument on Mr. Wright's motion to dismiss the school zone enhancement on February 8, 2011. RP 3-11. The trial court denied the motion on the grounds that CrR 8.3 only permitted the dismissal of criminal charges, not enhancements, and that there were disputed facts which would not permit the trial court to dismiss the enhancement. RP 11.

A 3.6 hearing was held on February 8, 2011. RP 12-146. The trial court held that the stop of Mr. Wright was not pretextual and denied the motion to suppress. RP 145-146.

On February 10, 2011, a 3.5 hearing was held. RP 157-186. The trial court ruled that all statements made by Mr. Wright before he was advised of his constitutional rights were inadmissible, but that all statements made by Mr. Wright after he was informed of his rights were admissible. RP 185-186.

Trial on the charges began on February 10, 2011. RP 199.

On February 14, 2011, Mr. Wright stipulated that he had been convicted of a felony at the time of his arrest on March 5, 2010. CP 131.

Mr. Wright objected to the State's proposed jury instructions 29-31 on the basis that setting out each of Mr. Wright's prior felony convictions in a separate jury instruction called undue attention to them. RP 488. The court overruled Mr. Wright's objections to the instructions. RP 489.

The jury found Mr. Wright guilty of unlawful possession of methamphetamine with intent to deliver, guilty of unlawful possession of heroin, guilty of unlawful possession of a firearm in the second degree, guilty of driving while license suspended in the third degree, and guilty of unlawful use of drug paraphernalia. CP 182-189. The jury found that Mr. Wright was armed with a firearm during the commission of the crime of unlawful possession of methamphetamine with intent to deliver and found that the methamphetamine was possessed within 1000 feet of a school bus stop. CP 190, 192.

On February 25, 2011, the trial court entered findings of fact and conclusions of law regarding the admissibility of Mr. Wright's statements and his motion to suppress evidence. CP 194-201. Also on February 25, 2011, Mr. Wright stipulated to the State's calculation of his criminal history and offender score. CP 213-215.

The court adopted the State's sentencing recommendation and sentenced Mr. Wright to 204 months confinement with 12 months community custody. RP 584-585, CP 216-231. One of the terms of Mr.

Wright's community custody was that Mr. Wright have "no contact with drug possessors, users, sellers." CP 216-229.

Notice of appeal was filed on March 31, 2011. CP 232.

#### IV. ARGUMENT

**I. Mr. Wright may challenge the search of his vehicle by Timber, the validity of the search warrant, and the search of his vehicle pursuant to the warrant for the first time on appeal.**

RAP 2.5(a) provides, in pertinent part, "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:...(3) manifest error affecting a constitutional right."

Appellate courts have a "long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal." *State v. Contreras*, 92 Wn.App. 307, 313, 966 P.2d 915 (1998).

To raise an error for the first time on appeal under RAP 2.5(a)(3), an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Stated another way, the appellant must "identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial." *Kirkman*, 159 Wn.2d at 926-27, 155 P.3d

125. To establish that an error is “manifest,” the appellant must “show actual prejudice.” *Contreras*, 92 Wn.App. 307, 311, 966 P.2d 915.

A manifest error is one which is “unmistakable, evident or indisputable.” *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992). “Essential to this determination is a plausible showing ... that the asserted error had practical and identifiable consequences in the trial.” *Kirkman*, 159 Wn.2d at 935, 155 P.3d 125 (internal quotation marks omitted).

*a. The errors complained of are constitutional errors.*

As discussed more fully below, Mr. Wright is challenging the warrantless police use of a drug-sniffing dog to conduct a plain view search of his vehicle, the warrantless search of the interior of his vehicle incident to his arrest, the issuance of a search warrant for his vehicle based on evidence found during the search of his vehicle with the dog, and the admissibility of evidence discovered pursuant to that search warrant on the grounds that it violated his Article 1, § 7 and Fourth Amendment rights. This makes the errors complained of constitutional errors.

*b. The errors were manifest and “actually prejudiced” Mr. Wright.*

Here, all the evidence relating to the possession of methamphetamine, the possession of heroin, and the possession of a firearm was discovered pursuant to the searches Mr. Wright is arguing

were unlawful. Should this court find that the searches were unlawful, then the evidence relating to the possession of methamphetamine, possession of heroin, and possession of the firearm would have been inadmissible and the State would have had insufficient admissible evidence to convict Mr. Wright of unlawful possession of methamphetamine, unlawful possession of heroin, unlawful possession of a firearm, and of the aggravating factor of possession methamphetamine while armed with a firearm. The unlawful searches therefore had practical and identifiable consequences in Mr. Wright's trial in that Mr. Wright was convicted of unlawful possession of methamphetamine while armed with a firearm, unlawful possession of heroin, and unlawful possession of a firearm.

*c. Mr. Wright did not waive the ability to challenge the searches on appeal where his trial counsel failed to object to the searches at trial.*

It is anticipated that the State will cite *State v. Mierz*, 72 Wn.App. 783, 789, 866 P.2d 65, 875 P.2d 1228 (1994), *State v. Tarica*, 59 Wn.App. 368, 372-373, 798 P.2d 296 (1990) (*overruled by State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995)), *State v. Lee*, --- P.3d ----, 2011 WL 3088167, and *State v. Robinson*, 171 Wn.2d 292, 306-307, 253 P.3d 84 (2011), and argue that Mr. Wright waived the ability to challenge the searches on appeal because his trial counsel failed to challenge the

searches at trial. As will be discussed below, this argument fails since *Lee* is premised on *Tarica* and *Mierz* and *Tarica* and *Mierz* are incompatible with a modern understanding of the ability of appellants to raise issues for the first time on appeal. Further, an interpretation of *Robinson* as barring Mr. Wright from being able to challenge the searches on appeal under principles of issue preservation interprets *Robinson* far too broadly.

1. *Lee, Tarica, and Mierz.*

In *Lee*, Lee was stopped for speeding and arrested for driving with a suspended license. *Lee*, ---P.3d---, 2011 WL 3088167 \*1. After Lee had been searched and placed in the arresting officer's patrol car, the arresting officer searched Lee's vehicle and found a large rock of crack cocaine. *Lee*, ---P.3d---, 2011 WL 3088167 \*1. Lee was charged, inter alia, with unlawful possession of cocaine with intent to deliver. *Lee*, ---P.3d---, 2011 WL 3088167 \*1.

Lee's trial counsel failed to challenge the warrantless search of Mr. Lee's vehicle under *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 1723-24, 173 L.Ed.2d 485 (2009) or under Article 1, § 7. *Lee*, ---P.3d---, 2011 WL 3088167 \*1.<sup>1</sup> Lee was convicted and appealed challenging the

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<sup>1</sup> Under *Gant*, "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Arizona v. Gant*, 556 U.S. ----, 129 S.Ct. 1710, 1723-1724, 173 L.Ed.2d 485 (2009).

search of his vehicle on appeal under the Fourth Amendment, *Gant*, and Article 1, § 7. *Lee*, ---P.3d---, 2011 WL 3088167 \*2. Citing *Tarica* and *Mierz*, the Court of Appeals held that, despite the language of RAP 2.5(a)(3), Lee had waived his ability to challenge the lawfulness of the search of his vehicle on appeal by failing to challenge the search at trial because “A failure to move to suppress evidence...constitutes a waiver of the right to have it excluded.” *Lee*, ---P.3d---, 2011 WL 3088167 \*3, citing *State v. Mierz*, 72 Wn.App. 783, 789, 866 P.2d 65, 875 P.2d 1228 (1994) (citing *State v. Tarica*, 59 Wn.App. 368, 372–73, 798 P.2d 296 (1990), overruled on other grounds by *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995)).

*Lee* was incorrectly decided because *Tarica* and *Mierz*'s interpretation of the law of issue preservation is contrary to the modern interpretation of RAP 2.5(a)(3).

i. The *Tarica/Mierz* standard of issue preservation.

In *Tarica*, Tarica, challenged the discovery of evidence found in his wallet for the first time on appeal. *Tarica*, 59 Wn.App. at 373, 798 P.2d 296. The *Tarica* court engaged in an analysis of whether Tarica could raise a suppression issue for the first time on appeal under RAP 2.5(a)(3) or if Tarica was barred from raising the issue under the doctrine

of issue preservation since he hadn't objected to the introduction of the evidence at trial:

RAP 2.5(a) provides in pertinent part as follows:

(a) Errors Raised for First Time on Review.  
The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court ... (3) manifest error affecting a constitutional right.

In *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988), the Washington Supreme Court analyzed RAP 2.5(a)(3). As the State asserts, the *Scott* court stated that the constitutional error exception to the general rule that appellate courts will not consider issues not raised in the trial court

is not intended to afford criminal defendants a means for obtaining new trials whenever they can "identify a constitutional issue not litigated below."

*Scott*, at 687, 757 P.2d 492 (quoting *State v. Valladares*, 31 Wn.App. 63, 76, 639 P.2d 813 (1982), *aff'd in part, rev'd in part*, 99 Wn.2d 663, 664 P.2d 508 (1983)).

The *Scott* court set forth a 2-part test for dealing with claims of constitutional error asserted for the first time on appeal:

First, the appellate court should satisfy itself that the error is truly of constitutional magnitude—that is what is meant by "manifest". If the asserted error is not a constitutional error, the court may refuse review on that ground. If the claim is constitutional, then the court should

examine the effect the error had on the defendant's trial according to the harmless error standard set forth in *Chapman v. California*, [386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065 (1967) ].

(Footnote omitted.) *Scott*, at 688, 757 P.2d 492.

There is no question that the search and seizure issue presented is constitutional, and there is a reasonable possibility that a motion to suppress, had it been made, would have been successful. However, there was no *error* in the trial court proceedings below.

In *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966), the Washington Supreme Court stated that the exclusion of improperly obtained evidence is a privilege that may be waived. Even though the state and federal constitutions protect individuals from unreasonable searches and seizures, a seasonable objection must be made to preserve the right. *Baxter*, at 423, 413 P.2d 638. In *Baxter*, the defendant was well aware of the circumstances surrounding his arrest at the time the alleged items were offered into evidence, such that his motion to suppress at the end of the State's case was too late. *Baxter*, at 424, 413 P.2d 638.

In *State v. Valladares*, 31 Wn.App. 63, 639 P.2d 813 (1982), *rev'd in part on other grounds*, 99 Wn.2d 663, 664 P.2d 508 (1983), Valladares made a motion to suppress evidence seized in a warrantless search of his vehicle, but later withdrew the motion. On appeal, he sought to raise the issue, despite having made no objection to admission of the evidence at trial. The *Valladares* court stated as follows:

With these principles in mind we believe the propriety of invoking RAP 2.5(a)(3) in this case turns on whether a clear violation of due process resulted from the admission of evidence, without objection, that may have been obtained in violation of defendant's

Fourth Amendment rights. It must be remembered that, historically, otherwise competent and relevant evidence, even though illegally or unconstitutionally obtained, is not thereby rendered inadmissible. There is no constitutional per se prohibition against its use, i.e., the use itself violates no constitutional right. True, the exclusionary rule was devised by the courts to afford meaning to such rights. But the defendant must take advantage of the rule and affirmatively seek its protection. [Citation omitted.] By withdrawing his motion to suppress, Valladares simply elected not to take advantage of the mechanism which the State has placed at his disposal for excluding the evidence.

Defendant thus waived or abandoned his Fourth Amendment objections.

*Valladares*, at 76, 639 P.2d 813.

Applying the *Valladares* reasoning to the circumstances before us, we find that Tarica failed to preserve this issue for appellate review. His failure to move to suppress the evidence obtained from his wallet constituted a waiver of his right to have it excluded as having been obtained in violation of the Fourth Amendment.

*Tarica*, 59 Wn.App. at 372-373, 798 P.2d 296 (emphasis in original).

The *Tarica* court held that in order for there to be an “error” in the record sufficient for appeal, a defendant would have to challenge the admissibility of evidence at trial. Thus, under *Tarica*, even if a defendant wished to raise an issue of constitutional magnitude on appeal, such as a challenge to an unlawful search, that defendant would be unable to raise

the issue if that defendant had not challenged the search at trial, despite the language of RAP 2.5(a)(3) that manifest issues of constitutional magnitude can be raised for the first time on appeal.

In *Mierz*, Mierz challenged the lawfulness of a search for the first time on appeal. *Mierz*, 72 Wn.App. at 789, 866 P.2d 65. The *Mierz* court engaged in a brief discussion of whether or not the search could be challenged for the first time on appeal and held:

RAP 2.5(a) provides that an error of constitutional magnitude may be raised for the first time on appeal. Admission of evidence obtained in violation of either the federal or state constitution is an error of constitutional magnitude. A failure to move to suppress evidence, however, constitutes a waiver of the right to have it excluded, and the trial court does not err in considering evidence that the defendant has not moved to suppress. *State v. Tarica*, 59 Wn.App. 368, 372–73, 798 P.2d 296 (1990). Because there was no error below, this issue is not properly raised for the first time on appeal as a trial court error.

*Mierz*, 72 Wn.App. at 789, 866 P.2d 65.

Thus, *Mierz* adopted, without further analysis, *Tarica*'s conclusion that only "errors" may be raised on appeal, and a failure to object to an unconstitutional search at trial precludes challenging the search on appeal since there was no "error" in the trial court, despite RAP 2.5(a)(3)'s explicit statement that manifest issues of constitutional magnitude can be raised for the first time on appeal.

ii. The modern interpretation of RAP 2.5(a)(3) and issue preservation.

Interpretation of RAP 2.5(a)(3) and the test adopted in *Scott* continued to develop in the years following *Tarica* and *Mierz*.

In *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995), the Washington Supreme Court addressed the issue of whether or not a defendant could challenge a warrantless arrest for the first time on appeal in the context on an ineffective assistance of counsel claim. *McFarland*, 127 Wn.2d at 332, 899 P.2d 1251. The *McFarland* court determined that the warrantless arrest could not be challenged independent of an ineffective assistance of counsel argument for the first time on appeal under RAP 2.5(a)(3) because, in order for the error to be a “manifest error,” the trial record had to be sufficient to permit the Court of Appeals to address the issue in the case. *McFarland*, 127 Wn.2d at 332-334, 899 P.2d 1251.

*McFarland* and *Fisher* challenge their warrantless arrests for the first time on appeal. As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a “manifest error affecting a constitutional right”. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686–87, 757 P.2d 492 (1988); *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992). As we recognized in *Scott*, constitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial

proceedings. *Scott*, 110 Wn.2d at 686–87, 757 P.2d 492. On the other hand, “permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts”. *Lynn*, 67 Wn.App. at 344, 835 P.2d 251.

As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest”— i.e., it must be “truly of constitutional magnitude”. *Scott*, 110 Wn.2d at 688, 757 P.2d 492. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error “manifest”, allowing appellate review. *Scott*, 110 Wn.2d at 688, 757 P.2d 492; *Lynn*, 67 Wn.App. at 346, 835 P.2d 251. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

McFarland and Fisher ask this court to consider alleged constitutional errors arising from trial counsels’ failure to make a motion to suppress evidence obtained following a warrantless arrest. Each Defendant, to show he was actually prejudiced by counsel’s failure to move for suppression, must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record. In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. FN2 Without an affirmative showing of actual prejudice, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5(a)(3).

FN2. Because no motion to suppress was

made, there exists no record of the trial court's determination of the issue in either case. We recognize the predicament this causes for McFarland and Fisher: each Defendant must show the motion likely would have been granted based on the record in the trial court, yet the record has not been developed on this matter because the motion was not made. Even a de novo review of the records (which would relieve each Defendant of his burden to show the alleged error was manifest) does not reveal actual prejudice accruing to either Defendant from the asserted constitutional error.

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Because neither record shows actual prejudice, we find no "manifest error affecting a constitutional right" which would allow review of the warrantless arrest under RAP 2.5(a)(3).

*McFarland*, 127 Wn.2d at 332-334, 899 P.2d 1251.

Contrary to *Tarica* and *Mierz*, the *McFarland* court did **not** rule that the defendants could not raise constitutional errors under RAP 2.5(a)(3) simply because their trial counsel failed to object to the introduction of evidence. Rather, the *McFarland* court held that the failure of trial counsel to raise the issue at trial resulted in a record that was too poorly developed to allow the appellate court to analyze the issues, and, therefore, this meant that the errors were not sufficiently "manifest" in the record to permit review under RAP 2.5(a)(3).

The interpretation of RAP 2.5(a)(3) as requiring only a sufficiently developed trial record as opposed to a specific objection at trial to allow a defendant to raise an issue under RAP 2.5(a)(3) was further developed and adopted in *Contreras*, 92 Wn.App. 307, 314, 966 P.2d 915.

In *Contreras*, Contreras was convicted of unlawful possession of methamphetamine found on his person when he was searched while being booked on the charge of obstructing a law enforcement officer. *Contreras*, 92 Wn.App. at 311, 966 P.2d 915. Contreras appealed, arguing, *inter alia*, that his initial seizure and arrest were invalid. *Contreras*, 92 Wn.App. at 309, 966 P.2d 915.

Despite the fact that no motion to suppress or objection to admission of evidence of the methamphetamine was made at Contreras' trial, this court addressed Mr. Contreras' arguments about the lawfulness of his seizure under RAP 2.5. *Contreras*, 92 Wn.App. at 311-, 966 P.2d 915. In reaching its decision that Contreras' seizure issues could be addressed by this court for the first time on appeal, the *Contreras* court discussed the purposes underlying RAP 2.5 and why Contreras' arguments about an unlawful seizure could be raised for the first time on appeal. *Contreras*, 92 Wn.App. at 311, 966 P.2d 915.

The *Contreras* court began its analysis by recognizing that “[C]onstitutional errors are treated specially under RAP 2.5(a) because

they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings.” *Contreras*, 92 Wn.App. at 311, 966 P.2d 915, citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The *Contreras* court also acknowledged that “On the other hand, permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.” *Contreras*, 92 Wn.App. at 311, 966 P.2d 915, citing *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. The *Contreras* court synthesized these two principles by finding that,

As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest” i.e., it must be “truly of constitutional magnitude”.

*Contreras*, 92 Wn.App. at 312, 966 P.2d 915, citing *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

The *Contreras* court held that, “Where the alleged constitutional error arises from trial counsel’s failure to move to suppress, the defendant “must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice actual prejudice must appear in the record.” *Contreras*, 92 Wn.App. at 312, 966 P.2d 915, citing

*McFarland*, 127 Wn.2d at 334, 899 P.2d 1251. In the context of assessing “actual prejudice,” the *Contreras* court recognized that *McFarland* noted:

In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. [ FN 2 ] Without an affirmative showing of actual prejudice, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5(a)(3).

[ FN 2 ] Because no motion to suppress was made, there exists no record of the trial court’s determination of the issue in either case. We recognize the predicament this causes for *McFarland* and *Fisher*: each Defendant must show the motion likely would have been granted based on the record in the trial court, yet the record has not been developed on this matter because the motion was not made. Even a de novo review of the records (which would relieve each Defendant of his burden to show the alleged error was manifest) does not reveal actual prejudice accruing to either Defendant from the asserted constitutional error.

*Contreras*, 92 Wn.App. at 312, 966 P.2d 915, citing *McFarland*, 127 Wn.2d at 334, 899 P.2d 1251.

The *Contreras* court held,

we read RAP 2.5 together with *McFarland*’s underlying discussion and other case law concerning appellate review of constitutional issues not raised at trial. We conclude that when an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal. *See*

*State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).FN1

FN1. Where the court stated:

Riley raises his Fourth Amendment argument against the admission of the incriminating statements for the first time on appeal. Arguments not raised in the trial court generally will not be considered on appeal. Moreover, although RAP 2.5(a) permits a party to raise for the first time on appeal a “manifest error affecting a constitutional right”, RAP 2.5(a) does not mandate appellate review of a newly raised argument *where the facts necessary for its adjudication are not in the record and therefore where the error is not “manifest”*. Here, the record is unclear as to whether any or all of Riley’s incriminating statements were the product of the invalid search warrant. In particular, the record is unclear whether Riley made incriminating statements prior to being told the investigating officer had a search warrant. *Because we lack the needed record for review, we decline to consider whether the Fourth Amendment requires exclusion of Riley’s incriminating statements.*

*Contreras*, 92 Wn.App. at 313, 966 P.2d 915 (emphasis in original).

In reaching its ruling, the *Contreras* court rejected the State’s argument that *McFarland* should be read literally and be read to stand for the proposition that without a trial ruling on an issue, appellate review is impossible:

Here, the State urges us to read the emphasized *McFarland* language literally, arguing that, where there has been no

trial court ruling, an appellate court cannot know what the trial court would have done and, therefore, cannot review the alleged error. But such a narrow reading of *McFarland* would essentially preclude any review of any alleged error resulting from failure to make any motion or any objection at trial; we could no longer review such errors for the first time on appeal because there would be no record of how the trial court would have ruled. Adopting the State's position would preclude review on a record devoid of a trial court's ruling where no motion or objection was made; such an outcome would directly contravene RAP 2.5 and render the rule essentially meaningless. We therefore decline to adopt such a narrow reading of *McFarland*.

*Contreras*, 92 Wn.App. at 312-313, 966 P.2d 915. Thus, the *Contreras* court explicitly **rejected** the argument that an objection at trial was necessary for a defendant to raise an issue under RAP 2.5(a)(3).

Despite the fact that no objection or motion to suppress was brought by *Contreras* at his trial, the *Contreras* court held that “the record is sufficiently developed for us to determine whether a motion to suppress clearly would have been granted or denied; thus we can review the suppression issue, even in the absence of a motion and trial court ruling thereon.” *Contreras*, 92 Wn.App. at 314, 966 P.2d 915.

Post-*Riley*, *McFarland* and *Contreras*, a proper understanding and interpretation of RAP 2.5(a)(3) is that a defendant may raise a constitutional error for the first time on appeal, even in the absence of a pertinent objection at trial, where the trial record is sufficiently developed to permit the court of appeals to address the issue. Further, contrary to

*Tarica, Mierz, and Lee*, a defendant is not required to make an objection at trial to “preserve” constitutional errors for appeal. All that is required is the development of a record sufficient to permit the appellate court to analyze the constitutional error and a showing how the error prejudiced the defendant. The older principles of issue preservation have been supplanted by the RAP 2.5(a)(3) test of establishing a “manifest error affecting a constitutional right.”

This understanding of RAP 2.5(a)(3) has been continually affirmed by this court in the years since *Contreras* was decided. For example, on April 12 of this year, this court issued its opinion in *State v. Abuan*, --- Wn.App. ---, --- P.3d --- WL 1496182 (2011), where this court wrote:

Abuan challenges the pat down search for the first time on appeal. RAP 2.5(a) generally does not allow parties to raise claims for the first time on appeal. But RAP 2.5(a)(3) allows appellants to raise claims for the first time on appeal if such claims constitute manifest constitutional error. In order to establish manifest constitutional error allowing appellate review, appellants must demonstrate actual prejudice resulting from the error. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). ““Essential to this determination is a plausible showing ... that the asserted error had practical and identifiable consequences in the trial.”” *Kirkman*, 159 Wn.2d at 935, 155 P.3d 125 (internal quotation marks omitted) (*quoting State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). An appellant demonstrates actual prejudice when he establishes from an adequate record that the trial court likely would have granted a suppression motion. *State v. Contreras*, 92 Wn.App. 307, 312, 966 P.2d 915 (1998).

*Abuan*, --- Wn.App. ---, --- P.3d --- \*3 WL 1496182. See also *State v. O'Hara*, 167 Wn.2d 91, 97-100, 217 P.3d 756 (2009). The above passage from *Abuan* clearly demonstrates that the old issue preservation standard requiring an objection to be made at trial to preserve an issue for appeal has been supplanted by the “manifest constitutional error” test under RAP 2.5(a)(3). An objection is not necessary- only an adequate record to establish that “the asserted error had practical and identifiable consequences in the trial” and, where the error on appeal is based on trial counsel failure to move to suppress evidence, that the trial court likely would have granted a suppression motion.

*Tarica* and *Mierz* are an aberration in the interpretation of RAP 2.5(a)(3) in that the court in those cases presumed that the trial record would always be inadequate to permit the court of appeals to address an issue for the first time on appeal without an objection being made in the trial court. This interpretation of RAP 2.5 ignores situations where no objection is made at trial but the trial record is sufficient to permit the appellant to establish how the error prejudiced him or her, therefore permitting the appellate court to address the issue. The *Tarica* and *Mierz* standard of issue preservation has been explicitly rejected by this court in the past and is an incorrect interpretation of RAP 2.5(a)(3). As recognized by this court in *Contreras*, requiring a defendant to make an objection at

trial in order to raise an issue under RAP 2.5(a)(3) would render RAP 2.5(a)(3) meaningless. The plain language of RAP 2.5(a)(3) indicates that such issues may be raised for the “FIRST TIME IN THE APPELLATE COURT.” Thus, *Lee* was improperly decided and should not be relied upon by this court in making its decision in this case.

Modern interpretation of RAP 2.5(a)(3) does not require any action in the trial court other than creation of a record sufficient to permit appellate review and the identification of an issue of constitutional magnitude. Even if Washington law once did require a specific objection below to preserve constitutional issues for appeal, it no longer does.

Any argument by the State that Mr. Wright “waived” the ability to challenge the searches on appeal because his trial counsel failed to challenge them at trial is premised on incorrect and outdated law and, therefore, fails.

## 2. *Robinson.*

The *Lee* court also found that the recent decision of *State v. Robinson* 171 Wn.2d 292, 253 P.3d 84 (2011) prohibited Lee from challenging the search of his vehicle under *Arizona v. Gant* for the first time on appeal because *Gant* was decided prior to the conclusion of Lee’s trial and Mr. Lee failed to challenge the search at trial. *Lee*, --- P.3d ----, \*2-3, WL 3088167. However, the *Lee* court interpreted *Robinson* too

broadly.

In *Robinson*, the court was addressing whether or not defendants whose trials ended prior to *Gant* being decided could challenge the searches of their vehicles under *Gant* for the first time on appeal. The central issue in *Robinson* was how to deal with the issue of how the doctrine of issue preservation applied to defendants who did not assert a constitutional right at trial because the constitutional right did not exist at trial. To address defendants who found themselves in this situation, *Robinson* adopted a four-part test to determine whether or not principles of issue preservation applied:

We recognize...that in a narrow class of cases, insistence on issue preservation would be counterproductive to the goal of judicial efficiency. Accordingly, we hold that principles of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

*Robinson*, 171 Wn.2d 292, 253 P.3d at 89.

However, the *Lee* court interpreted *Robinson* too broadly in finding that *Robinson* barred Lee from challenging the search of his vehicle on appeal. The *Lee* court interpreted *Robinson* as addressing "issue preservation in the context of search and seizure." *Lee*, --- P.3d ----

, \*2, WL 3088167. This is an incorrect and overly-broad interpretation of *Robinson*. By its very terms, the test pronounced in *Robinson* applies only to situations where a defendant's trial is completed prior to the new interpretation of a controlling constitutional principle. *Robinson* does not address issue preservation in the context of all search and seizure issues raised for the first time on appeal. Rather, *Robinson* addresses only those cases where a new interpretation of a constitutional principle is pronounced after a defendant's trial has completed but before the defendant's appeal is final. *Robinson* was not, as the *Lee* court interpreted it, a mandate on how all *Gant*-based challenges, or even all search-and-seizure related challenges, must be made in the future. Rather, *Robinson* addressed a "narrow class of cases" where the defendant's trial had completed before *Gant* was decided.

*Gant* was decided before Mr. Wright's trial began. Thus, the standard test for issue preservation, in other words RAP 2.5(a)(3), controls whether or not Mr. Lee may challenge his vehicle for the first time on appeal, *not* the test set out in *Robinson*. Any argument that the *Robinson* test controls or even applies to Mr. Wright's ability to challenge the searches for the first time on appeal fails. *Robinson* is factually distinguishable from Mr. Wright's case and does not control the determination of whether or not Mr. Wright may challenge the searches

for the first time on appeal.

*d. The record created at Mr. Wright's trial is sufficient to permit this court to review.*

As will be discussed below, Mr. Wright is challenging the warrantless search of his vehicle by Timber as an unlawful search under Article 1, § 7, and is challenging the admissibility of all evidence derived from the unlawful search of his vehicle. The only facts which are necessary for this court to address the issue of the lawfulness are the facts surrounding the search- specifically, whether or not the police were required to obtain a warrant before searching Mr. Wright's vehicle with Timber and whether or not some exception to the warrant requirement applied which would permit a search of Mr. Wright's vehicle with Timber. As will be discussed in greater detail below, the facts in the record are sufficient to permit this court to address these issues.

**2. The warrantless search using the drug sniffing dog violated Mr. Wright's Article 1, § 7 constitutional protection against warrantless searches.**

Article 1, § 7 of the Washington Constitution provides "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Under article I, § 7, a search occurs whenever a state agent invades "those privacy interests which citizens of this state have held, and should

be entitled to hold, safe from governmental trespass absent a warrant,” irrespective of a person’s subjective expectations. *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). Washington courts recognize a privacy interest in automobiles and the contents therein. *State v. Patton*, 167 Wn.2d 379, 385, 219 P.3d 651 (2009).

“[U]nder article I, section 7...a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement.” *Patton*, 167 Wn.2d at 386, 219 P.3d 651. “The warrant requirement is especially important under article I, section 7, of the Washington Constitution **as it is the warrant which provides the ‘authority of law’ referenced therein.**” *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (emphasis added).

“[The Washington Supreme Court has] recognized exceptions [to the warrant requirement] for: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. The State bears the burden to show an exception applies.” *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010).

Exigent circumstances include: “(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; (5) mobility or destruction of the evidence.” *Tibbles*, 169 Wn.2d at 370, 236 P.3d 885.

It is undisputable that the use of Timber to smell the interior of Mr. Wright's vehicle constituted a search of his vehicle- Mr. Wright had a privacy interest in the interior of his vehicle and its contents and the police used Timber to invade the interior of Mr. Wright's vehicle and obtain information about the contents of Mr. Wright's vehicle. At the time Mr. Wright's vehicle was searched by Timber, he had not consented to any search of his vehicle, no exigent circumstances existed requiring an immediate search of his vehicle, the police were not conducting an inventory search of the vehicle, and the police were not conducting a *Terry* investigative stop of Mr. Wright since he was in police custody. The only possible exceptions to the warrant requirement that might apply to the search of Mr. Wright's vehicle by Timber would be the plain view exception or the search incident to arrest exception. However, for the reasons discussed below, the search of Mr. Wright's vehicle by Timber violated the permissible scope of a plain view search and the vehicle search incident to arrest exception did not apply.

- a. The warrantless search of the interior of Mr. Wright's vehicle by Timber exceeded the permissible scope of an open view search.*

Where a law enforcement officer is able to detect something at a lawful vantage point through his or her senses, no unlawful search occurs under article I section 7 of the Washington Constitution and the evidence

is admissible against the defendant even if the officer had no warrant to obtain the evidence. *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981).

[I]f an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car. Because there has been no search, article [I], section 7 is not implicated. Once there is an intrusion into the constitutionally protected area, article [I], section 7 is implicated and the intrusion must be justified if it is made without a warrant.

*State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986).

The open view doctrine “does not[, however,] provide authority to enter constitutionally-protected areas to take the items without first obtaining a warrant.” *State v. Posenjak*, 127 Wn.App. 41, 52–53, 111 P.3d 1206 (2005). In order to seize items in open view, the officer must have probable cause to believe the items were evidence of a crime and be faced with “emergent or exigent circumstances regarding the security and acquisition of incriminating evidence” such that it is impracticable to obtain a warrant. *Gibson*, 152 Wn.App. at 956, 219 P.3d 964 (quoting *State v. Smith*, 88 Wn.2d 127, 137–38, 559 P.2d 970 (1977)).

*State v. Jones*, --- P.3d ----, 2011 WL 3821613 \*3.

However, a substantial and unreasonable departure from a lawful vantage point, or a particularly intrusive method of viewing, may constitute a search which exceeds the scope of the officer’s authority and evidence obtained pursuant to the officer’s actions may be inadmissible in court. *State v. Young*, 123 Wn.2d 173, 182-183, 867 P.2d 593 (1994).

For example, where police use an infrared thermal device to detect heat distribution patterns within a home that are not detectable by the naked eye or other senses, the surveillance was a particularly intrusive means of observation that exceeded allowable limits under article I, section 7. *Young*, 123 Wn.2d at 182-84, 867 P.2d 593.

In *State v. Dearman*, 932 Wn.App. 630, 962 P.2d 850 (1998), the court held that,

[I]ike an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to “see through the walls” of the home. The record is clear that officers could not detect the smell of marijuana using only their own sense of smell even when they attempted to do so from the same vantage point as Corky [the narcotics dog]. As in *Young*, police could not have obtained the same information without going inside the garage. It is true that a trained narcotics dog is less intrusive than an infrared thermal detection device. But the dog does expose information that could not have been obtained without the device and which officers were unable to detect by using one or more of their senses while lawfully present at the vantage point where those senses are used. The trial court thus correctly found that using a trained narcotics dog constituted a search for purposes of article 1, section 7 of the Washington Constitution and a search warrant was required.

*State v. Dearman*, 932 Wn.App. 630, 632, 962 P.2d 850, *review denied*, 137 Wn.2d 1032, 980 P.2d 1286 (1999) (citations omitted).

Here, police should have obtained a warrant before using Timber to conduct a search of the interior of Mr. Wright’s vehicle. The

warrantless use of a trained drug-sniffing dog to search the interior of Mr. Wright's vehicle violated his Article 1, § 7 rights both because it was a warrantless search of the interior of his vehicle and because the use of the dog was an overly intrusive method of conducting a plain view or open view search. The search of the interior of the vehicle by Timber was, therefore, an unconstitutional and unlawful warrantless search.

*b. Article 1, § 7 requires police to obtain a warrant to search a vehicle incident to the arrest of the driver unless exigent circumstances require an immediate search.*

Under Article 1, § 7,

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

*Patton*, 167 Wn.2d at 394-395, 219 P.3d 651.

Mr. Wright was in custody and secured in the back of a patrol car at the time of the search of his vehicle by Timber. RP 21, 220-221, 41. Because Mr. Wright was secured in the back of a patrol car, he no longer posed a safety risk to the officers and it was impossible for him to destroy any evidence in his vehicle. Ergo, the search incident to arrest exception did not apply and the deputies were required to obtain a warrant before searching Mr. Wright's vehicle. *See State v. Afana*, 169 Wn.2d 169, 177-

179, 233 P.3d 879 (2010) (where arrestee has been secured in the back of a police vehicle, both the Fourth Amendment and Article 1 § 7, prohibit warrantless searches of the vehicle formerly occupied by the arrestee); *State v. Swetz*, 160 Wn.App. 122, 136, 247 P.3d 802 (2011) (“article I, section 7 limits a search incident to arrest to situations where threats to officer safety or the preservation of evidence prevent the arresting officer from delaying the search to obtain a warrant.”)

It is true that Deputy Shaw did observe what he believed to be a broken glass drug pipe in Mr. Wright’s vehicle while contacting Mr. Wright during the course of the traffic stop. RP 40, 210, 234, 263, CP 5-6. Deputy Shaw’s discovery of this pipe was done during a lawful “open view” search. However, even if Deputy Shaw believed he was observing evidence of the crime of unlawful possession of drug paraphernalia, he still could not seize the broken pipe or search the interior of the vehicle without a warrant:

The open view doctrine “does not[, however,] provide authority to enter constitutionally-protected areas to take the items without first obtaining a warrant.” *State v. Posenjak*, 127 Wn.App. 41, 52–53, 111 P.3d 1206 (2005). In order to seize items in open view, the officer must have probable cause to believe the items were evidence of a crime and be faced with “emergent or exigent circumstances regarding the security and acquisition of incriminating evidence” such that it is impracticable to obtain a warrant. *Gibson*, 152 Wn.App. at 956, 219 P.3d 964 (quoting *State v. Smith*, 88 Wn.2d 127, 137–38, 559

P.2d 970 (1977)).

*Jones*, --- P.3d ----, 2011 WL 3821613 \*3. *See also Swetz*, 160 Wn.App. at 134, 247 P.3d 802 (“When a law enforcement officer observes something in open view from a lawful vantage point, the observation is not a “search” triggering the protections of article I, section 7. But the officer’s right to *seize* the items observed must be justified by a warrant or valid exception, if the items are in a constitutionally protected area.”) (emphasis in original).

As discussed above, no exigent circumstances were present which would have permitted Deputy Shaw or Deputy Cooke to seize the suspected drug pipe or search the interior of the vehicle without first obtaining a warrant. Even if Deputy Shaw’s observation of the broken suspected drug pipe was viewed as probable cause to search Mr. Wright’s vehicle<sup>2</sup>, the deputies were still required to obtain a warrant before searching the vehicle. *Tibbles*, 169 Wn.2d at 369, 236 P.3d 885

As will be discussed further below, the observation of the broken pipe did not provide probable cause to search Mr. Wright’s vehicle for drugs. The Deputies had already seized all the evidence of possession of automobile burglary tools they believed were present in the vehicle when they seized Mr. Wright and his keys. Article 1, § 7 required the deputies

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<sup>2</sup> Mr. Wright does not concede that the observation of the broken glass pipe did provide probable cause to search the vehicle. This issue will be addressed further below.

to obtain a warrant before a search of the interior of Mr. Wright's vehicle would be considered lawful. The search of Mr. Wright's vehicle by Timber the drug-sniffing dog violated Mr. Wright's Article 1, § 7 rights both because it was a warrantless search of an area in which he had a privacy interest and because it was an overly intrusive method of conducting an open or plain view search.

**3. The complaint for the warrant to search Mr. Wright's vehicle contained insufficient facts independent of the results of Timber's search of Mr. Wright's vehicle to establish a nexus between Mr. Wright's vehicle and the crime of unlawful possession of a controlled substance.**

The warrant clause of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based upon 'facts and circumstances sufficient to establish a reasonable inference' that criminal activity is occurring or that contraband exists at a certain location. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

An affidavit in support of a search warrant must set forth sufficient facts and circumstances to establish a reasonable probability that criminal activity is occurring or is about to occur. *State v. Petty*, 48 Wn.App. 615, 621, 740 P.2d 879, *review denied* 109 Wn.2d 1012 (1987). An affidavit of probable cause must show "a nexus between criminal activity and the item

to be seized, and also a nexus between the item to be seized and the place to be searched.” *Thein*, 138 Wn.2d at 140, 977 P.2d 582. Affidavits are to be read as a whole, in a commonsense, nontechnical manner, with doubts resolved in favor of the warrant. *State v. Casto*, 39 Wn.App. 229, 232, 692 P.2d 890 (1984), *review denied*, 103 Wn.2d 1020 (1985). The issuing magistrate’s decision that the facts contained in a complaint for a search warrant establish probable cause for the warrant to issue is reviewed de novo. *State v. Emery*, 161 Wn.App. 172, 202, 253 P.3d 413 (2011).

Where a search warrant issued without probable cause, evidence gathered pursuant to the search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Crawley*, 61 Wn.App. 29, 808 P.2d 773, *review denied*, 117 Wn.2d 1009, 816 P.2d 1223 (1991).

- a. *All evidence discovered pursuant to the search of the vehicle by Timber must be excised from the complaint for the search warrant and the probable cause determination made from the remaining facts contained in the warrant.*

“If information contained in an affidavit of probable cause for a search warrant was obtained by an unconstitutional search, that information may not be used to support the warrant.” *State v. Eisfeldt*, 163 Wn.2d 628, 640, 185 P.3d 580 (2008). “The court must view the warrant without the illegally gathered information to determine if the

remaining facts present probable cause to support the search warrant.” *Eisfeldt*, 163 Wn.2d at 640, 4 P.3d 130. “If the warrant, viewed in this light, fails for lack of probable cause, the evidence seized pursuant to that warrant must also be excluded.” *Eisfeldt*, 163 Wn.2d at 640, 4 P.3d 130.

As discussed above, the search of Mr. Wright’s vehicle by Timber violated Article 1, § 7. Thus, under *Eisfeldt*, all evidence derived from the search of the vehicle by Timber must be excluded from the complaint for the search warrant and this court must determine whether or not probable cause existed to issue the search warrant based on the facts remaining in the complaint.

*b. The fact that Mr. Wright was booked for unlawful possession of drug paraphernalia must also be excised from the complaint for the search warrant.*

Mere possession of drug paraphernalia is not a crime and cannot be the basis for an arrest. *State v. McKenna*, 91 Wn.App. 554, 563, 958 P.2d 1017 (1998). Using the paraphernalia to ingest drugs is a misdemeanor. RCW 69.50.412. A police officer, however, cannot arrest for a misdemeanor unless the arrestee commits that crime in the officer’s presence. RCW 10.31.100; *State v. O’Neill*, 148 Wn.2d 564, 584 n. 8, 62 P.3d 489 (2003).

Here, the deputies did not observe Mr. Wright ingest any drugs. Despite this, the Deputies still arrested and booked Mr. Wright for the

non-existent crime of unlawful possession of drug paraphernalia. RP 19, 40. Because no such crime exists in Washington, the arrest of Mr. Wright for unlawful possession of drug paraphernalia was unconstitutional. Accordingly, under *Eisfeldt*, all evidence that Mr. Wright was booked for unlawful possession of drug paraphernalia should be disregarded by this court in determining whether or not the complaint for the search warrant contained facts sufficient for the warrant to issue.

*c. The untainted facts in the complaint for the search warrant were insufficient to establish probable cause for the search warrant for Mr. Wright's vehicle to issue.*

Deputy Nordstrom's complaint for the search warrant of Mr. Wright's vehicle is included in the Clerk's Papers at CP 18-22. Deputy Nordstrom sought the warrant for Mr. Wright's vehicle to search for evidence of the crime of unlawful possession of a controlled substance, not unlawful possession of drug paraphernalia. CP 18. In the complaint for the search warrant, Deputy Nordstrom set forth the facts of the stop of Mr. Wright's vehicle, the observation of the broken pipe in the vehicle, the arrest and search of Mr. Wright revealing a pipe containing methamphetamine residue, and the fact that Timber indicated the presence of narcotics in the cubby hole that held the broken glass pipe and in the lockbox found in the interior of Mr. Wright's vehicle. CP 20. However,

as discussed above, all evidence derived from the search of the vehicle by Timber must be disregarded, as must reference to the fact that Mr. Wright was booked for possession of drug paraphernalia.

If the tainted facts are redacted from the complaint for the warrant, the facts remaining in the complaint for the search warrant are insufficient to establish that any crime or evidence of a crime would have been found in Mr. Wright's vehicle. The untainted facts in the complaint establish only that Mr. Wright was arrested for having a shaved key in his lap and that when he was searched after his arrest it was discovered that Mr. Wright had a methamphetamine pipe with residue. There are no untainted facts establishing a nexus between the vehicle and any other possession of a controlled substance.

The untainted facts contained in the complaint for the search warrant were insufficient for the search warrant to issue. The search warrant was unlawfully issued and the search of Mr. Wright's vehicle incident to that warrant was unlawful.

- 4. All evidence discovered pursuant to the warrantless search of Mr. Wright's vehicle by Timber and the search of the vehicle pursuant to the search warrant was inadmissible and should have been suppressed.**

Under the Fourth Amendment, evidence obtained directly or indirectly through exploitation of an unconstitutional police action must

be suppressed, unless the secondary evidence is sufficiently attenuated from the illegality as to dissipate the taint. *Wong Sun*, 371 U.S. at 491, 83 S.Ct. 407, 9 L.Ed.2d 441.

Warrantless searches done without a valid exception are per se unreasonable under article I, section 7. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). Under article 1, section 7, suppression is constitutionally required. *State v. White*, 97 Wn.2d 92, 110-112, 640 P.2d 1061 (1982) (“[T]he language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy...The important place of the right to privacy in Const. art. 1, 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow.”)

In Washington, the exclusionary rule prohibits the introduction of unlawfully discovered evidence for three reasons: “first, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means.” *State v. Bonds*, 98 Wn.2d 1, 11-12, 653 P.2d 1024 (1982), *cert. denied* 464 U.S. 831, 104 S.Ct. 111, 78 L.Ed.2d 112 (1983).

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *Kennedy*, 107 Wn.2d at 4, 726 P.2d 445. This constitutionally mandated exclusionary rule “saves article 1, section 7 from becoming a meaningless promise.” *Ladson*, 138 Wn.2d at 359, 979 P.2d 833 (1999). Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by “not tainting our proceedings by illegally obtained evidence.” *Ladson*, 138 Wn.2d at 359-360, 979 P.2d 833.

As discussed above, the initial arrest of Mr. Wright for unlawful possession of drug paraphernalia was unlawful, the warrantless search of the interior of Mr. Wright’s vehicle was unlawful, the warrantless use of a drug-sniffing dog to search the interior of Mr. Wright’s vehicle was unlawful, and the probable cause to issue the search warrant for Mr. Wright’s vehicle was based entirely on facts discovered pursuant to these unconstitutional police actions.

**5. The State presented insufficient admissible evidence to convict Mr. Wright of unlawful possession of methamphetamine with intent to deliver, unlawful possession of heroin, and unlawful possession of a firearm.**

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

Where a criminal defendant challenges the sufficiency of the evidence, appellate courts review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972). If there is insufficient evidence to prove an element, reversal is required and retrial is 'unequivocally prohibited.' *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Here, Mr. Wright was convicted of unlawful possession of methamphetamine with intent to deliver, unlawful possession of heroin, and unlawful possession of a firearm. CP 216-229. All of these crimes

have possession of a controlled substance or a firearm as an essential element. RCWs 69.50.401(1); 69.50.4013(1); 9.41.040(2)(a)(i).

All evidence that Mr. Wright possessed methamphetamine, heroin, or a firearm was discovered pursuant to the unlawful searches of his vehicle. As discussed above, all evidence derived from those searches was inadmissible. Without evidence that Mr. Wright possessed methamphetamine, heroin, or a firearm, the State had insufficient admissible evidence to convict Mr. Wright of unlawful possession of methamphetamine with intent to deliver, unlawful possession of heroin, and unlawful possession of a firearm. This court should vacate Mr. Wright's convictions for those crimes and remand for dismissal of those charges with prejudice.

- 6. Mr. Wright receive ineffective assistance of counsel where his trial counsel failed to challenge the search of Mr. Wright's vehicle by Timber, failed to challenge the validity of the warrant, and failed to challenge the lawfulness of the search of Mr. Wright's vehicle pursuant to the warrant.**

As discussed at length above, it is Mr. Wright's position that the constitutionality of the searches of his vehicle and the validity of the search warrant for his vehicle may be challenged for the first time on appeal under RAP 2.5(a)(3). However, given this court's recent decisions in *Lee*, --- P.3d ---, 2011 WL 3088167, and *State v. Millan*, 151 Wn.App.

492, 212 P.3d 603 (2009), reversed by *State v. Robinson*, 171 Wash.2d 292, 253 P.3d 84 (2011), in an abundance of caution Mr. Wright also asserts that his trial counsel's failure to raise the challenges in the trial court constituted ineffective assistance of counsel.<sup>3</sup>

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9<sup>th</sup> Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness.

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<sup>3</sup> Counsel for Mr. Wright is aware of this court's decisions in *Abuan*, 161 Wn.App. 135, 257 P.3d 1 and *State v. McCormick*, 152 Wn.App. 536, 216 P.3d 475 (2009), *review denied*, --- P.3d ---- (2011) and the Washington Supreme Court's decisions in *Afana*, 169 Wn.2d 169, 233 P.3d 879 and *Robinson*, 171 Wn.2d 292, 253 P.3d 84, all of which hold that the lawfulness of searches may be challenged for the first time on appeal. However, given the split in Division II of the court of appeals regarding this issue, it may not be effective assistance of appellate counsel to rely solely on the argument that RAP 2.5(a)(3) permits such challenges for the first time on appeal.

*McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280.

When a claim of constitutional error for failure to suppress evidence is raised for the first time on appeal because no motion to suppress was made at the trial court, the party raising the issue must show that the trial court would have likely granted the suppression motion had it been made. *McFarland*, 127 Wn.2d at 333-34, 899 P.2d 1251.

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280. If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280. The remedy for ineffective assistance of counsel is remand for a new trial. *See State v. Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

As discussed above, Mr. Wright's arrest and the warrantless search of the interior of his vehicle by Timber were unconstitutional and the complaint for the search warrant contained insufficient untainted evidence

to establish probable cause for the warrant to issue rendering the search of MR. Wright's vehicle pursuant to the warrant unlawful. Despite this, trial counsel for Mr. Wright failed to challenge any of the searches or the validity of the search warrant. Given that both the majority and the most serious charges against Mr. Wright arose from evidence discovered pursuant to these unlawful searches, it was not objectively reasonable nor was it a legitimate trial strategy for Mr. Wright's trial counsel to fail to challenge them.

Mr. Wright's trial counsel's performance was deficient. Given the clear unlawfulness of the searches of Mr. Wright's vehicle as discussed above, had the searches been challenged the trial court would likely have granted the motions to suppress. Mr. Wright was prejudiced by his trial counsel's failure to challenge the searches in that he was convicted of crimes based entirely on inadmissible evidence discovered pursuant to unlawful searches.

Mr. Wright received ineffective assistance of counsel and, should this court choose to not address Mr. Wright's challenges to the searches for the first time in his appeal, this court should vacate Mr. Wright's convictions and remand for a new trial.

- 7. The trial court exceeded its authority in imposing a term of Mr. Wright's community custody that violates his freedom of association because the term prohibits**

**Mr. Wright from contacting an unidentifiable class of people.**

Sentencing courts may impose only statutorily authorized sentences. *State v. Paulson*, 131 Wn.App. 579, 588, 128 P.3d 133 (2006). They do not have legal authority to sentence an offender beyond that authorized by the legislature. *In re Pers. Restraint of Fleming*, 129 Wn.2d 529, 533, 919 P.2d 66 (1996). A trial court's action is void if it exceeds its sentencing authority. *Paulson*, 131 Wn.App. at 588, 128 P.3d 133.

The Sentencing Reform Act of 1981(Act), RCW 9.94A.505(8), authorizes the trial court to impose "crime-related prohibitions." Under the Act, trial courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007). "Crime-related prohibitions" are orders directly related to "the circumstances of the crime." RCW 9.94A.030(13). Appellate courts review sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Such conditions are usually upheld if reasonably crime related. *Riley*, 121 Wn.2d at 36- 37, 846 P.2d 1365.

More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right. *State v.*

*Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), *cert. denied* 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009). Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. *Warren*, 165 Wn.2d at 32, 195 P.3d 940. Additionally, conditions that interfere with fundamental rights must be sensitively imposed. *Riley*, 121 Wn.2d at 37, 846 P.2d 1365 (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir.1975)).

Crime-related prohibitions that infringe upon fundamental constitutional rights are subject to strict scrutiny review. *Warren*, 165 Wn.2d at 34, 195 P.3d 940. Under this standard, appellate courts determine whether the State proved that the restriction on the right to parent was “sensitively imposed” and “reasonably necessary to accomplish the essential needs of the State.” *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

The First Amendment protects an individual’s right to freedom of speech and association. Because the SRA expressly authorizes a sentencing court to order that the defendant “not have direct or indirect contact with the victim of the crime or a specified class of individuals,” a sentencing court may restrict an offender’s freedom of association as a condition of sentencing “if reasonably necessary to accomplish the essential needs of the state and public order.”

*State v. Moultrie*, 143 Wn.App. 387, 399, 177 P.3d 776, *review denied*

164 Wash.2d 1035, 197 P.3d 1185 (2008) (footnotes omitted).

Here, the sentencing court imposed the condition that Mr. Wright “shall have no contact with drug possessors, users, sellers.” CP 216-229. The problem with this condition is that Mr. Wright has no way of determining whether or not any person he meets is a drug possessor, user, or seller unless that person reveals such a fact to Mr. Wright, something which would not be likely to occur. The only way Mr. Wright could ever hope to comply with this provision of his judgment and sentence would be to shun contact with all people for fear of encountering someone might possess, use, or sell drugs.

Prohibiting Mr. Wright from contacting all people is not reasonably necessary to accomplish any need of the State or to ensure public order. The trial court exceeded its authority in imposing this condition and the condition violates Mr. Wright’s freedom of association. This court should find the condition of the sentence unconstitutional, vacate it, and remand Mr. Wright’s case for resentencing.

## **VI. CONCLUSION**

Mr. Wright was convicted on the basis of inadmissible evidence derived from unlawful searches of his vehicle. Mr. Wright received ineffective assistance of counsel when his trial counsel failed to challenge the lawfulness of the search or challenge the admissibility of the evidence

derived from those searches at trial.

This court should vacate Mr. Wright's convictions for unlawful possession of methamphetamine with intent to sell, possession of heroin, and unlawful possession of a firearm and remand Mr. Wright's case for dismissal of those charges with prejudice. Alternatively, this court should vacate Mr. Wright's convictions and remand his case for a new trial on the basis that he received ineffective assistance of counsel.

DATED this 30th day of September, 2011.

Respectfully submitted,

\_\_\_\_\_  
Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 30, 2011, she delivered in person to the Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Room 946, Tacoma, Washington 98402, and by United States Mail to appellant, Dwayne Wright, DOC # 749816, Airway Heights Corrections Center, Post Office Box 2049, Airway Heights, Washington 99001 true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on September 30, 2011.

\_\_\_\_\_  
Norma Kinter

# ARNOLD LAW OFFICE

**September 30, 2011 - 12:25 PM**

## Transmittal Letter

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Case Name: Dwayne Wright

Court of Appeals Case Number: 41949-1

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: \_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: Opening Brief of Appellant

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A copy of this document has been emailed to the following addresses:

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