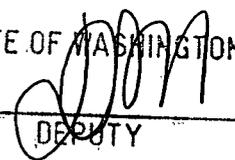


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DIVISION II

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NO. 46342-3-II STATE OF WASHINGTON

BY  DEPUTY

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JAMES A. SHEA,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR MASON COUNTY

The Honorable TONI A. SHELDON, Judge

---

BRIEF OF APPELLANT

---

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P.M. 3-9-2015

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## I. Introduction

On November 26, 2013, the Appellant was charged (Count I) with Unlawful Possession of a Controlled Substance, RCW 69.50.4013(1). CP 95.

On December 9, 2013, the Appellant was charged (Count II) with Hit And Run with Injury, RCW 46.52.020(4)(b). CP 93-94.

On March 26, 2014, the Appellant was charged (Count III) with Obstructing a Law Enforcement Officer, RCW 9A.76.020(1). CP 78-79.

The Appellant was convicted on all counts (CP 48-50) and judged guilty and sentenced on April 14, 2014. CP 18-34.

A Notice of Appeal was filed on May 9, 2014. CP 5-16.

## II. Assignments of Error

### A. Assignments of Error

1. The Appellant did not hinder, delay, or otherwise obstruct law enforcement officers in the execution of their official powers or duties.
2. The search of the wallet was unlawful.
3. Statements made by the Appellant after he was arrested were involuntary coerced, and inadmissible.
4. The Appellant did not receive affective assistance of counsel.

### B. Issues Pertaining to Assignment of Error

1. Did the Appellant made a false statement to the police officers?
2. Was the search of the wallet incident to a lawful arrest?
3. Did the exclusive control over the wallet by a third party sufficiently invalidate its search for evidence against the Appellant?
4. By the time that the Appellant's wallet was searched, did officer concerns for their safety and preservation of evidence exist to justify the warrantless search?
5. Were the statements made by the Appellant after he was hand-cuffed and in pain, and after he was arrested, knowing, voluntary and admissible?

6. Did the Appellant receive affective assistance of counsel?

### III. Statement of the Case

#### 2. Trial Testimony

##### a. Officer Auderer

On November 22, 2013, Shelton City Police Officer Robert Andrew Auderer was off-duty (RP 134 9-15) at Bob's Tavern in Shelton, Washington; he heard a commotion just outside. RP 134-135 24-1; RP 139 16-16. He was wearing plain clothes. RP 137 12-15.

He observed a yellow Mustang in the roadway with a pedestrian pinned underneath one tire by the foot; the pedestrian was standing up and bracing upon the automobile. RP 135 5-9.

The Mustang backed off and the suspension "kind of wiggled". RP 135 15-19.

Several people are shouting for the Mustang to stop, and the pedestrian is

"a little dazed but still on his feet and kind of shaking his hands like what the hell's going on, I just got hit by a car and the driver left." RP 135 19-23.

Officer Auderer follows the Mustang and calls 911. RP 137 9-11; 135 24-25.

This incident "tied up all the lines" to 911. RP 136 2-7.

He identified the Appellant as the operator of the Mustang (RP 136 13-16); the Appellant was not driving excessively fast. RP 137 22-25.

He followed the Appellant (RP 139-140 25-3), got out and confronted him, telling him he is not free to go, that he is an officer, and that uniformed officers are on their way. RP 140 5-8.

Other people came out of the Appellant's. RP 140 10-14.

He again identified himself as a police officer (RP 142 7-12) and at some point displayed his officer's commission card. RP 143 12-19.

Officer Auderer identified Exhibit 1 as a partial video recording of the encounter between himself and the Appellant. RP 145 1-17. Exhibit 1 was published, RP 146 18-19.

Before uniformed officers arrived, the Appellant

"was emptying his pockets of their contents ... he takes his wallet out, which had been hanging from a chain or . . . Anyhow, he drops it and throws it to his friend Dave, who's on the scene." RP 148 5-11.

Office Auderer identifies this bearded man as "Dave Kohlstaedt," RP 148 2-21; he seized the wallet from this individual. RP 149 8-15.

The ID card "was a Washington State ID of sorts, driver's license or ID." RP 149 21-23.

He also confiscated another piece of ID belonging to the Appellant. RP 150 1-6.

From when the Appellant tossed his wallet to the ground and it was picked up by "Dave Kohlstaedt," to the moment when he seized it, Officer Auderer had "Dave Kohlstaedt" and his hands in eye sight the entire time, RP 150 7-16; nobody else interacted with "Dave Kohlstaedt", RP 150 17-19.

Officer Auderer waited until officers arrived to detain the Appellant "because there

was no need to put Mr. Shea into the cuffing position until I had handcuffs available." RP 151 6-19.

Regarding self-incriminating statements, Officer Auderer testified:

"he said something to the effect of I barely hit that guy. I barely hit him. He wasn't even hurt. And he continued to repeat that until all of his friends came out and I was surrounded." RP 153-154 23-3.

Questioned why he ordered the Appellant not rifle into his pockets, to keep his hands where you could see them (RP 154 11-12), Officer Auderer responded:

"I didn't want him to pull a weapon out and (RP 154 13) ... To prevent the destruction or concealment of contraband." RP 154 25.

Trial defense counsel asked about Exhibit 2 (RP 157-158 15-1), which is Officer Auderer's official report on the incident. RP 158 4-6.

Exhibit 2 lacks any mention of two pieces of the Appellant's identification being located during the incident. RP 158-159 24-5. The only

piece of identification that Officer Auderer mentions in his report is the one located inside the Appellant's wallet. RP 159 12-13.

Officer Auderer admitted that it was several minutes after he picked up the Appellant's identification off the ground, that he then seized the wallet. RP 160 5-12.

b. Officer Backus

Officer Christopher Andrew Backus testified that multiple hand cuffs were used on the Appellant's hands to alleviate pain. RP 168 5-8.

Officer Auderer went to another hand-cuffed individual and retrieved a wallet (RP 169 3-7), opened the wallet, and then gave it to him. RP 169 11-12.

Located in the wallet was the Appellant's identification and a baggie of methamphetamine. RP 169-170 18-2.

The identification is a driver's license. RP 171 112-13.

Whether the Appellant was hindering him upon his arrival, Officer Backus testified:

"Hindering me? Well, he wasn't complying with our orders when I arrived on the scene, so yes." RP 171 16-17.

Whether the Appellant was obstructing, Officer Backus testified:

"He wasn't complying with what we were telling him to do ... so when we told him to do something he wasn't ... complying with anything we said. He was pulling away from us when we told him to stop. We wouldn't place his hands behind his back and he was constantly pulling away so we couldn't do what we needed to do at that point in time." RP 171-172 21-2.

The driver's license that inside the wallet is the only piece of identification of he got from the scene. RP 172 6-9.

c. Mr. Manning

Respondent's next witness was Grant Manning, who testified that as he was walking back to his automobile from Bob's Tavern:

"There was no one in the street when I crossed and all of the sudden, I'm not sure even where he came from but he ended up pinning my foot to the ground with his driver's side tire and then hit my left knee. And he was sitting on my foot and I finally had to yell at him to back off my foot so I could get off to the side of the street."

RP 176-177 23-4.

"After I got to the side the vehicle backed up. And once I got to the side I told him to stop and that, at that point he just took off." RP 177 6-8.

Describing his injury:

"At the time there was - the fire, the EMTs came to the scene. I said I was okay. At that time I could walk fine, and like I said I was going to go on home. They canceled the ambulance. But the next morning I almost could not walk at all so I went to the emergency room and they x-rayed my foot, and it was not broken" RP 177 10-15.

His foot was bruised, he was in pain, RP 177-178 24-2, and his knee required surgery. RP 178 9-11.

Mr. Manning identified that Appellant as the driver of the automobile. RP 179 1-12.

The Appellant did not provide ID, insurance information, did not attempt to provide assistance, ask if he was okay, RP 179-180 20-2, or exhibit a driver's license, RP 180 7-8.

Mr. Manning testified that he never threatened the Appellant, and that the Appellant did not say anything. RP 3-6.

He told the EMTs that that Appellant "landed on top of my foot and hit my knee, but I said I could walk so I was going home." RP 180 20-22.

Mr. Manning testified that during the following day, he immediately went to the Shelton Police after his hospital visit. RP 181 1-4.

Trial counsel: "The knee injury, the knee complaints never arose until much later; isn't that true?" RP 181 9-10.

Mr. Manning answered:

"Within the next day. I could walk, but my foot was the most immediate pain that I had because when I got up in the morning I could barely walk. That was my foot, but my knee also was beginning to bother me." RP 181 11-14.

Following lunch, the trial court notified the parties that Juror 7 realized that he works with Mr. Manning's son (RP 183 12-16) but that it would not affect his decision. RP 183 17-20.

Trial counsel did not question Juror 7 about this matter. RP 184 2-5.

d. Forensics Scientist Kee

Forensics scientist Tami Kee (RP 184 16-25) identified the substance in the baggie (Exhibit 4) as methamphetamine. RP 188 1.

e. Mr. Wells

David E. Wells was driving behind the Appellant and witnessed the incident between the Appellant and Mr. Manning:

"Jimmie pulled away from the curb -- -- and there was a guy coming across the road who - Jimmie stopped. This guy stopped. The guy beat on Jimmie's hood and they maybe exchanged words, something; there was some gesturing. The guy walked off down the sidewalk and Jimmie and I proceeded towards his house." RP 190-191 24-3.

Mr. Wells testified that Mr. Manning was "coming across the street came to the side of Jimmie's car, front quarter panel somewhere between bumper and door to front quarter panel." RP 191 22-24.

"At that point that's when the guy took another step and hit the hood of the car and there was some gesturing." RP 192 1-2.

Mr. Manning then "Walked off. Got on the sidewalk and continued on his way." RP 192 14.

Manning did not make any motions to indicate that he was injured (RP 192 15-18); no other

passers-by tried to contact the Appellant (RP 191 22-25); the Appellant drove at a normal rate of speed, RP 193 1-2.

Mr. Wells was forced off the road Officer Auderer. RP 193-194 17-3.

Mr. Wells described Officer Auderer's conduct just after reaching the Appellant's home:

"He jumped out of his vehicle. He was excited, irate, yelling into his cell phone, pointed at me to get on the ground and call the police." RP 194 21-23.

After 4 minutes of observing Officer Auderer's behavior, Mr. Wells started video recording the encounter (RP 196 6-7, 13-15). He described the physical contact from Officer Auderer towards the Appellant as injurious to the Appellant. RP 196 20-24.

Officer Auderer's behavior drew other individuals to the scene. RP 196-198 20-1.

Mr. Wells recognized Tony (RP 197 6) and "Hippie Dave" (RP 197 14-16).

Mr. Wells is not familiar who the bearded man detained by the police, is. RP 200 2-12.

Officer Auderer picked the Appellant's driver's license up off the ground. RP 200 19-25.

Nobody posed a threat to Officer Auderer. RP 201 6-10.

Mr. Wells did not tamper with the video recording. RP 202 23-25.

Mr. Wells testified that "Hippie Dave" is Dave Kohlstaedt. RP 205 16-18.

Mr. Wells testified that the Appellant stopped during the encounter between himself and Mr. Manning, and

"Then the guy banged on his hood. Then the man went around the front of the vehicle and walked off down the sidewalk." RP 207 1-7.

Because of his demeanor at the Appellant's home, Mr. Wells was not convinced that Officer Auderer was a police officer. RP 208 1-7.

When he met the Appellant in downtown Shelton, the Appellant warned him that his headlights were not on. RP 210 8-1.

f. Mr. Sweeten

Appellant's friend, Tony Sweeten (RP 212 7), was at the Appellant's home when the encounter with Officer Auderer took place. RP 212 13-15.

Screaming and yelling caused Mr. Sweeten to go outside, where he saw the Appellant "being manhandled by a person." RP 212 22-25.

Other friends and several other persons unknown to him, also came. RP 13 5-6 and 10-14.

Mr. Sweeten recognized Mr. Wells. RP 213 22-25. "Hippie Dave" was there. RP 214 19-23.

Mr. Sweeten is not familiar with the bearded man. RP 217 5-10. Whether this individual is "Hippie Dave", Mr. Sweeten responded: "No, Hippie Dave don't wear glasses or ever wear a baseball cap." RP 217 12-13.

Officer Auderer had the Appellant's "arm wrenched completely behind his back" (RP 218 14-15); because of his behavior, Mr. Sweeten demanded proof from Officer Auderer that he is in fact a police officer. RP 218 15-18.

When Officer Auderer let go of the Appellant's arm to provide proof that he is a police officer, the Appellant removed his identification card from his wallet and threw his wallet to the ground, RP 219 1-4.

While the unidentified bearded man picks up the Appellant's wallet, Officer Auderer's attention is drawn towards Mr. Sweeten. RP 221 7-25. The situation as very verbal, confrontational, and heated. RP 222 7-12.

Mr. Sweeten testified that while in hand cuffs, Officer Auderer threatened him. RP 225 25-27; RP 226 7-11.

The arm twisting that Officer Auderer did upon the Appellant's arm (before uniformed officers arrived), was "way against the natural [motion of the joint] .... It was over the top." RP 230 10-18.

Mr. Sweeten smelled alcohol on Officer Auderer's breath. RP 231 22-23; 232 3-9.

g. Mr. Kohlstaedt

David Ray Kohlstaedt aka "Hippie Dave" was at the Appellant's home during the Appellant's encounter with Officer Auderer. RP 236 16.

He did not recognize the bearded man who took picked up the Appellant's wallet; he is not that bearded man, RP 236 19-23; and did not have possession of the Appellant's wallet, RP 237 3-6.

There were several individuals at the scene who he did not know. RP 237 22-23.

Office Auderer's was "acting crazy" (RP 239 23-25); "acting ... over the top" (RP 240 1-3); he was "completely schizophrenic" (RP 40 4-6) and his "eyes were bulging out" (RP 240 7-8).

h. Mr. Shea, the Appellant

On November 22, 2013, Mr. Sweeten, Mr. Kohlstaedt, and a Matt were in the Appellant's home when the Appellant left to meet Mr. Wells in downtown Shelton. RP 246 18-23. Everybody was getting ready to watch a Seahawk's game (RP 247 4-6).

After meeting Mr. Wells, the Appellant noticed that Mr. Wells's headlights were not on, so he pulled over, parked, and notified Mr. Wells to turn his headlights on. RP 248 2-10.

The street block where the Appellant pulled over, was right across the street from Bob's Tavern. RP 248 16-20.

About the encounter with Mr. Manning: "he walked into the side of my car". RP 249 16. The Appellant was traveling about three miles per hour when this occurred. RP 249 10-11.

Mr. Manning responded with "what the fuck" (RP 249 19-21. The Appellant responded with the exact same comment (RP 249 22-23); Mr. Manning then "backed away from the car, walked around the front of it up onto the sidewalk and proceeded to who knows where." RP 249-250 24-1.

Mr. Manning did not ask the Appellant to stop, indicate that he was injured or express any other concerns. RP 250 3-9.

The Appellant proceeded home. He noticed an automobile pass Mr. Wells, so he slowed down to allow this motorist to pass, but the motorist followed him home. RP 14-21; 251 22-24.

Upon getting home, the Appellant walked over to the automobile which followed him. The man exited this automobile and accused the Appellant of running over another man. RP 252 1-3; 14-16; 18. The Appellant denied hitting anybody. RP 252 20-24.

This man got his cell phone out and was "jerking me around". RP 253 1-9.

The Appellant removed his Washington State Driver's License from his wallet, which was the only piece of identification he had in his possession. RP 253 10-25.

The individual was behind the Appellant and holding the Appellant by the arm. RP 255 1.

This individual did not initially identify himself to the Appellant as a police officer. RP 255 10-13.

The Appellant's ankle was taken out of a cast the day before, so the Appellant was in a great deal of pain by the way that this individual was handling him. RP 255 14-18.

While leaning on Officer Auderer's sports car (RP 255 22-24), Officer Auderer "grabbed my arm and jerked me up and he said put your hands behind my back. As I - as he grabbed my arm he twisted me like this and then back." RP 256 6-8. That was at the moment when uniformed Officer Backus appeared. RP 256 9-19.

He tossed his wallet along with a small pocket knife, into his yard, to not be considered armed. RP 257 16-22.

The Appellant did not recognize the man who picked up his wallet, RP 258 1-6; and affirmed that this was not Mr. Kohlstaedt. RP 259 9-13.

The Appellant identified Officer Auderer as the individual who picked his driver's license up from the ground and "put it in his pocket." RP 259-260 23-2.

Being booked and released that same night, the Appellant got his wallet back; inside it was his driver's license. RP 260 3-16.

The Appellant identified Exhibit 1 as having the complete recording that Mr. Wells provided him with. RP 261 21-24. The Appellant did not alter the video recording. RP 261-262 25-6.

When asked on cross examination the fact that he said "Here, Dave" when he tossed his wallet onto the ground, the Appellant responded that there were three Daves there during the events with Officer Auderer. RP 264 1-6.

i. Detective Moran

Shelton Police Department Detective Calvin Moran was called in rebuttal. RP 265.

When he asked Mr. Wells about the nature of his relationship with the Appellant, Mr. Wells said, "he didn't really know Mr. Shea and that he wouldn't even really call him an acquaintance." RP 266-267 22-5.

About the nature of the relationship between Mr. Wells and Mr. Sweeten, Mr. Wells responded "he even knew them less." RP 267 6-11.

j. Officer Auderer

Officer Auderer was recalled in rebuttal. RP 271.

While at Bob's Tavern, he ordered a beer, but did not consume it. RP 271 8-15.

He displayed his officer's commission card to Mr. Sweeten, but claims that this was before the video recording started. RP 272 1-6.

He claimed that Mr. Sweeten threatened him (RP 272-273, 21-4) and that he ordered him to stay put but that Mr. Sweeten went into the Appellant's home instead. RP 272 16-17.

He testified that Mr. Sweeten was inside the Appellant's home when the Appellant tossed his wallet onto the ground. RP 274-275 24-2.

He testified that he was "mindful" of the bearded man who picked up the Appellant's wallet (RP 276-277 9-14),

"Because he had just received the wallet from Mr. Shea and I wanted to preserve that, the integrity of that evidence. I was investigating a crime." RP 276-277.

He testified that at no time did he ever put a finger hold or an arm hold against the natural movement of the joint to the Appellant's arm, or twist it so that he was face-to-face with the Appellant. RP 277 11-18.

Officer Auderer testified that he saw the tire on Mr. Manning's foot. RP 277 23-25.

### 3. Trial Exhibit 1

Officer Auderer looks away from the direction where the unidentified bearded man who was in possession of the Appellant's wallet, on multiple occasions. Exhibit 1 Time stamp 00:40 through 01:20.

Officer Backus tells the Appellant "You're under arrest. You have the right to an attorney." RP 6 10-11.

Officer Auderer asked about "the victim" (Mr. Manning) and was told by another officer, "He's gone." RP Ex.1 8 9-10. Officer Auderer

responds, "Is he gone? Okay. Well, he's [the Appellant] still going." RP Ex. 1 8 11-12.

Officer Auderer strikes up a conversation with the Appellant (RP 8-9 16-17) to which the Appellant makes statements (RP Ex 1 8-9 21-17) which the Respondent claimed during closing are admissions to the hit and run. RP 320 21-5.

#### 4. Closing Arguments

##### a. Respondent's Closing Argument:

Respondent argued that the Appellant and his witnesses presented contradictory evidence, alluding to this at least 7 times at RP 298.

As to the Obstruction charge, the Respondent focuses on the Appellant's conduct after Officer Backus drives up to the scene:

"What does the defendant do? He doesn't respond. He doesn't put his hand behind his back, so Officer Auderer has to grab his arm. He pulls away. Not only does he pull away but then he pulls towards Officer Auderer, the opposite direction he's trying to place his hand. That is resisting a police officer with full knowledge that he is an officer and then he goes ahead and he resists Officer Backus, who gets on the other side. Officer Backus testified that he was resisting him. That is obstructing." RP 302 2-10.

b. Appellant's Closing Argument

Trial counsel pointed out that Exhibit 1 shows the officers at the scene mentioning that Mr. Manning walked off the scene at Bob's Tavern. RP 306 17-19.

Trial counsel reminds the Jury that Mr. Manning did not testify that the Appellant struck him. RP 311 13-14.

c. Respondent's Rebuttal Closing Argument

In rebuttal argument, the Respondent argued that Mr. Wells is not credible (RP 314 9-15), that Mr. Wells and the Appellant were inconsistent about the incident with Mr. Manning, RP 314 16-24.

Respondent points out in Exhibit 1 that the Appellant claimed that he didn't hit Mr. Manning "hard enough". RP 320-321 22-5.

#### IV. Summary of Argument

The Appellant did not make a false statement to the police officers to support an Obstruction charge under Count I.

The search of the Appellant's wallet was after it was in the exclusive possession and control of an unknown bystander, after it no longer posed a danger to the police, or posed the possibility that evidence would get lost.

The Appellant was never read his Miranda rights but was goaded into making self-incriminating statements after he was arrested and placed in hand cuffs and was clearly suffering from pain.

This case boiled down to witness credibility, so a juror whose fellow employee is the son of a star witness against the Appellant, could not guarantee the Appellant a fair trial.

Ultimately, the Appellant was not represented by effective counsel, as no challenges to the Obstruction charge, the

Appellant's self-incriminating statements, the biased juror, or the contents of the wallet, were made.

## V. Argument

1. There was insufficient evidence to support the conclusion that the Appellant hindered, delayed, or otherwise obstructed law enforcement officers in the execution of their official powers or duties.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. State v. Hosier, 157 Wash.2d 1, 8, 133 P.3d 936 (2006). On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. Hosier, 157 Wash.2d at 8, 133 P.3d 936. In the sufficiency context, we consider circumstantial evidence as probative as direct evidence. State v. Goodman, 150 Wash.2d 774, 781, 83 P.3d 410 (2004). We may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. Goodman, 150 Wash.2d at 781, 83 P.3d 410. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Thomas,

150 Wash.2d 821, 874-75, 83 P.3d 970 (2004),  
abrogated in part on other grounds by Crawford v.  
Washington, 541 U.S. 36, 124 S.Ct. 1354, 158  
L.Ed.2d 177 (2004)."

State v. Davis, 176 Wn.App. 849, 861, 315 P.3d  
1105 (II, 2013)

"A detainee's refusal to disclose his name,  
address, and other information cannot be the  
basis of an arrest." State v. White, 97 Wash.2d  
92, 106, 640 P.2d 1061 (1982).

Obstruction requires both conduct and false  
statement. State v. Williams, 171 Wn.2d 474,  
485-486, 251 P.3d 877 (2011). There was only a  
false statement in Williams.

Where an owner of a purse lied that it was  
not hers, and she then grabs it from the police  
as they are about to search it, walked away from  
the officers and failed to obey their demands  
that she stop, both elements satisfy an  
obstruction conviction. State v. Oster, No.  
41850-9-II (2012).

Nothing that the Appellant did hindered,  
delayed, or otherwise obstructed Officers Auderer

or Backus from executing their official duties or delayed their decision to arrest him.

More importantly, the Appellant did not provide a false statement, to the officers.

When Officer Auderer was told that Mr. Manning was gone, he made his intentions know that regardless of the potential of a hit and run charge, the Appellant was "still going" to jail.

Tossing his wallet and dropping his identification card, is clearly insufficient for such a charge. At most this conduct is a refusal to provide identification, not a false statement.

The Appellant was charged with resisting arrest (Exhibit 2). The resisting charge was so tenuous that the prosecuting attorney didn't even take it to trial. Officer Auderer was obviously grasping at straws to legitimize the arrest.

This dubious charge does not deserve judicial gloss or approval.

As to hindering an investigation into the contents of the Appellant's wallet: Officer

Auderer ordered the Appellant not to file through his pockets, not that he cannot drop his wallet onto the ground. And the act alone did not constitute a false statement.

Officer Auderer also failed to demonstrate that this "rifling" hindered, delayed or obstructed the investigation of the Appellant or constituted a false statement, or constituted a false statement.

Officer Auderer admits that he was concerned about securing the evidence, but what basis did he have to support his suspicions that contraband might be seized from the Appellant's wallet? And still no false statement is evident.

2. The search of the wallet was without lawful authority when it was finally searched, as it posed no safety or evidentiary concerns and was in the exclusive possession of an unknown third party for over 40 seconds.

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." State Constitution, art. 1, section 7.

"Warrantless searches are per se unreasonable under our state constitution,

subject to a limited set of carefully drawn exceptions. State v. Garcia-Salgado, 170 Wash.2d 176, 184, 240 P.3d 153 (2010); State v. Tibbles, 169 Wash.2d 364, 368-69, 236 P.3d 885 (2010); State v. Ringer, 100 Wash.2d 686, 701, 674 P.2d 1240 (1983), *overruled on other grounds by State v. Stroud*, 106 Wash.2d 144, 720 P.2d 436 (1986). The State bears the burden of establishing that an exception to the warrant requirement applies.” State v. Kirwin, 165 Wash.2d 818, 203 P.3d 1044 (2009); State v. Vrieling, 144 Wash.2d 489, 494, 28 P.3d 762 (2001).

A search incident to arrest is an exception to the warrant requirement.

State v. Smith, 119 Wash.2d 675, 678, 835 P.2d 1025 (1992).

Officer Auderer admits that he could have placed the Appellant into a “cuffing position” but he chose to wait until uniformed officers arrived. RP 151 6-19.

This choice by Officer Auderer allowed the Appellant to divested himself of his wallet.

And Officer Auderer never instructed the Appellant that he could not throw the wallet onto the ground.

These circumstances are similar to what happened in Washington v. Levingston, No. 34561-7-II (2007).

Levingston was arrested and Aalaand, the owner of the automobile he was driving and arrested in, was allowed to exercise control over the automobile for about 16 seconds. The police then searched that automobile and seized evidence.

Relying on State v. Boyce, 52 Wn.App. 274, 758 P.2d 1017 (1988), this Court stated in Levingston:

"an event occurred between the time of Levingston's arrest and the time police searched the vehicle that eliminated the possibility of him accessing a weapon or destroying evidence. Officers effectively released the vehicle to Aaland and allowed her to enter and lock it on exiting. Once this occurred, they no longer maintained control over the car out of a concern for their safety or the preservation of evidence. After Aaland locked the vehicle, there was no longer a possibility that Levingston could destroy evidence or access a weapon because the vehicle was no longer accessible to him without her permission." Id.

Boyce, 52 Wn. App. at 279: "once police removed the defendant, there was no possibility the defendant could access a weapon or destroy evidence and, therefore, "there simply were no special circumstances present that justified a warrantless vehicle search."

In Appellant's case, the wallet was no longer in his exclusive control. The Appellant reasonably believed that he was not under arrest but was waiting for uniformed officers to arrive, and Officer Auderer's testimony supports that conclusion.

While Officer Auderer was mindful of the wallet being in possession of a third party, he looked away several times. Yet that does not seem to have any legal significance, because in Levingston, the police officers had the owner of the automobile in view the entire time she was alone at her automobile.

The fact that the police knew exactly who Aaland was - they had her identification before they allowed her to go to her automobile - distinguishes Levingston because nobody in the Appellant's case actually seized any identification from the bearded man to affirmatively identify him.

In the Appellant's case, he stayed with Officer Auderer. Over 40 seconds transpire with the wallet in the possession of an unknown third party. Ex. 1.

By the time the Appellant is arrested and hand-cuffed, the wallet posed no safety concern to the police. Once Officer Auderer seized it from the bearded man, he could have gotten a telephonic search warrant for it.

The fact that he already has possession of the Appellant's driver's license before he seized the wallet from the bearded man, diminished any argument that Officer Auderer did not know the identity of the Appellant. As that point, the search of the wallet was purely to discover incriminating evidence, as it could serve no other purpose. All justifications for a warrantless search transpired.

This conclusion should be reached based upon the rationale behind Levingston and Boyce. The fact that these two cases deal with search of

automobiles, should not distinguish them from the core rationale that both cases hinge their outcomes on the fact that otherwise legitimate warrantless searches do at some point lose their warrantless legitimacy, when concerns for safety and "evanescent evidence" are no longer present, as is the case here.

Just as importantly, nobody searched the bearded man's pockets for evidence of controlled substances or paraphernalia to determine whether cross-contamination could have occurred.

The same goes for the driver's license: Officer Auderer picks it up and at some point places it back into the Appellant's wallet after the driver's license was inside Officer Auderer's own pocket for several seconds. Since Officer Auderer is a proactive off-duty police officer, did cross-contamination occur?

Finally, there is no evidence on the record supporting the conclusion that the Appellant was arrested for a crime involving the use of a

weapon or for a crime where the evidence might be in the wallet.

3. Self-incriminating statements made by the Appellant after he was arrested were involuntary and inadmissible because he was never given his Miranda warning, and was goaded while he was in pain.

"The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Article I, section 9 of the Washington State Constitution affords the same protection. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008); State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). To be admissible, a defendant's statement to law enforcement must pass two tests of voluntariness: (1) the due process test, whether the statement was the product of police coercion; and (2) the Miranda test, whether a defendant who has been informed of his rights thereafter knowingly and intelligently waived those rights before making a statement. State v. Reuben, 62 Wn.App. 620, 624, 814 P.2d 1177 (1991). A confession that is the product of government coercion must be suppressed regardless of whether Miranda has been complied with. United States v. Anderson, 929 F.2d 96, 98 (2nd Cir. 1991)."

"Courts evaluate the totality of the circumstances to determine whether custodial statements were voluntarily given. Unga, 165 Wn.2d at 100 (citing Fare v. Michael C, 442 U.S.

707, 724-25, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); Schneekloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Miranda v. Arizona, 384 U.S. 436, 475-77, 86 S.Ct. 1602, 16 L.Ed2d 694 (1966). The government must prove the voluntariness of a defendant's statement by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972)."  
State v. Deleon, No. 29657-1-III 27-28 (2014, Amended 2015).

A view of Exhibit 1 demonstrates that the Appellant was in hand cuffs and in pain. It also demonstrates that Office Backus started to Mirandize the Appellant, but only said "You're under arrest. You have the right to an attorney." RP 6 10-11. The Appellant was clearly never advised that what he said, would be used against him in a court of law. Instead, Office Auderer goads the Appellant and the Appellant end up responding with damning statements like "I didn't [] hit him hard enough." RP Ex. 1 9 line 6. This is tantamount to police coercion, and the first test, is satisfied.

Under the second test, the Appellant was never informed of his rights, other than he has a right to an attorney.

The Appellant's self-incriminating statements must therefore be suppressed.

Their damage to the Appellant's defense in Count II is insurmountable, because here is a recording that contradicts the Appellant's testimony at trial that he did not hit Mr. Manning, and the recording is so strong that any doubts that the Jury may have had about the credibility of Officer Auderer and Mr. Manning as to the hit and run charge, fell by the wayside.

4. The Appellant did not receive affective assistance of counsel.

"To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different."

State v. Thomas, 109 Wash.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

"Competency of counsel is determined based upon the entire record below."

State v. White, 81 Wash.2d 223, 225, 500 P.2d 1242(1972).

Trial defense counsel should have done the following:

- i. Moved under CrR 3.5 to suppress the Appellant's confession.

No legitimate tactical reason for counsel's failure to move for suppression of this confession, is apparent. Without this confession, the Jury would have evaluated the testimony without the involuntary and coerced statement.

Both of Respondent's closing arguments exploited credibility against the Appellant, and Exhibit 1 was the keystone.

The result of the outcome would have been different as to Count II (Hit and Run), because

what the Appellant was recorded as saying on Exhibit 1, was the Appellant's Achilles' heel.

Arguably the Appellant was trying to say that he did not in fact hit Mr. Manning. But the context was exploited and with two other witnesses claiming that he did hit Mr. Manning, the case was sealed against the Appellant.

It is reasonable to conclude that the Jury would have at least hung on Count II, had the suppression been exercised, giving a different outcome for the Appellant.

ii. Move under CrR 3.6 to suppress the contents of the wallet.

No legitimate tactical reason for counsel's failure to move for suppression, is apparent.

Without the controlled substance in evidence, Count I would have been dismissed, which would have been the only outcome, had trial defense counsel sought to suppress this evidence using the authority and argument made earlier in this brief on the wallet.

iii. Strike Juror 7 off the Panel.

No legitimate tactical reason for counsel's failure to move remove Juror 7 off the Panel, is apparent. With this juror off the panel, the Appellant would have been afforded judgment by a disinterested panel.

It was obvious that the outcome of the case turned upon credibility, particularly as to Count II (Hit and Run). With a star witness having a son who is a fellow employee with a juror on the panel, there were no credibility issues to be resolved by such a juror. The juror said that it will not affect his decision, but trial counsel took liberties buy not even probing into this juror's perceptions in light of the fact that either the Appellant, or the juror's co-worker's father, lied about the incident, at Bob's Tavern.

iv. Move for the dismissal of Count III

No legitimate tactical reason for counsel's failure to move for the dismissal of Count III at

the end of the State's case in-chief, is apparent. The evidence which the Respondent produced lacked any false statement.

Allowing the Panel to view the Appellant as an individual who disrespects authority, thereby prejudicing the entire Panel against the Appellant as to the remaining charges. Had Count III been dismissed, the Panel would have placed that prejudice aside, and focused upon the merits of the remaining charges.

#### **VI. Conclusion**

Count III (Obstruction) should be dismissed because there was no false statement made.

The contents of the wallet, in particular the methamphetamine, should be suppressed because by the time the officers seized it, it had been in the exclusive possession of a third party, cross-contamination was very likely, and the wallet posed no safety or evidentiary issues for

the officers. Therefore, Count I (Possession of a Controlled Substance) should be remanded for dismissal.

Exhibit 1 should be suppressed so far as the last few moments depicting the goading of the Appellant into making self-incriminating statements, and Count II (Hit and Run) should be remanded to the trial court for further proceedings.

Respectfully submitted  
This 9<sup>th</sup> day of March, 2015

  
George A. Kolin, WSBA 22529  
Attorney for Appellant

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

STATE OF WASHINGTON,  
Respondent,

No. 46342-3-II

v.

CERTIFICATE OF SERVICE OF  
BRIEF OF APPELLANT

JAMES A. SHEA,  
Appellant

I certify and affirm that I served a copy of the Brief of Appellant by placing same into a sealed envelope and depositing it into the United States Postal Service with postage pre-paid first-class to the following:

For the Respondent: Timothy J. Higgs  
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And that I sent the original Brief of Appellant for filing with the Clerk of Court at:

Clerk  
Court of Appeals  
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Done and Dated March 9, 2015, at Washougal, Washington.

  
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