

No. 42638-2-II

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

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STATE OF WASHINGTON,

*Respondent/Plaintiff,*

vs.

MICHAEL JOSEPH MOYLE,

*Mr. Moyle/Defendant.*

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BRIEF OF RESPONDENT

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Lewis M. Schrawyer, #12202  
Deputy Prosecuting Attorney  
Clallam County Prosecutor's Office  
223 East 4<sup>th</sup> Street, Suite 11  
Port Angeles, WA 98362  
(360) 417-2301  
FAX (360) 417-2422  
[lschrawyer@co.clallam.wa.us](mailto:lschrawyer@co.clallam.wa.us)

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## COUNTER STATEMENT OF ISSUES

### ISSUE ONE

Did the trial court and defense counsel create a structural error when they decided Mr. Moyle's motion to suppress based on evidence obtained in another hearing when CrR 3.6 requires defense counsel to submit a statement or affidavit of pertinent facts and permits live testimony only at the discretion of the Court? If there was no structural error, then did a manifest error occur?

### ISSUE TWO

Did defense counsel provide ineffective assistance of counsel when he submitted Mr. Moyle's suppression motion on facts developed in a prior hearing, when the record contained all the facts necessary to decide the motion and the choice can be supported as a legitimate trial tactic?

### ISSUE THREE

Are the two challenged findings of the court substantially correct and are all the conclusions supported by appropriate findings? Even if conclusion of law number 3 is not supported by substantial evidence or appropriate findings, does finding the methamphetamine packet arise from an independent source?

### ISSUE FOUR

Did the trial court err when it imposed costs without first determining whether Mr. Moyle had the ability to pay them, but was it correct when it imposed \$2,000 for the "drug fund"?

## STATEMENT OF FACTS

September 30, 2010

The State, Mr. Moyle and Carol Case, his counsel, appeared before the Court to set a 3.6 hearing and a trial date (RP 9/30/2010-4,9). The case is called in conjunction with the case of Fanny Burdette, who was represented by Alex Stalker (RP 9/30/2010-3). The parties agree the two cases are not joined (RP 9/30/2010-3) but that Mr. Moyle's case presents "purely a legal issue" so that a motion to dismiss will be dispositive (RP 9/30/2010-4). November 9, 2010 was set as the date for a suppression motion in both cases (RP 9/30/2010-8).

November 9, 2010

The State, Ms Case (telephonically), Mr. Moyle, Mr. Stalker and Ms. Burdette appeared for a 3.6 hearing. The case is reset for December 1, 2010 (RP 11/9/2010-5).

December 1, 2010

The State, Ms. Case, Mr. Stalker and Ms. Burdette appear for the 3.6 hearing. Mr. Moyle does not appear (RP 12/1/2010-3). Mr. Stalker informed the Court the two cases have "the same set of facts" so the two 3.6 hearings can be heard jointly (RP 12/1/2010-3). The Court issued a warrant for Mr. Moyle's arrest and then

granted Ms. Case's request to withdraw (RP 12/1/2010-7). Mr. Anderson was appointed in her place (RP 12/1/2010-7). Mr. Stalker, Ms. Burdette and the Court wanted to proceed to hearing; even if Mr. Moyle arrived soon, he had new counsel, so his motion cannot be heard that day (RP 12/1/2010-9). The State adopted the brief it filed in Mr. Moyle's case for Ms. Burdette's case (RP 12/1/2010-10).

Officer Justin Leroux, Port Angeles police officer (RP 12/1/2010-14) testified first. He testified he was assigned as a west side officer on July 19, 2010 (RP 12/1/2010-14). The city was conducting an emphasis in the area because "there's a high number of vehicle prowls and burglaries" so "it was kind of my main patrol looking for people [ ] in and around vehicles at that time" (RP 12/1/2010-14). Between 2300 and 2330 hours, he was in the area of 10th and B Street (RP 12/1/2010-14). He saw what appeared to be three males standing next to a vehicle. Two appeared to be in a vehicle with the dome light on. A third male appeared to be at the driver's side of the vehicle (RP 12/1/2010-15). When he made contact, he saw a male in the driver's seat and a female standing outside the passenger door with the door open (RP 12/1/2010-15). The male indicated he was the brother of the owner of the vehicle

and the woman said her name was "Rose" (RP 12/1/2010-16). Officer Arand and Corporal Winfield arrived; Corporal Winfield noticed an individual who appeared to be "passed out" in a red Honda Accord (RP 12/1/2010-16). Officer Leroux continued to speak to the first two people he contacted while Corporal Winfield made contact with the individual in the red Honda (RP 12/1/2010-17). When Corporal Winfield notified Officer Leroux he had found an alleged methamphetamine pipe between the passenger and driver's seat and the console, Leroux learned the red Honda belonged to Ms. Burdette (RP 12/1/2010-17, 20). She indicated to him that she drove the vehicle earlier in the day and that the keys were left in the vehicle (RP 12/1/2010-17). Both were detained and Mr. Moyle admitted post-*Miranda* that the pipe was his and that there was another pipe used to smoke marijuana in the vehicle (RP 12/1/2010-18). During cross examination, Officer Laroux testified he eventually saw the pipe in the red Honda, sitting on the console between the two seats (RP 12/1/2010-24).

Officer Arand, a police officer for the City of Port Angeles testified next. He testified he was on patrol on July 19, 2010 at approximately 2300 hours and was assigned as Officer Leroux's backup officer (RP 12/1/2010-28). His focus for the night was to

patrol the west side of town because of a rash of burglaries in that area (RP 12/1/2010-29). He arrived at Officer Leroux's location and began by speaking to the occupants of the house (RP 12/1/2010-29). Corporal Winfield had arrived by that time and asked if anybody knew anything about the guy passed out in a car near the pickup (RP 12/1/2010-29). Officer Arand saw that Mr. Moyle was sitting in the reclined passenger seat and appeared to be either sleeping or passed out (RP 12/1/2010-29, 30). Corporal Winfield also alerted him to a meth pipe by shining his light through the windshield (RP 12/1/2010-30). Officer Arand saw what he called a meth pipe sitting on top of the center console. He described the pipe as a glass pipe with a milky white residue (RP 12/1/2010-30). Officer Arand is trained to recognize drug residue and has had numerous occasions to view drugs and drug paraphernalia (RP 12/1/2010-31). He explained the type of training that he had received (RP 12/1/2010-31) and then testified he has recognized drug residue "in the minimum of dozens if not hundreds" of times including the same type of pipe commonly used to ingest methamphetamine (RP 12/1/2010-32-33). At that point, Corporal Winfield got Mr. Moyle's attention and told him to step out. After he stepped out, he was placed in handcuffs and told he was being

detained. (RP 12/1/2010-33). Officer Arand walked Mr. Moyle over to his patrol car and began to pat him down for weapons for officer safety purposes (RP 12/1/2010-34). The officer first found a clip knife in his right pocket and a marijuana pipe in his left pocket (RP 12/1/2010-34, 41). He also located a hard cylindrical object (a brown plastic pill bottle) in Mr. Moyle's sweatshirt (RP 12/1/2010-34). He observed a marijuana bud (RP 12/1/2010-35). He then gave Mr. Moyle his advice of rights (RP 12/1/2010-35). Mr. Moyle indicated to the officer that the pipe was his and also that he had used it to smoke methamphetamine approximately one-half hour earlier (RP 12/1/2010-36). He also indicated the car belonged to Ms. Burdette (RP 12/1/2010-36). A warrant was obtained to search the vehicle and secure the methamphetamine pipe Officer Arand and Officer Winfield had seen (RP 12/1/2010-37).

On cross, Officer Arand was questioned extensively about whether the pipe he viewed had a white residue rather than a black residue as Officer Laroux had testified (RP 12/1/2010-43-45). Defense counsel asked Officer Arand why it could not have been a pipe with white glass; Officer Arand was adamant he saw a white residue (RP 12/1/2010-45). Ms. Burdette's counsel asked:

Q. Now, you said you woke Mr. Moyle up, removed him from the vehicle and detained him in handcuffs by your vehicle; is that correct?

A. Yes.

Q. And then you frisked him?

A. Yes.

Q. And you found a pipe and marijuana?

A. Yes.

[ ]

Q. Did you search him again later?

A. Yes I did.

Q. And what did you find during that second search?

A. Well, during the second search I performed a more thorough search which was after he was actually placed under arrest. During that search [the officer found another small baggie of methamphetamine and more methamphetamine in the brown plastic bottle]. (RP 12/1/2010-45-6).

Jesse Winfield, a police corporal with the City of Port Angeles (RP 12/1/2010-55) testified he was the supervisor on July 19<sup>th</sup>. He recognized the red Honda as a vehicle about which he had spoken with Ms. Burdette the night before and that she had been arrested for possession of drugs the prior day (RP 12/1/2010-60). He then saw Mr. Moyle inside a vehicle (RP 12/1/2010-56). Corporal Winfield testified he saw a methamphetamine pipe between the front seats (RP 12/1/2010-56). He then testified to his extensive training regarding drug residue, beginning in 1990. He was asked:

Q: Can you describe your experience in recognizing drug

residue?

A: Yeah, I've made over a thousand arrests related to drugs and I have seen drug paraphernalia over a thousand times and talked to people about how they use them and why there would be residue here, what this is used for and that. (RP 12/1/2010-57).

He believed the pipe near Mr. Moyle contained a white residue of methamphetamine in the neck (RP 12/1/2010-58).

On cross, defense counsel asked Corporal Winfield about the residue on the pipe in the neck (RP 12/1/2010-66). Corporal Winfield stated the residue in the bowl would be brown or black but the residue in the stem would be white (RP 12/1/2010-66). He disagreed with counsel that the white residue could simply be the color of the glass because the pipe he saw was clear (RP 12/1/2010-66). Defense counsel continued to ask questions related to how Corporal Winfield could tell at night what he was looking at; the officer continued to answer he could see quite well by flashlight (RP 12/1/2010-67). Defense counsel then asked whether the person in the car was passed out? Corporal Winfield answered he did not know, "whether he was passed out or asleep or faking it I didn't know" (RP 12/1/2010-68). The State rested (RP 12/1/2010-72). Defense then rested (RP 12/1/2010-68). Argument followed in Ms. Burdette's case (RP 12/1/2010-68-94).

December 15, 2010

Defense Counsel Anderson appeared with Mr. Moyle on December 15, 2010. Counsel stated he believed the matter could be submitted on the record created in the Burdette case, if his client agreed (RP 12/15/2010-12). After discussing how to proceed, the State agreed it would proceed on the record, but requested the hearing be transcribed first (RP 12/15/2010-14). The 3.6 hearing was continued to January 19, 2011 so the transcript could be prepared and Mr. Anderson could meet with Mr. Moyle (12/15/2010-15).

January 19, 2011

The matter was continued to January 26, 2011 so it could be heard by the same judge that heard the Burdette matter (RP 1/19/2011-3).

March 1, 2011

Mr. Moyle did not appear for court; the matter was continued again.

March 4, 2011

Mr. Anderson provided copies of the Burdette transcript and stated there might be some slight additional testimony (RP

3/4/2011-21). A new hearing date was set for April 13, 2011 (3/4/2011-21).

April 13, 2011

Mr. Moyle did not appear for court; a warrant was issued for his arrest (RP 4/13/2011-3). Mr. Moyle appeared late but by then the trial had been cancelled and had to be reset to April 27, 2011 (RP 4/13/2011-4).

April 27, 2011

Mr. Moyle appeared this time. The Trial Court began the hearing by pointing out that "since the facts were identical" to the Burdette case, "there was no need to repeat the officer's testimony [ ]" (RP 4/27/2011-2). The Trial Court also pointed out that Mr. Anderson had been present for the prior suppression hearing (RP 4/27/2011-2). The State began argument at RP 4/27/2011-3. Defense counsel began by stating he agreed with the issues as the former defense attorney for Mr Moyle had briefed them, which began with there was no particularized suspicion to permit Corporal Winfield to contact Mr. Moyle (RP 4/27/2011-8). He then argued that Mr. Moyle was seized without probable cause (RP 4/27/2011-8). All of Mr. Moyle's statements and the evidence found are then

fruit of the poisonous tree<sup>1</sup> (RP 4/27/2011-9). The warrant should then fail because the information relied on in obtaining the warrant flowed from the warrantless contact (RP 4/27/2011-9). Defense counsel then argued that the police had no justification for contacting the vehicle in the first place, if what they were concerned about was whether someone was breaking into it (RP 4/27/2011-9). Defense counsel argued, since methamphetamine is not a sedative, there is an issue about whether Mr. Moyle actually possessed it because he was sleeping (RP 4/27/2011-10). Again, defense counsel argued the police have no reason to “even investigate or talk to Mr. Moyle because there’s no particularized suspicion [ ]” about him or the vehicle (RP 4/27/2011-10). He argued the police seized Mr. Moyle without probable cause (RP 4/27/2011-10).

Defense counsel then pointed out, as had the previous defense counsel, that possession of drug paraphernalia is not a crime (RP 4/27/2011-11). Counsel continued to argue that the State could not establish possession because the vehicle was not his (RP 4/27/2011-11). Counsel then addressed the time of day, the difference in opinion between the officers about the residue in

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<sup>1</sup> *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)

the pipe, pointing out that the testimony was very confused about the pipe's color and the color of the residue (RP 4/27/2011-12). Defense counsel argued the officer patting down Mr. Moyle did "an interesting dance" around whether the pill bottle could contain a knife (RP 4/27/2011-15). Counsel argued that there is no reason a pill bottle could be confused with a weapon so there was no basis to search it (RP 4/27/2011-15). Counsel then pointed out the police had arrested Ms. Burdette the previous evening for "a VUCSA" so there was a good chance her car would contain contraband (RP 4/27/2011-16). Defense counsel ended by stating the officer candidly admitted Mr. Moyle was arrested without probable cause (RP 4/27/2011-18). On rebuttal, Counsel argued that, once Mr. Moyle was removed from the vehicle, he was in custody because he was not free to leave (RP 4/27/2011-26). The Court agreed the case presented a close call but denied the motion to suppress (RP 4/27/2011-29). The Trial Court stated:

"it's a fine line between a person being detained by officers investigating a suspicious situation and being arrested, which means you are in custody, you are not free to leave. I got the impression from the facts in this case that this was still part of an investigation and the officers simply wanted to talk to Mr. Moyle and find out what was going on, and that he was arrested after the pat down which is justified for officer safety, and then was arrested when contraband was found on his person." (RP 4/27/2011-26).

After permitting further argument on whether the facts showed a detention or an arrest, the Trial Court stated:

“The motion to suppress is going to be denied. And here is the Court's reasoning, and obviously I have been through this before with another defendant but her situation was very different because of her connection to the automobile. The officer, La Rue [sic], who started this investigation testified that he was on patrol in that area because of a high incidents [sic] of recent burglaries and car prowls, and was basically patrolling the streets of this residential area looking for suspicious activity. And when he saw what he originally thought was 3 people around a car, turned out to be 2 people, at about 11:30 at night, that that aroused his suspicion. He called for back up and eventually the other 2 officers arrived, Officer Arand and Corporal Winfield, who was apparently the shift supervisor.

At that point after dealing with Ms. Burdette, all 3 officers noticed what they all felt was a meth pipe on the console in the vehicle in very close proximity to Mr. Moyle, who appeared to be either passed out or asleep.

The circumstances of him not being conscious in the passenger seat of this car with all this activity going on around him, the interrogation of another possible defendant, and flash lights being shined in and so on, and not being aroused, added to the proximity to the meth pipe, the Court finds gave the officers a reasonable and specific suspicion that he was up to no good in some manner. The key being what was clearly identified as a meth pipe.

The Court relies primarily in that regard on the testimony of Corporal Jesse Winfield who was an 18 year veteran who testified that he has been involved in over a thousand drug arrests, many of which involved nothing more than residue.

He described the meth pipe and why he felt it was a meth pipe and indicated that there were 2 colors of residue, because in the bowl area you would have residue from the material being burned which would change its composition in color, and in the pipe stem you would have some of the

actual material itself still in white form having not been burned. And he said – and based on his experience which the Court finds to be considerable, this was clearly unquestionably a meth pipe and was in very close proximity, within easy reach of the gentleman who was apparently passed out. And under these circumstances it's hard to imagine how the officers would simply ignore this situation and drive away.

In addition to the obvious proximity to the obvious meth pipe, they had a legitimate concern about Mr. Moyle himself who despite all the activity going on around him did not appear to have been aroused at all.

And so I find it was reasonable for them to ask him to step out of the, [sic] car which is what they did, and to simply pat him down for officer safety and detain him to find out what was going on. That is what they did, a pat down which was reasonable under the circumstances, and did in fact disclose a knife which is a potential weapon, was justified by the circumstances. That pat down also yielded contraband which is the basis for the charge.

So, the Court finds that there was a reasonable specific suspicion of criminal activity involving this Defendant and that's the reason for the denial of the motion." (RP 4/27/2011-29-31).

Mr. Moyle was found guilty in a stipulated trial on June 28, 2011 (RP 6/28/2011-32). This appeal followed.

## ARGUMENT

### ISSUE ONE

Did the trial court and defense counsel create a structural error when they decided Mr. Moyle's motion to suppress based on evidence obtained in another hearing when CrR 3.6 requires defense counsel to submit an affidavit or statement of pertinent facts and permits live testimony only at the discretion of the Court? If there was no structural error, then did a manifest error occur?

Neither the trial court nor defense counsel created a structural error or a manifest error when presenting and deciding Mr. Moyle's motion to suppress by referring to testimony developed in a previous suppression hearing. CrR 3.6<sup>2</sup> requires submission of a suppression motion on a statement or affidavit of facts and permits a new hearing only if the Court believes further evidence is necessary.

Mr. Moyle contends the Trial Court created "structural error" by failing to conduct a new 3.6 hearing for him and instead relied upon testimony developed from a prior suppression hearing. Mr. Moyle also contends, if there was no structural error, the appellate court should determine a manifest error occurred. There was neither a structural error nor was a manifest error committed in the present case.

A. Mr. Moyle provided no authority to support his assertion that failure to conduct a separate hearing created a structural error or a manifest error. The assertion is waived.

Mr. Moyle contends in his assignments of error that failure to

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<sup>2</sup> (a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The Court shall determine whether an evidentiary hearing is required based upon the moving papers. If the Court determines that no evidentiary hearing is required, the Court shall enter a written order setting forth its reasons.

conduct a hearing violated art. 1, section 7, and the 5<sup>th</sup> and 6<sup>th</sup> Amendment. Aside from hornbook references to Sixth Amendment cases discussing “structural errors,” Mr. Moyle provides no guidance to the Court to determine on what basis Mr. Moyle contends a structural error occurred in this case. Failure to provide appropriate citations to authority and argument waives the assignment of error. *State v. Applegate*, 163 Wn.App. 460, 472, 259 P.3d 311 (2011), citing to RAP 10.3 (a) (6)(“[Appellant] provides no discrete argument relating to [art. 1,] section 10. [ ] An appellant waives an assignment of error if he fails to support it with argument or citation to authority.”)

B. There is no structural error. CrR 3.6 envisions a suppression hearing will be conducted on a written statement of facts, not live testimony.

In *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), the Supreme Court explained the difference between a “structural error” and an error of constitutional magnitude. Citing to *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed. 2d (1991), the Court affirmed that a limited class of fundamental constitutional errors defy analysis for which the “harmless error” standard is appropriate. Some errors affect the

framework within which a trial proceeds, rather than simply an error in the trial process itself. *Neder*, 527 U.S. 8. Some errors “seriously affect[t] the fairness, integrity or public reputation of judicial proceedings,” *Neder*, 527 U.S. 9, quoting from *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). In other words, the question is no longer what evidence was produced at trial, but whether the trial itself, no matter the results, was “fundamentally fair.” *Neder* also stated, however, that there is a strong presumption that any errors are subject to a harmless error analysis. *Neder*, 527 U.S. at 8, and it is very rare that an error at the trial level automatically requires reversal. The Washington State Supreme Court also referred to the test to determine a “structural error” as defined in *Neder* when it decided *State v. Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006). The Court defined the difference between the two tests at 156 Wn.2d 725:

A structural error resists harmless error review completely because it taints the entire proceeding. A trial-type error is harmless if “it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Neder*, 527 U.S. at 15.

Based on these decisions, it is difficult to understand why Mr. Moyle believes there is a “structural error.” To prove a “structural error” occurred, Mr. Moyle must show the failure to conduct a new

hearing violated his fundamental rights. Mr. Moyle has presented neither citation to appropriate authority nor argument to support his supposition that a "structural error" may have occurred in this case.

The State believes CrR 3.6 controls. The rule requires Defense Counsel to supply a statement or affidavit setting forth the facts it intends to rely on in support of its motion to suppress. The Court will then decide whether a hearing is necessary. CrR 3.6 eliminates any concept that a defendant has a fundamental trial right to a live hearing in all suppression motions. A Court must first find that a live hearing will assist the Court to determine the suppression issue. In this case, the Court determined it could decide the motion based upon the facts presented in the prior hearing. No structural error occurred.

Mr. Moyle cited to a non-published opinion that allegedly supports his position that a structural error occurred. The non-published opinion is of no assistance, even if it were proper to cite to it. He contends *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011) supports his argument that a structural error occurred. It does not. The decision holds that, when the Court issues a new controlling interpretation, material to the defendant's case, which overrules an existing controlling interpretation, the defendant may

seek a new suppression hearing if the new interpretation applies retroactively to his case and his trial was completed prior to the new interpretation. *Robinson*, 171 Wn.2d at 305.

C. There is no manifest error because there is no error of constitutional magnitude.

Mr. Moyle next contends he can raise his claimed error for the first time on appeal because “prejudice is manifest.” He argues that trial counsel erred when he relied on Ms. Burdette’s hearing because Ms. Burdette’s trial counsel’s interests clearly opposed his. This is not sufficient to show a manifest error. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

*McFarland* held at 127 Wn.2d 333 that a manifest error must truly be of constitutional magnitude, citing to *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). *McFarland* stated “[i]t is not enough that the Defendant allege prejudice—actual prejudice must appear in the record.” *McFarland*, 127 Wn.2d at page 333. Mr. Moyle fails this portion of the test because he has provided nothing showing actual prejudice, let alone a prejudice of constitutional magnitude. Mr. Moyle’s appeal should be denied because he has not proved a manifest error occurred below.

## ISSUE TWO

Did defense counsel provide ineffective assistance of counsel when he submitted Mr. Moyle's suppression motion on facts developed in a prior hearing, when the record contained all the facts necessary to decide the motion and the choice can be supported as a legitimate trial tactic?

Trial counsel did not render ineffective assistance to his client when he agreed to submit the defendant's argument for suppression on evidence obtained in a prior 3.6 hearing. First, 3.6 permits the Court to decide whether a live hearing is necessary. Second, the record contained all the facts necessary to address the motion (and, is sufficient to address the appeal). Third, counsel's choice to submit the suppression motion on the prior hearing is a legitimate trial tactic.

Mr. Moyle contends Defense Counsel was ineffective because he presented his argument based upon evidence generated in a prior hearing. Mr. Moyle erroneously contends Defense Counsel used the prior hearing for "judicial economy and the convenience of police witnesses." Mr. Moyle's brief at 12. There is nothing in the record to support this accusation, or, for that matter, that Defense Counsel "subjugated" his client's needs. The

record reflects that all the facts necessary were developed in the first hearing. The key fact in both cases was whether the officers could provide sufficient evidence to investigate the pipe seen in the Honda's windshield. If they could, Mr. Moyle's detention was correct because use of drug paraphernalia is a crime.<sup>3</sup> Ms. Burdette's attorney had just as much interest as Mr. Moyle's attorney in getting the pipe suppressed because the meth residue in the pipe also would be enough to show she possessed a controlled substance. Ms. Burdette's counsel asked Officer Leroux to describe the pipe he saw (RP 12/1/2010-24). Defense counsel examined Officer Arand at length about how he looked into the vehicle (flash light), what he saw (meth pipe with white residue), where he stood when he viewed the pipe (3 to 4 feet away), his training and experience in identifying meth residue (trained and experienced), the difference in his opinion from Officer Leroux (believed the residue was black), that the pipe may have been white (the pipe was clear glass) (RP 12/1/2010-42-46). Defense Counsel examined Corporal Winfield about residue he claimed to

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<sup>3</sup> It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor. RCW 60.50.412 (1).

see (black burn residue and white powdery residue in the neck), whether the glass could have been white (it was clear and the powder he saw was consistent with pipes he had seen before), how he observed the pipe (it was dark so he used a flashlight), how far away he stood (2 and ½ feet), how long he looked at the pipe initially (a minute or two when he walked up to the car), whether the windshield was tinted (it was) and the location of the pipe (center console) (RP 12/1/2010-62-69).

Mr. Moyle asserts his counsel could have more zealously challenged the officer's testimony about whether he knew from his observations that he was looking at a meth pipe. He does not suggest, however, how his counsel should have challenged the evidence any differently. Moreover, Mr. Moyle only argues more zealous cross-examination "may well" have persuaded the Court. Neither assertion is sufficient to merit attention. When the appellate court reviews the suppression hearing record to address Mr. Moyle's assignments of error, it will see the record is sufficient to permit review of Mr. Moyle's assignments. That fact, alone, shows the record developed below is sufficient.

To prove ineffective assistance of counsel, Mr. Moyle is required to show defense counsel's representation was deficient

and prejudicial. *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996), citing to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. *State v. Neff*, 163 Wn.2d 453, 465, 181 P.3d 819, 826 (2008); *State v. McFarland*, *supra* at 335. There is a strong presumption of effective assistance and the defendant bears the burden of demonstrating the absence in the record of a strategic basis for the challenged conduct. *In re the Detention of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). In general, a stipulation as to facts is a tactical decision. *State v. McFarland*, *supra*; *State v. Mierz*, 127 Wn.2d 460, 476, 901 P.2d 286 (1995); *State v. Ashue*, 145 Wn.App. 492, 505, 188 P.3d 522 (2008).

Mr. Moyle himself points out a tactical reason why his defense counsel may have decided to argue based upon the previous record. Three officers disagreed about what the pipe looked like. Ms. Burdette's defense counsel argued the officers differed about the color of the residue, whether the object was actually in "plain view," whether the circumstances were sufficiently clear to actually see the pipe. The record developed below

permitted Mr. Moyle's attorney to raise the same arguments (RP 4/27/2011-12-13). Any time three officers disagree about serious factual issues (the residue, the vantage point and whether the residue pointed to a meth pipe), it is a good idea to leave the record alone.

In addition, Mr. Moyle benefitted from the testimony developed in Ms. Burdette's 3.6 hearing because, once the pipe was seized, the remaining issue was whether she had dominion and control over the pipe. In Ms. Burdette's hearing, the State focused on whether Ms. Burdette had possession and control. In arguing for suppression, Mr. Moyle's defense counsel was able to point to portions of the first hearing in which the State argued that Ms. Burdette had dominion and control over the pipe (RP 4/27/2011-8-12, 14). Because there was no separate hearing, the State was limited to the facts presented in the first hearing and had no opportunity to present other theories (if there were any) about why Mr. Moyle had possession and control over the pipe. Defense counsel did not err when he decided to forgo a second hearing.

### ISSUE THREE

Are the two challenged findings of the court substantially correct and are all the conclusions supported by appropriate findings? Even if conclusion \_\_\_\_\_ of law number 3 is not supported by

substantial evidence or appropriate findings, does finding the methamphetamine packet arise from an independent source?

Mr. Moyle ascribes the Trial Court's finding that Corporal Winfield discerned and identified methamphetamine residue solely by its appearance in the light of his flashlight through a tinted window "a fairy tale that no reasonable judge could have accepted as fact." Mr. Moyle's Brief, page 14.

The State strenuously objects to the characterization of a Clallam County Judge as a creator of fairy tales. Counsel should be admonished for unprofessional conduct.

A. Only two insignificant challenges were raised to the findings. The two findings are substantially correct and the remaining findings are verities on appeal.

Challenged findings of fact from a suppression hearing are reviewed to determine whether there is substantial evidence in the record to support them. Unchallenged findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Ashue*, 145 Wn.App. 492, 504, 188 P.3d 522 (2008).<sup>4</sup> Mr. Moyle has only challenged finding of fact number 10 and 11. The remainder of the findings are verities on appeal. *State v. Bliss*, 153 Wn.App. 197, 203, 222 P.3d 107 (2009); RAP 10.3 (g).

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<sup>4</sup> The findings and conclusions are attached to the response as Appendix A.

Finding of fact number 10 reads:

Officer Leroux, Officer Arand, and Cpl. Winfield all saw what appeared to be a methamphetamine pipe containing drug residue next to the passenger on the console between the driver and front passenger seat.

Mr. Moyle argues this finding is not supported by substantial evidence because Officers Leroux and Arand both claimed they did not see the pipe until after Mr. Moyle was removed from the vehicle. Officer Leroux testified he saw the pipe after Mr. Moyle was removed from the vehicle (RP 12/1/2010-24) because his main focus was on the two other people (RP 12/1/2010-17). Officer Arand testified Corporal Winfield alerted him there was a meth pipe in the red Honda and a person who appeared to be sleeping or passed out. (RP 12/1/2010-29). As he walked up to the vehicle, he saw what appeared to be a meth pipe sitting on top of the center console (RP 12/1/2010-30). Mr. Moyle admits Corporal Winfield saw the pipe before Mr. Moyle was removed from the vehicle. Brief of Mr. Moyle, page 14. The finding is substantially correct.

Finding of fact number 11 reads:

Cpl. Winfield is an 18 year veteran law enforcement officer who has made thousands of arrest [sic], many involving residue of controlled substances.

Here is the testimony of Corporal Winfield:

Q: Can you describe your experience in recognizing drug residue?

A: Yeah, I've made over a thousand arrests related to drugs and I have seen drug paraphernalia over a thousand times and talked to people about how they use them and why there would be residue here, what this is used for and that. (RP 12/1/2010-57).

The State believes finding 11 should stand because "a thousand arrests" is substantially correct. Every finding is supported by substantial evidence.<sup>5</sup>

B. Conclusions of law are reviewed de novo to see whether each conclusion is supported by appropriate findings of fact. Two of the three conclusions are supported by findings of the trial court.

Conclusions of law are reviewed *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). Review is limited to determining whether the findings of fact support the conclusions of law. *State v. Alvarez*, 105 Wn.App. 215, 220, 19 P.3d 485 (2001).

Mr. Moyle first contends he was arrested without probable cause, rather than detained. His argument is that a reasonable

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<sup>5</sup> Mr. Moyle makes reference to a "spurious finding" about the "emergency aid exception" but the State cannot locate any finding related to this assertion. The assertion is pointless and should be stricken.

person under these circumstances would have believed he was arrested.

The error in Mr. Moyle's analysis arises because he conflates the events into one, single event.<sup>6</sup> The record shows the entire process was as follows:

1. A pipe was seen through windshield; it showed both residue from use and presence of methamphetamine in the stem;
2. Mr. Moyle was removed from the vehicle;
3. Mr. Moyle was handcuffed;
4. Mr. Moyle was searched, yielding the knife, the marijuana pipe, and the prescription-like bottle in which Officer Arand saw a marijuana bud;
5. Mr. Moyle was advised of his *Miranda*<sup>7</sup> rights and waived them;
6. Mr. Moyle admitted to smoking meth in the past one-half hour, using the pipe in the vehicle;

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<sup>6</sup> "Some clues that Moyle's seizure was an arrest, not a *Terry* stop, are that Moyle was ordered to get out of the car, told he was 'detained,' handcuffed, removed to a patrol car, searched, searched again, and secured in the car for transport." Brief of Appellant, page. 19.

<sup>7</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

7. Mr. Moyle was placed under arrest for possession of meth from the pipe and for possession of marijuana from the bottle;
8. Mr. Moyle was searched again, incident to arrest, and more methamphetamine was found, including:
  - a. Residue in the brown bottle, and
  - b. Another packet of meth in his pocket.

To determine whether each conclusion was supported by appropriate findings, each factual step must be addressed individually.

1. There was more than sufficient reason to approach Ms. Burdette's vehicle. The police did nothing at this point to interfere with Mr. Moyle's freedom.

When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). One factor which will support an investigatory stop is location. A high crime area is a location that provides a basis for contact. *Glover*, 116 Wn.2d at 514. An officer has a "limited right and a duty to approach and inquire about what appeared to be suspicious circumstances." *State v. Belanger*, 36 Wn.App. 818, 821, 677 P.2d 781 (1984). It is not sufficient to

permit seizure, however. *Belanger*, 36 Wn.App. at 821. Mr. Moyles claims his right to privacy was interfered with when the officer shined a light into the vehicle, but a person is not seized when a police officer shines a light on him/her. The shining of a flashlight or spotlight does not invade a person's privacy interest under the Washington State Constitution. *State v. Young*, 135 Wn.2d 498, 511-12, 957 P.2d 681 (1998).

The officers were patrolling the area because of a high incidence of vehicle prowling and burglaries. Corporal Winfield knew Fanny Burdette, knew she possessed the red Honda, and knew she had been arrested the night before for drug possession. When Corporal Winfield arrived, he looked into her vehicle with a flashlight. At that point, he was doing what he was supposed to do, which is "passive police observation [ ]." *State v. Young, id*, at page 511. His approach to the vehicle with a flashlight was normal police investigation and not a violation of any privacy

2. The police had a sufficient reasonable suspicion to investigate whether Mr. Moyle was involved in a crime.

Mr. Moyle argues the police had no reason to detain him. *State v. Glover, supra*, page 514, holds otherwise, basing its decision on *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d

889 (1968) and *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982). Both stated a police officer with a well-founded suspicion not amounting to probable cause may nonetheless stop [detain] a suspected person. As Mr. Moyle admits, possession of drug paraphernalia may be charged as possession of a controlled substance. *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008). Mr. Moyle was detained to determine whether he was in actual or constructive possession of methamphetamine. The evidence at that point was not sufficient to show Mr. Moyle had actual or constructive possession, but it was enough to detain him to investigate.

Generally, a police officer may briefly detain and question a person whom he reasonably suspects of criminal activity, and may frisk the person for weapons if the officer has reasonable grounds to believe he is armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993); *State v. Mitchell*, 80 Wn.App. 143, 906 P.2d 1013, *review denied*, 129 Wn.2d 1019, 919 P.2d 600 (1996). The suspicion of criminal activity must be well founded and based on specific, articulable facts. *Collins*, at 121;

*State v. Jones*, 85 Wn.App. 797, 798, 934 P.2d 1224, review denied, 133 Wn.2d 1012, 946 P.2d 402 (1997).

In this case, the officers had an obligation and authority to detain Mr. Moyle until they ascertained more about the pipe.

3. Mr. Moyle was not arrested at first; the reasonable facts show he was detained.

Mr. Moyle then argues he was arrested prior to determination of probable cause. He states a reasonable person would believe he or she is formally arrested under these facts. The State does not agree.

A person is "formally arrested" when a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004), citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). The determination of custody hinges upon the 'manifestations' of the arresting officer's intent. *State v. Radka*, 120 Wn.App. 43, 49, 83 Wn.2d 1038 (2004). *Radka's* analysis is appropriate to determine the question in this case.

If the totality of the circumstances included only that Mr. Moyle was handcuffed, patted down and placed in the rear of the

patrol car, the record still would not support a conclusion there was a full custodial arrest because the clear intent of the officers was to investigate the pipe, as the Trial Court found. This simple manifestation of intent is important because it shows the officers were focused on the pipe in the vehicle, not what Mr. Moyle had on his person. Further, the conversation Officer Arand had with Mr. Moyle after providing his *Miranda* warnings, was about the pipe, not the contents of the pill bottle. This shows that Officer Arand had not determined whether to take Mr. Moyle into custody. Finally, Mr. Moyle was taken into custody and searched again after he admitted using the pipe to smoke methamphetamine. These facts show Mr. Moyle was only detained prior to his admission.

*State v. Craig*, 115 Wn.App. 191, 61 P.3d 340 (2002) is instructive because a manifestation of the officer's intent was that he told Mr. Craig he was under arrest. In *Craig*, the defendant was handcuffed, but the determinative fact was that he was told he was under arrest. Further, cases like *Berkemer* and *Craig* pose significantly different scenarios from this case. A contact on the highway for a non-violent crime in no manner compares with the contact in this case. The totality of the circumstances as stated in conclusion of law 2 provides a scenario in which an officer is

justified to apply handcuffs and remove a person from the scene. Officer Arand told him he was being detained. Officer Arand correctly placed handcuffs on Mr. Moyle because Mr. Moyle was only one of three suspects present. Mr. Moyle's reason for being in Ms. Burdette's vehicle was not clear. It was late at night in a high crime area. Mr. Moyle was unresponsive when three police vehicles were parked near him with their intense lighting and when a flashlight was shined directly at him. Mr. Moyle had been aroused sitting next to a pipe containing a volatile agent.<sup>8</sup> It would have been contrary to safety of the officers not to handcuff him. Once handcuffed, he needed to be separated from the others. Placing him in a patrol vehicle separated him. Detaining an individual under these circumstances is appropriate. The steps taken may look like a formal arrest to some degree, but the steps the contact followed (seizure, pat down, *Miranda* warnings, questions about the pipe, admission by Mr. Moyle, arrested, searched incident to his arrest, would tell a reasonable person he or she is not being formally arrested at first.

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<sup>8</sup> Defense Counsel argued Mr. Moyle could not have been smoking meth because he was asleep ("methamphetamine is not considered a sedative" (RP 4/27/2011-10)).

4. Officer Arand erred when he conducted a safety frisk because the record does not reflect any reasonable concern of danger.

*State v. Xiong*, 164 Wn.2d 506, 207 P.3d 1266 (2009) controls. *Xiong* relied on *State v. Setterstrom*, 163 Wn.2d 621, 183 P.3d 1075 (2008), which held a safety frisk for a weapon could only be conducted if an individual is justifiably stopped before the frisk and if the officer has “a reasonable concern of danger [.]” *Satterstom, id.*, at 626. In *Xiong*, the police conducted a safety frisk when Mr Xiong arrived at his brother's house and stepped from a van. He did not resist or make any sudden moves. The Supreme Court refused to find it a reason to search Mr. Xiong based only on an officer's subjective fear.

In Mr. Moyle's case, the record contains many good reasons to conduct a safety frisk<sup>9</sup> but nothing that would reasonably support the conclusion that Mr. Moyle may access a weapon. Because Officer Arand did not present sufficient evidence on this issue and because there are no findings that support the Trial Court's conclusion that the search was appropriate, given the totality of the

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<sup>9</sup> Defendant unresponsive to light, sleeping, passed out, or faking sleep, lying next to the meth pipe, the contact was at 11:30 p.m., two other suspects were in the same area, and a concern about how he would react when awakened.

circumstances, the marijuana found on Mr. Moyle's person must be suppressed.

5. The evidence leading to Mr. Moyle's arrest was the confession he made after waiving his *Miranda* rights. This provided an independent source for the arrest for possession of methamphetamine.

The Trial Court erred when it held that Mr. Moyle was charged based on the evidence obtained in the frisk. Mr. Moyle was arrested after he waived his *Miranda* rights and admitted using the pipe to smoke methamphetamine. Moreover, Mr. Moyle was not convicted because of the methamphetamine found in the pipe. The State and Defense Counsel stipulated that Mr. Moyle was guilty of possession of a controlled substance based on tests of evidence number 47977 (methamphetamine found in pill bottle, CP 52) and evidence number 47978 (methamphetamine packet found on Mr. Moyle's body, CP 52). The stipulation is at CP 42. However, the appellate court "may affirm on any ground the record supports." *State v. Leon Smith*, \_\_\_ Wn.App. \_\_\_, 266 P.3d 250 (2011, No. 38920-7-II).

Mr. Moyle argues the search incident to his arrest was unlawful because (1) the arrest was not based upon probable

cause<sup>10</sup> or (2) the evidence derived from the security frisk was unlawfully obtained.<sup>11</sup> He supports this assertion by arguing there is insufficient evidence to show Mr. Moyle possessed the pipe found in the center console so therefore there is insufficient evidence to convict him without the improper security frisk. From there, he argues the admission he had made about using the pipe to smoke methamphetamine earlier must also be suppressed. The argument is not correct.

Had Mr. Moyle been arrested because of the evidence obtained during the security frisk, Mr. Moyle's argument would be correct. He was not. He was detained for further investigation. Once Mr. Moyle was detained, he was frisked and then he was given the *Miranda* warnings. Mr. Moyle agreed to speak to the officer and admitted he had used the pipe approximately a half hour earlier to smoke methamphetamine (RP 12/1/2010-36). This is the basis for probable cause to arrest him.

Mr. Moyle stipulated, however, that there was evidence beyond a reasonable doubt to convict him because of the methamphetamine in the pill bottle and in the packet found on his person during the second search. The question then is whether

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<sup>10</sup> Brief of Appellant, page 20.

<sup>11</sup> Brief of Appellant, page 22.

evidence found after he was advised of his *Miranda* warnings and searched incident to arrest is still admissible, even if the security frisk was not supported by evidence.

The State believes the packet of methamphetamine found on Mr. Moyle's person after he was given his *Miranda* warnings was properly obtained.<sup>12</sup> Mr. Moyle was given *Miranda* warnings even though he was only being detained at that moment. The evidence arises from an independent source.

*State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005) is directly on point. It held that evidence obtained pursuant to authority of law is admissible, even if the same evidence was inadmissible under other circumstances. *Gaines*, 154 Wn.2d at 718 ("evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action").

The facts in *State v. Gaines*, *id*, provide guidance to address this issue. An officer in that case opened the truck of a person in his custody and observed what appeared to be the barrel of an

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<sup>12</sup> The State is not conceding the methamphetamine in the pill bottle should be suppressed. One packet is all that is necessary to uphold the conviction. The State does not believe further argument about the methamphetamine is necessary.

assault rifle and numerous rounds of ammunition. The officer immediately closed the trunk but his observation was placed in a search warrant request that yielded an assault rifle and ammunition.

*Gaines* specifically held that the second search was admissible because it was done under authority of law. Article 1, section 7 requires a search be conducted with "authority of law." *Gaines, id.* at 718. A search incident to arrest is an accepted exception to a warrant requirement. See *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) (defendant may be searched after arrest but an arrest must occur first).

Although Officer Arand would have been within the limits of a *Terry* stop to ask Mr. Moyle limited questions about the pipe, he went the extra step and mirandized Mr. Moyle. Mr. Moyle waived his right to remain silent after being fully advised of his right to remain silent and his right to an attorney. A waiver of a fundamental right is acceptable if it is made knowingly, voluntarily, and intelligently. *State v. Applegate, supra*, p. 470. Obtaining a confession after *Miranda* warnings is a lawful mean independent of the unlawful action. The admission provided the basis for probable cause for unlawful use of drug paraphernalia. The packet of

methamphetamine was discovered after the waiver and after Mr. Moyle was arrested. There is an independent source that permits a conviction for possession of methamphetamine found in his pocket.

Division Two recently addressed the independent source rule in *State v. Leon Smith*, \_\_\_ Wn.App. \_\_\_, 266 P.3d 250 (2011, No. 38920-7-II). The majority held evidence obtained from a motel room was properly seized because the officers were in the room in a community caretaker role. Their analysis was that the defendant was already arrested when a female in the room sought medical assistance, so there was a “supervening, intervening factor [ ].” *Smith* at 266 P.3d 259. Judge Armstrong argued in his dissent, however, that there was no intervening event because the unlawful view of the room upon arrest was obtained “during the course of a single, continuous illegal search.” *Smith* at 266 P.3d 269 (Armstrong, J., dissenting). In this case, nothing from the illegal search contributed to the admission made by Mr. Moyle after he was advised of his right to remain silent. This case differs from *Smith* both because no incorrectly seized evidence led to the *Miranda* warnings and the *Miranda* warnings created a break in the process. If Mr. Moyle had been removed from the vehicle, placed in handcuffs, given *Miranda* warnings and waived them, admitted to

using the meth pipe one-half hour earlier, he would have been arrested and meth found on his person. The illegal search added nothing to the second search of his clothing.

The State believes the Court should affirm because the admission came from an independent source.

#### ISSUE FOUR

Did the trial court err when it imposed costs without first determining whether Mr. Moyle had the ability to pay them, but did not err when it imposed \$2,000 for the "drug fund"?

The case must be remanded to determine whether Mr. Moyle has the ability to pay fines and assessment, but the drug fund and OPNET assessments are appropriate.

Mr. Moyle correctly argues that the standard established in *State v. Betrand*, \_\_\_\_ Wn.App. \_\_\_\_, 267 P.3d 511 (No. 40403-II 2011) requires remand to review his ability to pay fines and costs. Mr. Moyle, however, is not correct when he indicates the \$2,000 costs for drug Court and for OPNET are not permitted.

Mr. Moyle also asserts that the drug fund and the OPNET assessment are not permitted under 10.01.160 (2). There are two other statutes that apply to drug convictions. RCW 9.94A.030 (30) permits other costs not listed under RCW 10.01.160 (2). RCW 9.94A.030 (30) reads:

(30) "Legal financial obligation" means a sum of money that is ordered by a superior Court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, Court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction. [ ]

The Clallam County Drug Court utilizes the drug fund assessment to provide an opportunity for drug addicted people to receive assistance and monitoring on a weekly basis. OPNET is an interlocal drug task force covering Clallam County and Jefferson County. Both the Drug Court and OPNET statutorily qualify for a portion of the LFOs imposed at sentencing.

Imposition of drug fund financial obligations was addressed in *State v. Hunter*, 102 Wn.App. 630, 9 P.3d 872 (2000). The decision reviewed RCW 9.94A.030 (30) and held that the trial Court did not err when it imposed \$2,500 in drug fund assessments. The Court did, however, add three requirements: (1) The assessment must be limited to drug related crimes (2) the amount must be based upon the cost of the investigation and (3) the assessment and fine could not exceed the maximum fine for the crime.

RCW 69.50.430<sup>13</sup> requires a sentencing Court to fine a defendant an additional \$1,000 when convicted of certain enumerated felony drug crimes, unless the Court finds the person is indigent. It also requires the sentencing Court to impose a fine of \$2000 for a second or subsequent enumerated drug conviction. RCW 69.50.4013,<sup>14</sup> the felony drug crime Mr. Moyle committed is one of the enumerated drug convictions (CP 14). Mr. Moyle has a prior conviction for the same offense committed in 2008 (CP 15). The sentencing Court was well within its authority to convert a portion of the fine to an assessment for drug related programs.

#### CONCLUSION

Mr. Moyle's conviction for possession of methamphetamine should stand. The admission that he had used came under authority of law (*Miranda* warnings). The illegal search did not

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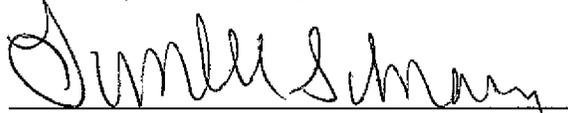
<sup>13</sup> 1) Every person convicted of a felony violation of RCW 69.50.401 through 69.50.4013, 69.50.4015, 69.50.402, 69.50.403, 69.50.406, 69.50.407, 69.50.410, or 69.50.415 shall be fined one thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the person to be indigent, this additional fine shall not be suspended or deferred by the court.

(2) On a second or subsequent conviction for violation of any of the laws listed in subsection (1) of this section, the person shall be fined two thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the person to be indigent, this additional fine shall not be suspended or deferred by the court.

<sup>14</sup> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

contribute anything to the second search. Assessments should stand if the trial court finds evidence of Mr. Moyle's ability to pay.

Respectfully submitted this 17th day of February, 2012.

  
Lewis M. Schrawyer, #12202  
Clallam County Deputy Prosecutor

#### CERTIFICATE OF DELIVERY

LEWIS M. SCHRAWYER, under penalty of perjury under the laws of the State of Washington, does swear or affirm that a copy of this document was sent to Jordan B. McCabe by electronic copy at [mccabejordanb@gmail.com](mailto:mccabejordanb@gmail.com) on February 17, 2012.

Signed at Port Angeles, Washington on February 17, 2012.

  
Lewis M. Schrawyer, #12202

SCANNED-4

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BARBARA CHRISTENSEN

IN THE SUPERIOR COURT FOR CLALLAM COUNTY, WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

MICHAEL J. MOYLE,

Defendant.

NO. 10-1-00296-0

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW ON CrR 3.6 MOTION TO SUPPRESS  
EVIDENCE

THIS MATTER came before the court on April 27, 2011, for a motion to suppress evidence, the plaintiff appearing by and through Clallam County Deputy Prosecuting Attorney, Jesse Espinoza, the Defendant appearing in person and by and through his attorney, Ralph W. Anderson, the defendant and the State having stipulated that the defendant's CrR 3.6 hearing would proceed based entirely on the briefing for the Motion to Suppress Evidence in *State v. Burdette*, Clallam Cause no. 10-1-00301-0, filed by prior defense counsel, Carol L. Case, and the transcript of the evidentiary hearing held pursuant such motion, as the facts were the same and testimony was elicited encompassing both the Burdette and Moyle matters, the Court having reviewed the briefings, the transcript of the aforementioned evidentiary hearing, and having heard the arguments by the parties, and deeming itself fully apprised in the premises, the court makes the following findings and conclusions:

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## II. ISSUES

1. Whether the defendant was detained or arrested.
2. Whether the PAPD Officers had reasonable suspicion justifying the detainment of the defendant.
3. Whether the facts and circumstances present justified a limited safety frisk of the defendant by Officer Arand.

## II. FINDINGS OF FACTS

1. On Monday night, July 19, 2010, Officer Leroux, PAPD, was on patrol and, due to a high incidence of vehicle prowling and burglaries, he assigned to the West side of Port Angeles with emphasis on vehicle prowling.
2. At approximately 11:30 p.m., as Officer Leroux was traveling Southbound on South B Street in Port Angeles, he saw a truck, which he believed contained 2 or 3 people, parked with the dome light on and the engine not running.
3. Officer Leroux decided to make contact with the individuals and called to notify dispatch of his intent to make contact with the individuals.
4. Officer Arand and Corporal Winfield arrived to provide back up while Officer Leroux was contacting the individuals.
5. Cpl. Winfield noticed a small red Honda vehicle parked in front of the residence at 831 West 10th Street, where the officers and individuals were situated.
6. Cpl. Winfield noticed an individual in the passenger seat in a reclined position who appeared to be passed out or asleep.
7. The passenger was later identified as Michael Moyle, the defendant.

- 1 8. Cpl. Winfield shined his flashlight through the passenger side window and the windshield
- 2 and noticed what appeared to be a methamphetamine pipe on the center console next to
- 3 the passenger and he alerted the other officers to its presence.
- 4
- 5 9. Cpl. Winfield shined his flashlight through the windshield of the vehicle to show the
- 6 other officers what he saw and the defendant was not aroused by the light.
- 7
- 8 10. Officer Leroux, Officer Arand, and Cpl. Winfield all saw what appeared to be a
- 9 methamphetamine pipe containing drug residue next to the passenger on the console
- 10 between the driver and front passenger seat.
- 11
- 12 11. Cpl. Winfield is an 18 year veteran law enforcement officer who has made thousands of
- 13 arrest, many involving residue of controlled substances.
- 14
- 15 12. Cpl. Winfield described the two colors of residue in the pipe that he observed as burn in
- 16 the bulbous portion of the pipe and white residue in the stem.
- 17
- 18 13. Officer Arand and Cpl. Winfield contacted the defendant and the defendant woke up.
- 19
- 20 14. Officer Arand and Cpl. Winfield told the defendant to step out of the vehicle and the
- 21 defendant got out of the vehicle.
- 22
- 23 15. Officer Arand placed the defendant in handcuffs and told him he was being detained.
- 24
- 25 16. Officer Arand performed a safety frisk of the defendant and located a knife in his right
- 26 pocket.
- 27
- 28 17. Officer Arand also felt a hard object in the defendant's left pocket and when he removed
- 29 it, he determined that it was a marijuana pipe.
- 30
18. Officer Arand also felt a hard cylindrical object in the defendant's sweatshirt pocket and
- the item fell out the other side of the sweatshirt pocket when Officer Arand attempted to
- remove it.
19. The cylindrical object was a large translucent prescription type bottle.
20. Officer Arand was able to see what appeared to be marijuana buds inside the bottle.

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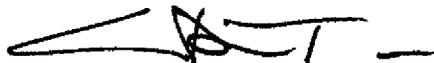
**III. CONCLUSIONS OF LAW**

1. Officer Arand detained the defendant when he contacted the defendant, told the defendant to step out of the vehicle, restrained him with handcuffs, and told him he was being detained.
2. Under the totality of the circumstances, the officers had reasonable and individualized suspicion justifying the detainment of the defendant based on articulable and specific facts which include the proximity of the pipe to the defendant, the officer's experience and their opinion that the pipe contained drug residue, the defendant's lone presence in the vehicle, that he appeared to be passed out or asleep and was not aroused by the shining of the flashlight, and concern for the defendant himself.
3. Officer Arand's safety frisk of the defendant was justified under the totality of the circumstances present.

**IV. ORDER**

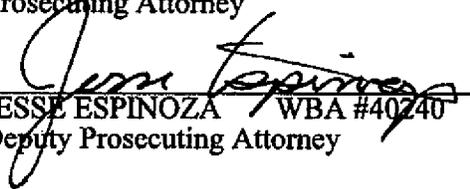
Based upon the Findings of Fact and Conclusions of Law, it is hereby ordered that the motion to suppress evidence is denied.

Dated this 27<sup>th</sup> day of <sup>SEPT.</sup> ~~May~~, 2011.

  
\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

Presented by:  
DEBORAH S. KELLY  
Prosecuting Attorney

Approved for Entry:

  
JESSE ESPINOZA WBA #40240  
Deputy Prosecuting Attorney

\_\_\_\_\_  
RALPH W. ANDERSON WBA# 6707  
Attorney for Defendant

# CLALLAM COUNTY PROSECUTOR

## February 17, 2012 - 9:59 AM

### Transmittal Letter

Document Uploaded: 426382-Respondent's 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:

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Motion: \_\_\_\_

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

Brief: Respondent's

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

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Sender Name: Doreen K Hamrick - Email: **dhamrick@co.clallam.wa.us**

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