

42638-2-II

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

State of Washington
Respondent

v.

MICHAEL JOSEPH MOYLE
Appellant

42638-2-II

On Appeal from the Superior Court of Clallam County
Superior Court Cause number 10-1-00296-0

The Honorable S. Brooke Taylor

REPLY BRIEF

**Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant, Michael J. Moyle**

MCCABE LAW OFFICE
PO Box 46668, Seattle, WA 98146
206-453-5604 • jordan.mccabe@comcast.net

CONTENTS

I. Authorities Cited ii

II. Statement of the Case 1

IV. Arguments in reply 4

 1. The court erroneously denied Moyle a suppression hearing 4

 2. Defense counsel was ineffective in not requesting an evidentiary hearing 7

 3. Key suppression findings are not supported by the record and the findings do not support the conclusions..... 8

 4. The intrusion into Moyle’s privacy was pretextual 10

 5. The police subjected Appellant to a warrantless seizure with neither probable cause to arrest nor articulable suspicion for an investigative stop 12

 6. The evidence was insufficient to prove possession 17

 7. The court imposed excessive costs 21

V. Conclusion 23

I. **AUTHORITIES CITED**

Washington Cases

In re Bailey, 162 Wn. App. 215
252 P.3d 924 (2011) 21

State v. Alvarez, 128 Wn.2d 1
904 P.2d 754 (1995) 19

State v. Bashaw, 169 Wn.2d 133
234 P.3d 195 (2010) 10

State v. Bertrand, 165 Wn. App. 393
267 P.3d 511 (2011) 23

State v. Broadnax, 98 Wn.2d 289
654 P.2d 96 (1982)14, 16

State v. Brown, 162 Wn.2d 422
173 P.3d 245 (2007) 18

State v. Callahan, 77 Wn.2d 27
459 P.2d 400 (1969) 19

State v. Chenoweth, 160 Wn.2d 454
158 P.3d 595 (2007) 5, 17

State v. Cote, 123 Wn. App. 546
96 P.3d 410 (2004) 8

State v. Craig, 115 Wn. App. 191
61 P.3d 340 (2002) 13

State v. Curry, 118 Wn.2d 911
829 P.2d 166 (1992) 21

State v. Day, 161 Wn.2d 889
168 P.3d 1265 (2007) 14

State v. Doughty, 239 P.3d 573 239 P.3d 573 (2010)	5
State v. Echeverria, 85 Wn. App. 777 934 P.2d 1214 (1997)	19
State v. Gaines, 154 Wn.2d 711 116 P.3d 993 (2005)	17
State v. Galisia, 63 Wn. App. 833 822 P.2d 303 (1992).....	18
State v. George, 146 Wn. App. 906 193 P.3d 693 (2008)	8, 19, 20
State v. Glenn, 140 Wn. App. 627 166 P.3d 1235 (2007)	13
State v. Green, 94 Wn.2d 216 616 P.2d 628 (1980)	19
State v. Hagen, 55 Wn. App. 494 781 P.2d 892 (1989)	19
State v. Hardesty, 129 Wn.2d 303 915 P.2d 1080 (1996)	19
State v. Hathaway, 161 Wn. App. 634 251 P.3d 253, 263 (2011)	22
State v. Hickman, 135 Wn.2d 97 954 P.2d 900 (1998)	19
State v. Hobart, 94 Wn.2d 437, 617 P.2d 429 (1980)	16
State v. Huff, 64 Wn. App. 641 826 P.2d 698 (1992)	20
State v. Hunter, 102 Wn. App. 630 9 P.3d 872 (2000)	23

State v. Hutton, 7 Wn. App. 726 502 P.2d 1037 (1972)	9
State v. Ibarra-Raya, 145 Wn. App. 516 187 P.3d 301 (2008)	19
State v. Ladson, 138 Wn.2d 343 979 P.2d 833 (1999)	11
State v. Little, 116 Wn.2d 488 806 P.2d 749 (1991)	19
State v. Lorenz, 152 Wn.2d 22 93 P.3d 133 (2004)	13
State v. Mance, 82 Wn. App. 539 918 P.2d 527 (1996)	14
State v. Mathews, 4 Wn. App. 653 484 P.2d 942 (1971)	19
State v. McKenna, 91 Wn. App. 560 958 P.2d 1017 (1998)	15
State v. Mendez, 137 Wn.2d 208 970 P.2d 722 (1999)	14
State v. Parker, 139 Wn.2d 486 987 P.2d 73 (1999)	15
State v. Parra, 122 Wn.2d 590 859 P.2d 1231 (1993)	2, 10
State v. Patton, 167 Wn.2d 379 219 P.3d 651 (2009)	12
State v. Portrey, 102 Wn. App. 898 10 P.3d 481 (2000)	20
State v. Prestegard, 108 Wn. App. 14 28 P.3d 817 (2001)	18

State v. Radka, 120 Wn. App. 43 83 P.3d 1038 (2004)	12
State v. Rangel-Reyes, 119 Wn. App. 494 81 P.3d 157 (2003)	18
State v. Reichenbach, 153 Wn.2d 126 101 P.3d 80 (2004)	13
State v. Robbins, 37 Wn.2d 431 224 P.2d 345 (1950)	5
State v. Salinas, 119 Wn.2d 192 829 P.2d 1068 (1992)	18
State v. Smith, 102 Wn.2d 449 688 P.2d 146 (1984)	14
State v. Spruell, 57 Wn. App. 383 788 P.2d 21 (1990)	20
State v. Staley, 123 Wn.2d 794 872 P.2d 502 (1994)	19
State v. Stanton, 68 Wn. App. 855 845 P.2d 1365 (1993)	18
State v. Studd, 137 Wn.2d 533 973 P.2d 1049 (1999)	10
State v. Sullivan, 65 Wn.2d 47 395 P.2d 745 (1964)	13
State v. Thompson, 93 Wn.2d 838 613 P.2d 525 (1980)	14
State v. White, 97 Wn.2d 92 640 P.2d 1061 (1982)	5, 17

Federal Cases

Berkemer v. McCarty, 468 U.S. 420
104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) 13

Dunaway v. New York, 442 U.S. 200
99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979) 14

Terry v. Ohio, 392 U.S. 1
88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 12

Wong Sun v. United States, 371 U.S. 471
83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) 5, 17

Ybarra v. Illinois, 444 U.S. 85
100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) 16

Washington Statutes

RCW 9.94A.030 22, 23

RCW 10.01.160 21, 22, 23

RCW 69.50.412 15

II. STATEMENT OF THE CASE

The facts were developed during a suppression hearing for one Fanny Burdette, who was tried separately and whose counsel was conflicted out of representing Mr. Moyle. Supp. CP 138. Nevertheless, the court ruled on Moyle's suppression motion without a hearing, relying instead on the Burdette transcript. CP 26; 12/1 RP 59.

On July 19, 2010, shortly before midnight, Port Angeles Police officers were patrolling the streets, hoping to intercept vehicle prowls. Officer Justin LeRoux decided to investigate a truck parked in a driveway. 12/1 RP 14; Finding 1, CP 27; CP 101. The truck's doors were open, its dome light was on, and several people were moving around inside and around it. CP 101. LeRoux immediately determined that one of the people was the owner of the driveway and another owned the truck. 12/1 RP 16; CP 101. Nevertheless, Officer LeRoux continued to detain these people. Back-up officers David Arand and Jesse Winfield arrived a few minutes later. 12/1 RP 16; Finding 4, CP 27; CP 101.

While Arand helped LeRoux conduct a vehicle prowl investigation of the owners of the truck in their own driveway, Corporal Winfield began shining his flashlight inside other cars parked in the vicinity. CP 101.

He spotted Mr. Moyle, who had fallen asleep in the passenger seat of Fanny Burdette's car while Ms. Burdette was visiting a nearby residence. CP 101. Moyle was lying with his eyes closed in the reclined passenger seat of Burdette's red Honda. CP 101. Just out of curiosity, Winfield illuminated Moyle with his flashlight. 12/1 RP 68. ("When I walked up to the car and I saw someone was in it, I pointed that out to the officers and I illuminated the inside of the car to see what the person was doing because I couldn't tell what he was doing so I looked at him.")

Winfield called Arand over and told him there was a glass pipe on the center console, between the driver's and passenger seats. 12/1 30-31; Finding 8, CP 28. In all the police reports, Officer Arand states that only Winfield actually saw the pipe until after Moyle was arrested. 2nd Supp. CP 139;¹ Narrative Case Report, filed July 20, 2010; State's Memorandum, CP 101. Officer LeRoux testified unequivocally that he also did not see the pipe until after Moyle was in custody. 12/1 RP 17, 24.

Corporal Winfield claimed to have instantly recognized the pipe as a meth pipe, having been trained to identify specific drug residues in the dark by sight. 12/1 RP 56-57.

¹ The State stipulated to the facts in the police reports. CP 34-35, 43. A party may not contend on appeal that the facts are other than as stipulated. See *State v. Parra*, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993).

Arand and Winfield opened the car door, ordered Mr. Moyle out, and told him he was “detained.” 12/1 RP 33; Finding 14, CP 28. He was immediately handcuffed, marched over to a patrol car, searched twice, Mirandized, and placed in the back seat. During the first body search, the officers found a marijuana pipe and a bud of marijuana in a plastic pill bottle. Findings 17, 19, 20, CP 28. The State concedes this search was unlawful and that the fruits must be suppressed. BR 35.

Following the unlawful search, Moyle was read his rights and admitted the pipe in the car was his meth pipe and that he had used it half an hour earlier. 12/1 RP 35. A second body search turned up a small baggie of methamphetamine in the pocket of Moyle’s sweater. 12/1RP 46. Moyle eventually was transported to jail. 12/1 RP 33-34; Findings 14-16, CP 28.

Moyle moved to suppress both his statements and the physical evidence. Moyle’s substitute counsel agreed that the court could rule on Moyle’s suppression motion without an evidentiary hearing, relying instead on the Fanny Burdette transcript. 12/15RP 12, 59; 12/15 RP 16-17; Suppression Findings, CP 26.

The court found sufficient facts to support a reasonable and individualized suspicion that Moyle was engaged in criminal activity. In addition to the proximity of the pipe, the court found it significant that

Moyle did not wake up when Winfield shined a flashlight on him. And the court found sua sponte that the officers were concerned about Mr. Moyle's well-being. Conclusion 2, CP 29. The court also concluded that the first search incident to Moyle's detention constituted no more than a "safety frisk" that was justified by the totality of the circumstances. Conclusion 3, CP 29. The State now concedes this was error. BR 35.

Moyle was convicted on stipulated facts. CP 16-17.

III. ARGUMENTS IN REPLY

1. THE COURT ERRONEOUSLY DENIED MOYLE A SUPPRESSION HEARING.

Moyle moved to suppress the State's evidence, but instead of holding a suppression hearing, the court relied on the transcript of Fanny Burdette's hearing. This was fundamental error that cannot be deemed harmless.

The State's procedural arguments all are meritless. The State claims that Moyle was not entitled to a hearing because he failed to apprise the trial court that one was necessary. Brief of Respondent (BR) 14-15.² But the trial court determined that a suppression hearing was necessary and issued an order to that effect. CP 109. And the State was on notice of Moyle's arguments, because the prosecutor filed a motion in

² Moyle's former counsel's brief was before the trial court, but does not appear to have been filed. 12/15/10 RP 16-17.

response. CP 101. The claim that Moyle has not cited to authority on appeal is simply wrong. BR 15. Please see Appellant's Brief (AB) 8-10.

Finally, the State asserts that Appellant waived this assignment of error because his supporting argument is "hornbook law." BR 16. No authority is cited for this remarkable proposition.³ Once a defendant challenges the admissibility of the State's evidence, the burden is on the State to demonstrate that the evidence was lawfully obtained. *State v. Doughty*, 170, Wn.2d 57, 61, 239 P.3d 573 (2010). By definition, where a defendant moves to suppress the State's evidence, and the State fails to meet its burden to overcome the challenge and prove that the evidence is admissible, the evidence is inadmissible. That is the case here.

Evidence derived from unlawful government conduct must be excluded for all purposes. *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Thus, it is the duty of the court, upon objection, to refuse to admit it. *State v. Robbins*, 37 Wn.2d 431, 437, 224 P.2d 345 (1950).

The State disputes whether prosecuting a Washington citizen with unlawfully obtained evidence undermines the framework of the trial. BR

³ The State suggests that Moyle cited an unpublished case and *State v. Robinson*, 171 Wn.2d 292 (2011). BR 18. Counsel can find neither reference.

17. But the State cites to no Washington case, and appellant's counsel finds none, where failure to hold hearing on a motion to suppress did not require automatic reversal.

Moreover, even if the Court were to engage in a harmless error analysis, prejudice is manifest, contrary to the State's claims. BR 19.

Burdette's interests were not congruent with those of Moyle. Her counsel had no incentive to challenge Corporal Winfield regarding his flashlight search of the vehicle in which Moyle was sleeping, the precise grounds for seizing Moyle, or what facts were within the officers' knowledge that could conceivably have constituted probable cause to subject Moyle to a custodial arrest.

Burdette also had no incentive to object when the officers persisted in characterizing Moyle as being "passed out" or even faking, implying a reason to suspect drug use at a point where none existed. 12/IRP 16, 29, 68. Neither officer articulated any reason for not simply saying Moyle appeared to be asleep. 12/IRP 30, 56, 68. The court adopted Corporal Winfield's mischaracterization in its findings of fact. 4/27RP 31; CP 27.

Reversal is required.

2. COUNSEL WAS INEFFECTIVE FOR NOT SEEKING AN EVIDENTIARY HEARING.

The State claims that judicial economy and the convenience of the police witnesses played no part in the decision to skip Moyle's suppression hearing. BR 20-21. But defense counsel remarked that doing so would spare the officers from having to testify a second time. 12/15 RP at 12. And no other reason suggests itself.

The State's claim that accepting a hand-me-down hearing transcript was a legitimate trial strategy is meritless. BR 21. Moyle was arrested and searched without probable cause or even an articulable suspicion sufficient to support an intrusion of any kind. BR 21. Moreover, Burdette's counsel was disqualified from representing Moyle precisely because their interests were conflicting. The State claims that all the necessary facts were in the record. BR 20. But the trial court determined that a hearing was necessary. And Burdette's counsel did not elicit the requisite police testimony regarding the specifics of Moyle's search and seizure, because that evidence did not benefit Burdette.

Finally, the State claims that counsel did the right thing because possession need not be exclusive, and Burdette was therefore motivated to challenge the possession evidence. BR 23. Then the State claims the

opposite, that the State's argument that Burdette exercised dominion and control over the pipe somehow relieved Moyle of liability. *Id.*

Dominion and control over the substance need not be exclusive. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). This has no relevance to this argument, however. Burdette had no incentive to challenge the conclusion that Moyle had possession of the pipe. Her sole concern was the claim of constructive possession against herself. Accordingly, she did not argue that mere proximity to a controlled substance does not prove possession. See AB 26. Or that an object centrally located in a car cannot be associated with the occupant of any particular seat. *State v. George*, 146 Wn. App. 906 193 P.3d 693 (2008).

No strategic reason can be conceived for waiving Moyle's right to have his own counsel challenge the testimony of police witnesses.

The prejudice to Moyle is manifest, because, had the officers' testimony been zealously challenged, the court may well have recognized that Moyle's search and seizure were unlawful.

3. THE RECORD DOES NOT SUPPORT KEY SUPPRESSION FINDINGS AND THE FACTS DO NOT SUPPORT THE CONCLUSION.

Evidence is not substantial unless it could convince a reasonable, unprejudiced person of the truth of the fact it is offered to prove. *State v.*

Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Substantial evidence cannot be based upon guess, speculation, or conjecture. *Id.*

The State first converts counsel's characterization of the evidence as fanciful to an insult to the judge and then requests that appellant's counsel be admonished. BR 25. But the State cites not a single case wherein a patrol officer's eyeball identification of drug residue viewed through tinted glass by flashlight at midnight (12/1 RP 57) was found to be substantial evidence, rather than guess or conjecture.

The court also found that all three officers saw a meth pipe in the Honda before Moyle was arrested. Finding 10, CP 28; 4/27 RP 29. The record does not support this. A party may not contend on appeal that the facts are other than as stipulated. *See State v. Parra*, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993). Officer LeRoux testified unequivocally that he did not see the pipe until after Moyle was in custody. 12/1 RP 17, 24. All the police reports show that only Winfield, not Arand, had actually seen the pipe. Supp. CP 140. The State stipulated to the facts in the police reports. CP 34-35, 43.

The trial court sua sponte invented the argument that the officers disturbed Mr. Moyle because they were concerned for his well-being. 4/27 RP 11. And the court relied on this spurious finding to conclude that

the officers had articulable grounds to seize Moyle presumably under the “emergency aid” exception to the warrant requirement.

But courts “are not in the business of inventing unbriefed arguments for parties sua sponte[.]” *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). There was no evidence that either officer entertained the slightest subjective belief that Moyle was in need of aid.

The court also concluded that Moyle’s failure to wake up was grounds to suspect he was “up to no good in some manner.” 4/27 RP 30. Again, there is no evidence that either officer thought his, and the conclusion simply does not follow from the facts.

Because key findings are not supported by the record, and do not support the conclusions of law, this court should reverse and remand with instructions to suppress all evidence obtained after Moyle was seized.

4. THE INVASION OF MOYLE’S PRIVACY
WAS PRETEXTUAL.

The Court may take judicial notice of facts conceded by the State in its brief on appeal. *State v. Bashaw*, 169 Wn.2d 133, 138, n.1, 234 P.3d 195 (2010). Here, the State concedes facts sufficient to support a conclusion that Corporal Winfield’s purported reasons for intruding upon Mr. Moyle’s privacy were pretextual. BR 29-30.

When the police stop an individual not to enforce the law but to conduct an unrelated criminal investigation, the stop is a pretext. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). When determining whether a stop is pretextual, the court considers all the circumstances, including not only the officer's claimed subjective intent, but also the objective reasonableness of his behavior. *Id.*, at 358-59.

The prosecutor notes that, rather than protecting the community from vehicle prowls as he claimed, or protecting Moyle's welfare as the trial court claimed, Corporal Winfield really inspected the interior of the car because he knew Fanny Burdette had been arrested the night before for a drug offense and also knew the red Honda was her car. BR 30.

The State concedes that three police vehicles displaying "intense lighting" were at the scene. BR 34. It is simply not objectively reasonable that Winfield could have imagined a vehicle prowl might be ongoing under those circumstances.

The State's concession establishes an additional reason why the Court should suppress all the evidence, reverse Mr. Moyle's conviction, and dismiss the prosecution.

5. THE POLICE ARRESTED MOYLE WITHOUT
A WARRANT OR PROBABLE CAUSE.

The State claims that Moyle was not immediately arrested but merely subjected to a *Terry* stop.⁴ BR 32. The record shows otherwise.

The reviewing court evaluates all the surrounding circumstances in evaluating a claim that no arrest occurred. *State v. Patton*, 167 Wn.2d 379, 387, 219 P.3d 651 (2009). The question is whether a reasonable person in the circumstances would think he was under arrest. *State v. Glenn*, 140 Wn. App. 627, 638-39, 166 P.3d 1235 (2007), citing *State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004). No formal announcement of arrest is necessary. *Glenn*, 140 Wn. App. at 639; *Patton*, 167 Wn.2d at 387, n.6. And the officer's subjective perception that something other than an arrest is occurring is irrelevant. *Glenn*, 140 Wn. App. at 639.

Moyle Was Arrested: The State erroneously cites to *Radka* for the claim that “the determination of custody hinges upon the manifestations of the arresting officer’s intent.” BR 32, citing *Radka*, 120 Wn. App. at 49. But this does not mean that manifestations of arrest such as handcuffing and confinement in a patrol car do not count if the officer claims a different subjective intent. *Radka* continues: “Typical manifestations of

⁴ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

intent indicating custodial arrest are the handcuffing of the suspect and placement of the suspect in a patrol vehicle, presumably for transport.” *Id.* The question is how would a reasonable person perceive his situation.

It is well settled that the test to determine whether a person is under custodial arrest is objective. *State v. Lorenz*, 152 Wn.2d 22, 36–37, 93 P.3d 133 (2004). The focus is whether a reasonable detainee under the circumstances would consider himself under a custodial arrest. *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). That is, whether his freedom was curtailed to a degree associated with formal arrest. *Lorenz*, 152 Wn.2d at 36, citing *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

Here, in an unbroken sequence, these officers ordered Moyle out of the car, handcuffed him, marched him over to a patrol car, searched him, searched him again, secured him in the car, read him his rights and transported him to jail. These actions are unequivocal manifestations of an arrest. *State v. Craig*, 115 Wn. App. 191, 195-96, 61 P.3d 340 (2002).

The State claims Moyle was not arrested because the officers said that he was “detained.” BR 32; 4/27 RP 28-29. But the police need not make a formal declaration of arrest. *State v. Sullivan*, 65 Wn.2d 47, 51, 395 P.2d 745 (1964). Telling a person he is “detained” means he is not free to leave, and a person who is not free to leave is in custody. When

the police then immediately handcuff the suspect, walk him over to a patrol car and search him, this is a curtailment of freedom to a degree associated with formal arrest.

Moyle Was Arrested Without Probable Cause: An official detention must be supported by probable cause, even if no formal arrest is made. *State v. Smith*, 102 Wn.2d 449, 452, 688 P.2d 146 (1984), citing *State v. Broadnax*, 98 Wn.2d 289, 293, 654 P.2d 96 (1982), and *Dunaway v. New York*, 442 U.S. 200, 208, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). Probable cause means that the arresting officers are aware of facts sufficient to cause a reasonable officer to believe the person has committed a crime. *State v. Mance*, 82 Wn. App. 539, 541, 918 P.2d 527 (1996). In order to justify a seizure, the police must have individualized suspicion. *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980).

Here, neither Winfield nor Arand knew any fact supporting the belief that Moyle ever handled the pipe on the center console of Burdette's car where anyone could have set it down from any seat in the car.

This Was Not a Terry Stop: The record does not support the claim that Moyle was subjected to a lawful *Terry* stop. BR 30-31.

The police may detain without a warrant a person they reasonably suspect is engaged in criminal conduct. *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007); *State v. Mendez*, 137 Wn.2d 208, 223, 970

P.2d 722 (1999), quoting *Terry*, 392 U.S. at 21. The stop must be justified at its inception, and cannot be justified by the fruits of the incident search. *Terry*, 392 U.S. at 20; *State v. McKenna*, 91 Wn. App. 560, 563, 958 P.2d 1017 (1998).

The seizure of Moyle cannot be classified as a *Terry* stop. The police had no grounds to bother him other than that he was sleeping in proximity to a possible meth pipe in a vehicle one of the officers knew belonged to someone else. But mere possession of drug paraphernalia is not a crime. *McKenna*, 91 Wn. App. at 554, citing RCW 69.50.412.

The officers knew only that a pipe was in proximity to Moyle as he slept.

Moyle Was Unlawfully Searched: A lawful custodial arrest is a constitutionally mandated prerequisite to a lawful search incident to arrest. *State v. Parker*, 139 Wn.2d 486, 496-97, 987 P.2d 73 (1999), citing cases. The search incident to arrest exception functions to secure officer safety and preserve evidence of the crime for which the suspect is arrested, but a lawful custodial arrest is a prerequisite, “regardless of the exigencies.” *Parker*, 139 Wn.2d at 496-97.

Moyle’s arrest was unlawful. Therefore, the incident search was unlawful.

The State claims the cart preceded the horse and that Moyle was not arrested until after he made incriminating statements which constituted probable cause to arrest him. BR 36. As discussed, however, the record refutes this claim. Moreover, the State concedes that the statements were obtained as the direct result of an unlawful frisk. BR 37.

No Lawful Grounds for a Frisk: The State concedes that the officers lacked any articulable grounds to search Moyle, and that marijuana bud and pipe discovered in the unlawful search must, therefore, be suppressed. BR 35. This voids CrR 3.6 Finding 16, that Arand performed a lawful safety frisk.

Terry permits an officer to frisk for weapons, but only if he can articulate reasonable grounds to believe the person is armed and presently dangerous. *Smith*, 102 Wn.2d at 452, citing *Broadnax*, 98 Wn.2d at 293–94; *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980). The suspicion of dangerousness must be particular to the suspect, not simply general considerations such as the character of the neighborhood. *Id.*; *Broadnax*, 98 Wn.2d at 295; *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

These officers did not believe Moyle was armed or dangerous.

Both Convictions Must be Reversed: Suppression must be granted whenever there is a meaningful causal connection between the State’s

evidence and its unlawful activity, because the evidence is deemed “fruit of the poisonous tree.” *Wong Sun*, 371 U.S. at 487-88. This includes not only evidence seized directly during the illegal intrusion but also evidence subsequently derived from evidence seized in the illegal search. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Such evidence is inadmissible in any Washington court for any purpose. *Chenoweth*, 160 Wn.2d at 473; *White*, 97 Wn.2d at 110.

The conviction for Count II, possession of marijuana must fall with the evidence the State concedes was unlawfully seized.

The methamphetamine conviction also cannot stand, because it is inextricably bound up in the entire course of unlawful conduct.

The State claims that evidence was obtained from an independent source. BR38. But all of the evidence against Moyle was tainted by a course of conduct that began with a pretext, continued with an arrest without probable cause, and exceeded the scope of any sort of lawful search. This Court should therefore reverse both convictions and dismiss the prosecution with prejudice.

6. THE EVIDENCE WAS INSUFFICIENT
TO PROVE POSSESSION.

In reviewing a challenge to the sufficiency of the evidence the Court views the evidence in the light most favorable to the State and

decides whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In evaluating the proof, the Court must be convinced that substantial evidence supports the State’s case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992). That is, the State must present enough evidence to allow a reasonable fact-finder to find each element beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When reviewing whether the evidence is substantial, the Court does not rely on guess, speculation, or conjecture. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001). The same standard applies whether the case is tried to a jury or to the court. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), citing *State v. Little*, 116 Wn.2d 488, 491, 806 P.2d 749 (1991).

A defendant may challenge the sufficiency of the evidence for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). “Retrial following reversal for insufficient evidence is ‘unequivocally

prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

The State failed to prove that Mr. Moyle possessed the pipe on the center console between the driver's and passenger seats in Burdette's car.

Possession may be either actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession means that an item is in the personal custody of the person charged. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Constructive possession requires a showing that the defendant had dominion and control over the item or over the premises where it was found. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Automobiles are considered "premises" in this context. *George*, 146 Wn. App. at 920.

Various factors determine dominion and control. *State v. Ibarra-Raya*, 145 Wn. App. 516, 525, 187 P.3d 301 (2008). "The ability to reduce an object to actual possession is one aspect of dominion and control." *Echeverria*, 85 Wn. App. at 783. But it is settled law in Washington that mere proximity to a controlled substance or the ability to reduce it to immediate possession does not prove dominion and control beyond a reasonable doubt. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989); *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942

(1971). *State v. Portrey*, 102 Wn. App. 898, 902-03, 10 P.3d 481 (2000); *State v. Huff*, 64 Wn. App. 641, 655, 826 P.2d 698 (1992). “[T]he rule is that ‘where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession.’” *George*, 146 Wn. App. at 520, quoting *State v. Spruell*, 57 Wn. App. 383, 388, 788 P.2d 21 (1990).

Constructive possession is fact-sensitive, and the Court is guided by the results reached in decisions with similar facts. *George*, 146 Wn. App. at 920. The facts here are comparable to those of *George*, in which constructive possession was not proven.

In *George*, a drug pipe was found on the floor of a car right at the suspect’s feet. Here, the pipe was on the center console. As in *George*, Moyle was not the owner or driver of the car, and therefore did not have dominion or control over the premises. Most importantly, as in *George*, it cannot be determined when and by whom the pipe was placed where it was found. The State could not show beyond a reasonable doubt that Moyle, not another recent occupant of the car, placed the pipe on the console, where it was equally likely to have been set down by anyone seated anywhere in vehicle, front or back.

Accordingly, even if any of the State's evidence was admissible, all the State proved against Mr. Moyle was his mere proximity to the meth pipe. It was further undisputed that the owner and driver of the car, Fanny Burdette, possessed a variety of drugs and paraphernalia in her car.

7. THE COURT EXCEEDED ITS LAWFUL
AUTHORITY TO IMPOSE COSTS.

The court imposed legal financial obligations of \$3,650.00. This included \$1,000 for a drug court program and \$1,000 for the Olympic Peninsula Narcotics Enforcement Team. CP 20. The court ruled that Moyle was able to pay.

The Court reviews the imposition of costs for abuse of discretion. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Costs are limited by statute to expenses specifically incurred by the State in prosecuting the defendant. RCW 10.01.160(2). The court may not impose costs for "expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law." RCW 10.01.160(2). That means only those costs incurred in prosecuting this particular defendant's particular case. *In re Bailey*, 162 Wn. App. 215, 220-21, 252 P.3d 924 (2011). This Court will remand for correction of facially invalid costs where the challenge involves a purely legal question and an immediate decision will facilitate judicial economy. *State*

v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253, 263 (2011). That is the case here.

First, court may not find that a defendant has the ability to pay his Legal Financial Obligations, absent a record supporting such a finding. *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 516 (2011). The State concedes that the trial court prematurely ruled that Mr. Moyle was able to pay costs. BR 41.

Next, the court assessed \$1,000.00 for the cost of a drug court program. CP 20. But Moyle was not offered the option to participate in drug court. Therefore, this cost is prohibited by RCW 10.01.160(2).

The court imposed another \$1,000.00 for the operation of the Olympic Peninsula Narcotics Enforcement Team (OPNET). CP 20, line 24. Again, however, the State did not employ OPNET in prosecuting Moyle. His arrest was conducted entirely by the local police. OPNET is a government law enforcement agency that must be maintained and operated irrespective of the specific violations of the law with which Moyle was convicted. The OPNET cost is, therefore, erroneous.

The State erroneously cites to a definition as if it were authority for assessing costs for maintaining county agencies that have no bearing on the prosecution. BR 42. RCW 9.94A.030(30) is the definition of legal financial obligations, which **may** include funding of interlocal drug

agencies. This does not mean drug costs may be imposed in every case, and it does not repeal RCW 10.01.160(2), which relieves defendants of the obligation to contribute to the maintenance of agencies the county did not employ in the prosecution and from which they did not benefit.

The court assessed costs that were not expended in Moyle's prosecution. RCW 9.94A.030(30) limits the amount of the assessment to the actual costs of the investigation, which the State failed to substantiate. *State v. Hunter*, 102 Wn. App. 630, 639, 9 P.3d 872 (2000).

Finally, the court included a community supervision prohibition against consuming alcohol. CP 18, 19. The State does not dispute that this restriction should be stricken as unrelated to the offense.

The Court should remand to strike the two \$1,000.00 assessments for drug court and the Olympic Peninsula Narcotics Enforcement Team and to strike the unsupported finding that Moyle has the ability to pay.

V. **CONCLUSION**

The Court should reverse Mr. Moyle's convictions, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this 5th day of March, 2012.



Jordan B. McCabe, WSBA No. 27211
Counsel for Michael J. Moyle

CERTIFICATE OF SERVICE

Jordan McCabe certifies that this Appellant's Brief was served upon opposing counsel electronically via the Division II upload portal.

Lewis W. Schrawyer, Clallam County Prosecutor's Office
lschrawyer@co.clallam.wa.us

Jordan McCabe also mailed this day, first class postage prepaid, a copy of this Reply Brief to:

Michael J. Moyle
Clallam County Jail
223 East 4th Street, Suite 20
Port Angeles, WA 98362

Jordan B McCabe Date: March 5, 2012

Jordan B. McCabe, WSBA No. 27211, Seattle, Washington

MCCABE LAW OFFICE

March 05, 2012 - 5:40 PM

Transmittal Letter

Document Uploaded: 426382-Reply Brief.pdf

Case Name: State v. Moyle

Court of Appeals Case Number: 42638-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Brief: Reply
- 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: _____

Sender Name: Jordan B McCabe - Email: jordan.mccabe@comcast.net

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

lschrawyer@co.clallam.wa.us