

FILED

JUN 07 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 285651

COURT OF APPEALS, STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Respondent,

v.

ZACHARY S. HARVEY, Appellant

BRIEF OF APPELLANT

William D. McCool
WSBA #09605
Attorney for Appellant

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Walla Walla, WA 99362
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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in impliedly finding as fact that Officer Lackey's testimony that he told Mr. Harvey his car would be held "temporarily" was more credible than Mr. Harvey's testimony that his car would be held "indefinitely" where there was no substantial evidence to support the court's implied finding of fact.
2. The trial court erred in entering a mixed finding of fact and conclusion of law that Officer Lackey's statements to Mr. Harvey were not unduly coercive and that such coercion did not vitiate consent.
3. The trial court erred in concluding that Mr. Harvey's oral statement made to Officers Lackey and Pellicer about the money turned over to Officer Pellicer is admissible.
4. The trial court erred in concluding that the drugs and scales found in Mr. Harvey's backpack and the money he turned over to Officer Pellicer are admissible for the reason that Mr. Harvey gave a valid voluntary consent for the search of the items.
5. The trial court erred in failing to suppress drugs and scales found in Mr. Harvey's backpack, drugs Mr. Harvey turned over to Officer Lackey

and money Mr. Harvey turned over to Officer Pellicer where the items were obtained as a result of involuntary consent on the part of Mr. Harvey.

6. The trial court erred in failing to suppress the statements made by Mr. Harvey to Officers Lackey and Pellicer about the money turned over to Officer Pellicer where said statements were the fruit of the poisonous tree of the involuntary consent given earlier by Mr. Harvey.

Issues Pertaining to Assignments of Error

1. Where Officer Lackey testified that he told Mr. Harvey that his car would be held “temporarily” but did not recall the exact words used and where Mr. Harvey specifically recalled that Officer Lackey said that his car would be held “indefinitely”, was the trial court’s finding that the officer’s version was more credible than Mr. Harvey’s supported by substantial evidence in the record, or did the trial court err by making such a finding? (Assignment of error No. 1.)

2. Where Mr. Harvey’s oral statement made to Officers Lackey and Pellicer regarding money given by Mr. Harvey to Officer Pellicer came on the heels of an involuntary consent to search which was the product of coercion, should the trial court have suppressed the statement as fruit of the poisonous tree of the involuntary consent? (Assignments of error Nos. 3

and 6).

3. Where Officer Lackey told Mr. Harvey that he would not arrest him if he gave consent to the search of his vehicle, and where Officer Lackey further told him that in the event of a refusal of consent, he would hold his vehicle for an indefinite period of time, did the trial court err by refusing to suppress evidence of drugs and scales found in Mr. Harvey's backpack, drugs turned over to Officer Lackey by Mr. Harvey and money turned over to Officer Pellicer by Mr. Harvey on the grounds of a warrantless seizure in violation of both the Fourth Amendment to the United States Constitution and Article 1, § 7 of the Washington State Constitution? (Assignments of error Nos. 2, 4 and 5).

4. Did the trial court err by not finding that Officer Lackey's statements to Mr. Harvey were unduly coercive or that such coercion vitiated consent? (Assignment of error Nos. 2 and 5.)

B. STATEMENT OF THE CASE

Appellant, Zachary S. Harvey, was charged by information in Walla Walla County Superior Court with a single count of possession of marijuana with intent to deliver. (CP 1-3). This charge stemmed from an incident wherein the store manager of Northwest Farm Supply, Joyce

Amber Davidson, contacted the Walla Walla Police Department in regard to an employee possibly selling narcotics. (RP 5). Officers Lackey and Pellicer made contact with Ms. Davidson, and Officer Lackey spent approximately ten minutes with her. (RP 15). According to Lackey, Ms. Davidson informed him that a couple of her employees saw some sort of transaction “but they weren’t specific on what they saw.” (RP 15). When Officer Lackey was asked whether or not Ms. Davidson had indicated that the employees would have been able to tell exactly what they saw such as a hand-to-hand exchange of “let’s say money and drugs”, Officer Lackey responded “she didn’t give me any specifics on that. She just said that they saw something and it was some sort of transaction between some guy and him.” (RP 16).

Based upon Ms. Davidson’s representations to the officers, while Officer Lackey was still conversing with Ms. Davidson, Officer Pellicer made contact with Mr. Harvey and said to him, “I have heard you have been selling marijuana.” (RP 30). When initially asked on direct examination what Mr. Harvey’s response was, Officer Pellicer indicated “I don’t remember. It’s been about a year ago.” (RP 30) Then on cross-examination, he admitted that Mr. Harvey denied the accusation. (RP 37).

Next, Officer Pellicer asked Mr. Harvey if he would give the officers permission to search his vehicle, and Mr. Harvey responded by asking “Why?” (RP 30). In response to Mr. Harvey’s question, Officer Pellicer stated “Well, if you don’t have anything to hide really then there is no reason to refuse consent.” (RP 31). Mr. Harvey did not respond to that statement, and he did not give consent to Officer Pellicer to go ahead with the search. (RP 31, 36).

About that time, Officer Lackey appeared and joined the conversation. According to Officer Lackey, he explained to Mr. Harvey about the complaint police had received from Ms. Davidson, and “told him that if he consented that I wouldn’t arrest him at this time, and explained to him the other option was to go and apply for a search warrant.” (RP 6).

When asked if he had made any promises other than telling Mr. Harvey that he wouldn’t be arrested if he agreed, Officer Lackey responded “No.” (RP 11). When asked if he had made any threats, Officer Lackey admitted ,

A. No. Well, no, other than I think I did tell him that we would seize his vehicle temporarily if I did have to go apply for a warrant.

Q. Okay. Okay.

A. I don’t know if I used the word temporarily. I don’t remember the exact wording.

On cross-examination on this issue, the following colloquy occurred:

Q. Officer Lackey, to help refresh your memory, based on what you told us previously under oath in District Court, the word you used was, "indefinitely," is that right?

A. That's possible if that's what I used over there. That's *probably what it is*.

Q. And when I asked you over there in District Court what your definition of indefinitely was, you indicated that indefinitely would be anywhere from two hours to two days; is that right?

A. That is correct.

(RP 11-12). (Italics supplied.)

Later on during cross-examination, Officer Lackey was asked,

Q. Officer Lackey, do you recall, you do recall in district court, however, saying that to you indefinite meant anywhere from two hours to two days?

A. Correct. At the time, of my experience.

(RP 23-4).

Before Mr. Harvey gave consent to the search of his vehicle it is clear that Officer Lackey mentioned arrest. During his cross-examination he was asked,

Q. And you told him that if he gave consent then you wouldn't arrest him, right?

A. At that time, correct.

Q. You would agree with me that the implication in that statement was that if he didn't give consent you were going to arrest him; isn't that right?

A. Well, based off what we found after we applied for the

search warrant.

(RP 12-13).

At the time Officer Lackey made the request to search Mr. Harvey's vehicle, he knew he did not have probable cause. That colloquy was as follows:

Q. Okay. And do you agree with me at least over in district court that you admitted that at the point he gave consent for the search of his vehicle or actually produced the stuff himself, you did not, at that point, believe you had probable cause to search his vehicle, did you?

A. I did not believe I had a lot of probable cause, but I was going to apply for a search warrant based off what the statement Ms. Davidson gave me.

Q. Just to make sure we're on the same wavelength, I'm not trying to give you a real hard time, Officer Lackey. When you testified over in district court you didn't say "I didn't have a lot of probable cause." *You admitted you didn't have probable cause*; isn't that right?

A. I could have. I don't remember what I said.

Q. Well, you didn't have probable cause, did you, at that point?

A. *At that point, no.*

(RP 13). (Italics and quotation marks supplied.) After an objection by the State

which was partially sustained and partially overruled, defense counsel inquired

again:

Q. As at least your opinion at that time was that at that point you didn't have probable cause to search his vehicle, correct?

A. *At that point, no, I did not.*

(RP 14). (Italics supplied.)

Defense counsel then pointed out that the officers made no attempt to follow up the information previously obtained. For example, since Ms. Davidson had caused Officer Lackey to believe that there were a couple of other guys that may or may not know something about whether or not Mr. Harvey was selling marijuana, there should have been follow up. (RP 14.) Officer Lackey responded that he didn't remember if Ms. Davidson gave names or if she just said a couple of employees witnessed something. (RP 14-15).

Q. And you never followed up on that at all, did you?

A. No, I did not.

(RP 15). Officer Lackey admitted that he obtained consent from Mr.

Harvey for the search of his vehicle before he explained to him the right to refuse, to restrict, or to withdraw consent at any time. (RP 18). Further, he acknowledged that no Miranda warnings were given to Mr. Harvey before the consent was obtained. (RP 18). Moreover, no Miranda warnings were given before Mr. Harvey was asked whether he made any money from the

sale of drugs. (RP 18).

When Officer Lackey was asked why he would even mention arrest after asking for Mr. Harvey's consent, he admitted "I don't know why I mentioned the arrest." (RP 19).

On further cross-examination, Officer Lackey initially denied that arrest was the first thing mentioned after requesting consent, but moments later the following colloquy occurred:

Q. Perhaps I misspoke in my question to you. When it came to the issue of actually asking for consent, the first thing that you threw out to him after you asked him for consent is, okay, you consent. Then I won't arrest you, right?

A. I guess, yeah. Yeah.

(RP 20).

During the suppression hearing held in Superior Court, Officer Lackey acknowledged that he gained no significantly different information on his follow-up contact with Ms. Davidson than he had received beforehand. (RP 26). He further admitted that when he spoke with Ms. Davidson in the videotaped interview that the "bragging" that Mr. Harvey had been doing about transactions was to Chris and Nicky, not to her. (RP 26). Defense counsel then inquired,

Q. Okay. So if you hadn't had anything further, if all you

had was what she told you, you knew at that point, at least in your opinion, you didn't have probable cause to obtain a warrant, right?

A. Based off of my initial conversation with her, *I mean, no, I did not*. I would have to go back and get more information from her and the witnesses.

(RP 26-7). (Italics supplied.) Upon further cross-examination, however, it became apparent that Officer Lackey was not even aware of whether Chris and Nicky were working there at that moment and that he did not know Chris's or Nicky's last names, addresses, or telephone numbers. (RP 27). He also conceded that he did not know whether or not he could have received any information about those employees from Northwest Seed and Farm Supply without some kind of a subpoena or some kind of court order. (RP 27). He had to admit that he didn't know anything about Chris or Nicky's reliability. (RP 27-8).

Officer Pellicer's testimony with regard to the contact between Officer Lackey and Mr. Harvey was substantially similar to that given by Officer Lackey. He stated,

A. Basically I don't remember word-for-word but he told him that we had received information he was selling marijuana out of the vehicle. And that he asked him for consent to search the vehicle. And he said that *if you do have any marijuana or what not on you, you won't be arrested today*. So that was it.

Q. Okay. And what was Mr. Harvey's response?

A. He gave consent.

(RP 32). (Italics supplied.) When asked on cross-examination if he [Pellicer] remembered Lackey saying anything about what would happen if Mr. Harvey didn't consent to the search, Pellicer responded, "I don't remember the exact wording. He said something about the possibility of his vehicle being seized." (RP 36). When Pellicer was asked whether or not he remembered Officer Lackey saying anything about for an indefinite period of time, he responded, "I don't remember exactly what his wording was." (RP 36). Officer Pellicer admitted on cross-examination that Mr. Harvey did not give any permission to search until after Officer Lackey had mentioned arrest. (RP 38).

Despite the fact that Ms. Davidson had purportedly told Officers Lackey and Pellicer that Mr. Harvey had come to work hung over, both officers indicated that Mr. Harvey did not appear to be under the influence of anything. (RP 11, 37). Both officers indicated when Officer Lackey questioned Mr. Harvey, without the benefit of *Miranda* warnings, regarding whether he had made any money from drug transactions, that Harvey handed five hundred dollars to Officer Pellicer, saying that he might as well give it to the officers because they were going to get it anyway. (RP 10,

34).

When Mr. Harvey testified on his own behalf at the suppression hearing, he was asked if he recalled Officer Lackey's specific words regarding what would happen if he did not consent. His response was

A. Yes. The, that my vehicle would be seized for an indefinite period of time. He also told me that the drug officers would show up on-site with a warrant in hand is what I remember.

(RP 45). He further testified that he came to the office of defense counsel in August of 2008, somewhere around the 19th of August, and told defense counsel what had happened a month or so earlier. (RP 48). He indicated that he watched defense counsel write notes and that what he testified to in court was substantially similar to what he told defense counsel in August of 2008. (RP 48). He further indicated that while in the office of defense counsel, he was told about a case called *State v. Apodaca, infra*. He indicated as follows:

A. Yes, I remember that very clearly.

Q. About officers telling you that they could get a warrant?

A. Yeah.

Q. When they might not be able to get one?

A. Yes, I remember that. And you actually read me the case.

(RP 49).

After presentation of all testimony at the suppression hearing, the

trial court indicated that it believed under the totality of the circumstances that the State had met its burden of proof. (RP 55).

Defense counsel urged the trial court to consider the coercive effect of Officer Lackey indicating that Mr. Harvey's vehicle could be seized for an indefinite period of time. (RP 60). The trial court responded that he did not see such a statement as coercive considering the totality of the circumstances. (RP 60).

Defense counsel filed a motion for reconsideration, asking the court to consider the effect of Officer Lackey's statement that the vehicle could be seized for an indefinite period of time in light of the requirement of *State v. Jackson, infra*, that a seizure without probable cause be only for a period which was reasonable in duration, not an indefinite period of time. (CP 37-39).

When considering the defense motion for reconsideration, the trial court compared the testimony of Officer Lackey and Mr. Harvey, and indicated that he found the officer's version to be the more credible than that of Mr. Harvey. (CP 40). The trial court indicated that the reasons set forth in *State v. Marcum, infra*, and *State v. O'Neill, infra*, which both involved a totality of the circumstances were persuasive to the court and

that under the totality of the circumstances, the court did not find Officer Lackey's statements either coercive or that such coercion vitiated consent. (CP 41). Based upon a stipulation to facts sufficient for a finding of guilt, (CP 46-7) Mr. Harvey was found guilty as charged and sentenced on September 21, 2009. (CP 48-50, 51-65). From the judgement and sentence, Mr. Harvey filed a timely notice of appeal to this Court. (CP 66-7).

C. ARGUMENT

I. No Substantial Evidence Exists to Support Court's Implied Finding of Fact That Officer Lackey's Testimony Was More Credible Than Mr. Harvey's on the Issue of Length of Detention of Mr. Harvey's Vehicle.

In the court's letter opinion of September 11, 2009, the trial court stated,

The defendant argues that the Court disregarded the fact that Officer Lackey indicated that he would be seizing Mr. Harvey's vehicle for an "indefinite" period of time. It is not clear to me that this term was used. Officer Lackey testified that he told the defendant that his car would be held "temporarily" although he did not recall the exact word he used. The gist of the conversation was that Officer Lackey indicated to the defendant that if he did not consent to the search he would proceed to document probable cause and obtain a warrant and hold the vehicle in the meantime. On cross-examination, he did not recall prior contrary testimony taken in District Court, nor was there a transcript thereof produced at the hearing. Prompted by the defense counsel

as to his possible use of the word “indefinitely” at the prior hearing, Officer Lackey testified that he did not know how long he would take to obtain a warrant, but had in mind in speaking to the defendant that it would take anywhere from “two hours to two days.” Months afterwards, and after consultation with his attorney, Mr. Harvey recalls that the officer said that the car would be held “indefinitely.” I found the officer’s version to be more credible.

(CP 40).

Although the trial court did not specifically denominate this as a finding of fact, nor did the State include this language in the findings, conclusions, and order regarding 3.5 and 3.6 hearing, (CP 42-45), the trial court nonetheless appears to have impliedly made such a finding in the September 11, 2009, letter.

The question for this Court’s review is whether or not such a finding is supported by substantial evidence in the record. That is so because if substantial evidence exists in the record to support a finding of fact, an appellate court should not substitute its judgment for that of the trial court. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008) (Citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003)).

The reason this inquiry is entirely critical to this Court’s review is that if the evidence supports the trial court’s position, then, quite candidly,

the issues of coerced consent and the confession being the product of that coerced consent as more fully discussed, *infra*, is entirely without merit; i.e., if the trial court's implied finding of fact is supported by substantial evidence in the record, then, as a matter of law, there could be no coercive effect of the statement made by Officer Lackey to Mr. Harvey. Hence, Mr. Harvey's consent would have been voluntary, and his statement made to the officers with regard to the money handed over to Officer Pellicer would not constitute the fruits of the poisonous tree.

As the courts of this State have long held, substantial evidence is that quantum of evidence in the record which would persuade a reasonable person that a finding of fact is true. *Pardee v. Jolly*, 163 Wn.2d at 566 (Citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d at 879). To put it another way, substantial evidence is a sufficient quantum of evidence to persuade a rational fair-minded person the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d at 879 (Citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

The problem with the trial court's implied finding that Officer Lackey's testimony regarding "temporarily" holding Mr. Harvey's vehicle

versus Mr. Harvey's testimony of his vehicle being held "indefinitely" is that the record simply does not support the trial court's implied finding. The trial court record amply demonstrates that, at least on a more probable than not basis, Officer Lackey did tell Mr. Harvey that his vehicle would be seized indefinitely. When Officer Lackey was asked on direct examination if he had made any threats to Mr. Harvey to obtain consent to search his vehicle, he responded

A. No. Well, no, other than I think I did tell him that we would seize his vehicle temporarily if I did have to go apply for a warrant.

Q. Okay. Okay.

A. And *I don't know if I used the word temporarily*. I don't remember the exact wording.

(RP 11). (Italics supplied.) Then, on cross-examination, Officer Lackey was questioned and answered as follows:

Q. Officer Lackey, to help refresh your memory, based on what you told us previously under oath in District Court, the word you used was, "indefinitely," is that right?

A. That's possible if that's what I used over there. *That's probably what it is.*

Q. And when I asked you over there in District Court what your *definition of indefinitely* was, you indicated that indefinitely would be anywhere from two hours to two days? Is that right?

A. That is correct.

(RP 11-12). (Italics supplied.)

It makes absolutely no sense whatsoever for Officer Lackey to be defining the term “indefinitely” as being two hours to two days if he had not used the word indefinitely to Mr. Harvey when describing his threat to seize Mr. Harvey’s vehicle. Further, the State could not reasonably argue, nor did it in the trial court, that a period of anywhere from two hours to two days could be considered “temporarily” seizing a vehicle. Moreover, this was not the last time that Officer Lackey did not disagree with the term “indefinitely.” For example, in further cross-examination, the following occurred:

Q. Let me see if I have this straight and correct, and if I’m wrong you’re welcome to correct me. Would it be fair to say that the posture you took that day with Mr. Harvey is, okay, I want consent to search your vehicle. If you give me consent to search your vehicle I won’t arrest you. If you don’t give me consent to search your vehicle *I’ll seize your vehicle for an indefinite period of time, whatever that is*, and then we’ll go get a warrant. And if we get a warrant then we’re going to arrest you?

A. No. That’s not correct.

Q. Tell me which part of that is incorrect?

A. Well, the wording and the posture. I don’t know what you mean by that. I mean, I wasn’t like in his face.

Q. What’s wrong with the wording that I used in my question?

A. Well, you said that we would go get a warrant. And I said I know I told him I had to go apply for one. Even though, I explained to him the options that we had, and then I wasn’t that in your face like you

explained. I explained it more in detail.

Q. Can you tell me why you even mentioned arrest?

A. Why would I mention arrest?

Q. Right.

A. I don't know why I mentioned the arrest.

(RP 19). (Italics supplied.) At no point in the foregoing colloquy did Officer Lackey make any attempt whatsoever to correct the issue of whether he had used the term "indefinitely". Instead, his disagreement was whether or not he was "in his [Harvey's] face" and whether he had said he would go get a warrant or whether he had said he would apply for a warrant. There was absolutely no disagreement whatsoever on the issue of whether he had used the term "indefinitely" with Mr. Harvey.

Again, on further cross-examination of Officer Lackey, he was asked and answered:

Q. Officer Lackey, do you recall, you do recall in District Court, however, saying that to you *indefinite* meant anywhere from *two hours to two days*?

A. *Correct.* At that time, of my experience.

(RP 23-4). (Italics supplied.) Again, why would Officer Lackey have even discussed whatsoever his understanding of the term "indefinite" had he not used that term with Mr. Harvey regarding the seizure of his vehicle?

In contrast to the uncertainty demonstrated by Officer Lackey, Mr. Harvey's testimony was very definite and straightforward. When he was asked about Officer Lackey's specific words to him about what would happen if he didn't consent to a search, he responded,

A. Yes. The, that my vehicle would be *seized for an indefinite period of time*. He also told me that the drug officers would show up on-site with a warrant in hand is what I remember.

(RP 45). (Italics supplied.)

On cross-examination, Mr. Harvey was asked whether or not he had written out notes of what happened that day and he indicated, "I wrote down a few things. I don't remember exactly what, but I remember it pretty clearly." (RP 46). Moreover, the record demonstrates that Mr. Harvey did not wait for a period of months before consulting with a lawyer. Rather, the information supplied to the trial court shows that he consulted with a local attorney, Richard Wernette, on June 25, 2008, only nine days after this encounter with Officers Lackey and Pellicer. (CP 25, 28, 29). He then consulted with William D. McCool on or about August 19, 2008, during which time he watched Mr. McCool write notes and testified in court substantially similar to what he had told Mr. McCool in August of 2008. (RP 48). In fact, Mr. Harvey specifically recalled not only a discussion

with Mr. McCool about a case called *State v. Apodaca*, 67 Wn.App. 736, 839 P.2d 352 (1992), but that he had specifically been read that case by Mr. McCool. (RP 49).

Given the foregoing specific statements from the record where Officer Lackey repeatedly admitted to the term “indefinitely” or did not dispute that the term “indefinitely” was used in his threat to Mr. Harvey regarding his vehicle being held, and further given Officer Lackey’s candid admission that he could not recall the words he used, the trial court’s implied finding of fact regarding Officer Lackey’s version being more credible than Mr. Harvey’s is simply *not* supported by substantial evidence in the record. For example, if Officer Lackey had testified in Superior Court that he did not make reference to the term “indefinitely” in District Court; that he doubted that he made such a statement in District Court; that he thought it was very unlikely that he made such a reference in District Court; or that he probably did not make such a reference in District Court, then perhaps there would have been substantial evidence in the record to support the trial court’s finding. But where Officer Lackey never at any time in Superior Court disputed that he acknowledged the term “indefinitely” in District Court and, in fact, admitted “that’s probably what

it is” (RP 11-12), where Mr. Harvey specifically recalled the terminology in the “my vehicle would be seized for an indefinite period of time” (RP 45) and made hand-written notes of his interaction with the police (RP 46), the trial court clearly erred by making implied findings of fact not supported by evidence in the record.

For the above reasons, Mr. Harvey respectfully requests this Court to find that the trial court erred in making the implied finding of fact that Officer Lackey’s version was more credible than Mr. Harvey’s, and to determine, based upon substantial evidence in the record, that Officer Lackey threatened to seize Mr. Harvey’s vehicle for “an indefinite period of time” for purposes of the voluntariness of consent issue below.

II. Officer Lackey’s Implied or Direct Threat to Arrest Mr. Harvey, Coupled With the Officers’ Threat to Seize Mr. Harvey’s Vehicle for an Indefinite Period of Time Vitiates Any Consent Given by Defendant.

An examination of the validity of a search and seizure in the State of Washington under Article 1, § 7 of the Washington State Constitution begins with the presumption that a warrantless search is per se unreasonable. *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009); *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

There are a few “‘jealously and carefully drawn’ exceptions to the

warrant requirement”, including consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches and *Terry* investigative searches. *Garvin*, 166 Wn.2d at 249 (Citing *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002) (quoting *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1045 (1984) (quoting *State v. Hauser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed. 2nd 235 (1979) (quoting *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed. 2nd 514 (1958)))))). The State of Washington bears a heavy burden to show that the search falls within one of the “narrowly drawn” exceptions. *State v. Garvin*, 166 Wn.2d at 250 (citing *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002)). The State must establish an exception to the warrant requirement “by clear and convincing evidence.” *Garvin*, 166 Wn.2d at 242 (citing *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990)).

(a) No Exception to the Warrant Requirement Existed.

In the instant case, because the search and seizure of Mr. Harvey’s backpack, baggie from his vehicle, and money from his wallet, were not accomplished pursuant to a valid search warrant, unless those searches and

seizures fall under a recognized exception to the warrant requirement, the search and seizure must be declared illegal and the trial court reversed in the instant case.

(i). No valid consent obtained.

One of the recognized exceptions to the warrant requirement is a validly-obtained consent. According to the case of *State v. Smith, supra*, the State of Washington bears the burden of proving that consent was voluntarily given. *Smith*, 115 Wn.2d at 789 (citing *State v. Shoemaker*, 85 Wn.2d 207, 210, 533 P.2d 123 (1975)). *See also, State v. Apodaca*, 67 Wn.App. 736, 739, 839 P.2d 352 (1992).

The burden of proving that the consent was voluntary must be shown by clear and convincing evidence. *State v. Smith*, 115 Wn.2d at 789; *State v. Mak*, 105 Wn.2d 692, 713, 718 P.2d 407 (1986); *State v. Cantrell*, 70 Wn.App. 340, 344-45, 853 P.2d 479 (1993); *State v. Flowers*, 57 Wn.App. 636, 645, 789 P.2d 333 (1990).

“Clear and convincing evidence” is the civil equivalent or counterpart to the term “beyond a reasonable doubt”. *State v. Rhodes*, 92 Wn.2d 755, 760, 760 P.2d 1264 (1979); *State v. McCarter*, 91 Wn.2d 249,

257, 588 P.2d 745 (1978); *In re Levias*, 83 Wn.2d 253, 256, 517 P.2d 588 (1973); *State v. P.*, 37 Wn.App. 773, 778, 686 P.2d 488 (1984); *State v. Warriner*, 30 Wn.App. 482, 486, n.1, 635 P.2d 755 (1981).

In determining whether or not consent has been given voluntarily, the appellate court must look at a number of factors including

(1) Whether *Miranda* warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right not to consent.

Smith, supra, 115 Wn.2d at 789 (quoting *Shoemaker, supra*, 85 Wn.2d at 212). The three factors quoted above are weighed against one another and no one factor is considered determinative. *Smith, supra*, 115 Wn.2d at 789; *Shoemaker, supra*, 185 Wn.2d at 212; *Nelson, supra*, 47 Wn.App. at 163.

In the instant case, the factors above preponderate in favor of Mr. Harvey. First, he was *not* given *Miranda* warnings before Officer Lackey obtained his consent. The second factor would appear to favor the State as the trial court found that Mr. Harvey “seems to be an intelligent person. He’s a high school graduate, ...”. (RP 57). The third factor also favors Mr. Harvey. That is so because although Officer Lackey did inform him of his right not to consent, that information occurred after he had already

consented. Officer Lackey's testimony at the 3.5 hearing is somewhat confusing, but when coupled with the information contained in his police report, which was attached to the State's memorandum, it becomes clear that the order of events was first, a request, second, a consent, third, an advisal of the right to refuse or restrict the consent, fourth, a production of the baggie of marijuana and the backpack and, finally, the written signed consent form. Officer Lackey's testimony at the suppression hearing was as follows:

Q. What did you do upon making contact?

A. I told him about the complaint and asked for consent to search his vehicle.

Q. Okay. How did you ask him that?

A. I've got to look at kind of my wording here. I explained to him about the complaint that we got, and told him that if he consented that I wouldn't arrest him at this time, and explained to him the other option was to go and apply for a search warrant.

Q. And how did you tell him that second option? Is that exactly what you said, or did you say it any differently?

A. You know, I don't know if it was exactly those words. It was -- but I mean the wording was apply for a search warrant, but I don't know exactly how we --

Q. Okay. Did you prepare a written report after your encounter with him?

A. I did.

Q. How long afterwards?

A. It was probably within three hours.

Q. Okay. What was Mr. Harvey's response?

A. He asked me what -- he didn't know exactly what was going on. So I explained to him again the complaint, and

then he understood and he gave me consent.

Q. How did he give you consent?

A. He said, yes. And then I took him over to the vehicle and he actually got into the vehicle and got the stuff out, and then -- hold on. I think I jumped ahead. I did tell him he had the right to refuse, restrict the search, because at the time I thought I was going to be searching the vehicle, but Mr. Harvey went ahead and got in the vehicle and took the stuff out, so --

Q. Did you have a written consent form for him that you filled out and he signed?

A. I did, but he didn't actually sign it until after he got into the vehicle and got the stuff out of the vehicle; the backpack and the baggie.

(RP 5-7).

Officer Lackey's written report, submitted by the State as a part of its memorandum, indicates as follows:

I asked Harvey if it would be okay to look in his vehicle, [sic] he asked me why I would want to. I told him that I believe that he was selling some sort of narcotics out of his vehicle. I then explained to him that if he gave me consent to search that I would not arrest him at this time. I then explained to him that my other option was to take the statement that was given to me and go apply for a search warrant.

Harvey said that he would give me consent, [sic] I explained to him that he had the right to refuse, restrict, and withdraw the consent at any time.

(CP 23). Since from the context of the police report, Mr. Harvey had already consented before he was given the *Ferrier*¹-type warnings, it was

¹ *State v. Ferrier*, 136 Wn.2d 103, 930 P.2d 927 (1998)

already akin to “letting the cat out of the bag.” Most certainly, the written consent form was not signed until after Mr. Harvey had produced the marijuana and the backpack for Officer Lackey (RP 6-7); therefore, having already produced the marijuana, the cat was clearly already out of the bag and the subsequent written consent form was a mere formality.

The concept of the “cat out of the bag” was discussed by our Supreme Court in *State v. Erho*, 77 Wn.2d 553, 463 P.2d 779 (1970), when the court indicated,

We are satisfied, upon the record as it stands, that the written statement is but the direct and derivative product of the oral admissions. It perforce suffers from the same infirmities the trial court found infected the oral statements. In short, by his oral admissions the appellant had “let the cat out of the bag by confessing” and was not “thereafter free of the psychological and practical disadvantages of having confessed.” He could not get the cat back in the bag, for the secret was out. *United States v. Bayer*, 331 U.S. 532, 91 L.Ed. 2^d 1654, 67 S.Ct. 1394 (1947); *West over v. United States*, 384 U.S. 436, 494, 16 L.Ed. 2^d 694, 86 S.Ct. 1602 (1966); *Harrison v. United States*, 392 U.S. 219, 20 L.Ed. 2d 1047, 88 S.Ct. 2008 (1968).

Id. at 561.

Because Mr. Harvey had already consented to a search before being given either verbal or written warnings, the psychological impact of that consent was such that it rendered the subsequent warnings meaningless. As

Judge Ringold indicated in his dissenting opinion in *State v. Lavaris*, 32 Wn.App. 769, 649 P.2d 849 (1982),

As a practical matter, *Miranda* warnings are of little use to a person who has already confessed. A person in this position is likely to think “[w]hat use is a lawyer? What good is a lawyer now? What benefit can a lawyer tell me? I’ve already told the police everything?” *People v. Raddatz*, 91 Ill.App. 2d 425, 430, 235 N.E. 2^d 353, 356 (1968).

Lavaris, 32 Wn.App. at 779-80. Once Mr. Harvey had already consented to the search of his vehicle and had already turned over the bag of marijuana and backpack, it made no difference that he received verbal warnings after his consent and written warnings after he had already produced the baggie and his backpack.

(ii) Implied and Direct Threats Vitiates Consent

During the court’s verbal rulings, it indicated that it did not view statements made by Officer Lackey to Mr. Harvey as coercive, “given the totality of the circumstances here.” (RP 60). The trial court was correct in applying a totality of the circumstances approach. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). However, when looking at the totality of the circumstances, the trial court not only looks at the three factors set forth in *Smith, supra*, and *Shoemaker, supra*, it also “may weigh any express or implied claims of police authority to search, previous illegal

actions of the police, the defendant's cooperation, and police deception as to identity or purpose." *Reichenbach* at 132. As this Division indicated in *State v. Jensen*, 44 Wn.App. 485, 488, 723 P.2d 443 (1986),

The general test for consent is "whether a consent to a search was in fact 'voluntary' or was the *product of duress or coercion, express or implied*, is a *question of fact to be determined from the totality of all the circumstances*". (Italics ours.) *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L.Ed. 2nd 854, 93 S.Ct. 2041 (1973); ...

(Some italics supplied.)

In determining whether or not Mr. Jensen's consent to a State Trooper to search his automobile, Division III was influenced by the fact that Jensen was not threatened overtly or implicitly or otherwise induced into consenting to the search, that he had cooperated with the trooper during and after the arrest, that he orally consented to the search twice before actually signing the consent form, and was read directly from the consent form that he need not consent to the search of his car. *Jensen*, 44 Wn.App. at 488-089.

By contrast, the facts of the case before this Court clearly demonstrate that there were express and implied threats directed to Mr. Harvey before he consented to the search of his vehicle and produced the marijuana and backpack.

Before Officer Lackey obtained consent to search and physical possession of the baggie of marijuana and backpack from Mr. Harvey, he either directly or impliedly threatened him with arrest. Specifically, according to Officer Pellicer's testimony,

[H]e asked him for consent to search the vehicle. And he said that *if you do have any marijuana or what not on you, you won't be arrested today.* So that was it.

Q. Okay. And what was Mr. Harvey's response?

A. He gave consent.

(RP 32). (Italics supplied.) Officer Lackey's testimony on the issue was more candid and enlightening. He indicated that he "told him that *if he consented, that I wouldn't arrest him at this time, ...*" (RP 6). (Italics supplied.) Any objectively reasonable defendant under those circumstances would rationally conclude that he was being told by the officer the equivalent of "Consent, and I won't arrest you. Don't consent, and I will arrest you." What caused that particular statement to be at least an implied, if not direct, threat was that at that point Officer Lackey would have had absolutely no reasonable basis for the arrest of Mr. Harvey. As he had to repeatedly admit during his testimony at the 3.6 hearing, he did not believe he had probable cause even to search Mr. Harvey's vehicle, let alone make an arrest. (RP 13-14). Hence, the reference to arrest can only

be fairly characterized as an attempt to intimidate or coerce Mr. Harvey into giving consent.

Mr. Harvey respectfully submits that this threat alone was enough to produce involuntary consent. However, this was not the only threat made by Officer Lackey. As he candidly admitted during direct examination at the 3.6 hearing, he threatened to seize Mr. Harvey's vehicle. As was discussed in section 1, *supra*, by at least a preponderance of the evidence, the duration of that threatened seizure was "indefinitely," which was further defined by Officer Lackey as anywhere from two hours to two days. (RP 11-12, 24). At that point, Officer Lackey's threat to seize Mr. Harvey's vehicle for an indefinite period of time would have occurred at a time period in which he was of the opinion that he *did not* have probable cause. (RP 13-14, 26). He further acknowledged that if he didn't have any further information than what he had already been told, he didn't have probable cause to obtain a warrant. (RP 26). Officer Lackey's admissions are critical because case law in this State appears to limit the ability of law enforcement agencies to seize items and hold them in order to obtain probable cause. Mr. Harvey has found absolutely no appellate authority in the State of Washington to support the proposition that an item can be

seized “indefinitely” while probable cause is procured. There are a handful of cases that suggest that there are some items of personal property which can be seized for a reasonable period of time to enable officers to obtain probable cause. Appellant has been able to find only one case which suggest that automobiles can be included in those items which can be held in order to enable law enforcement to obtain probable cause. Examples of cases where items have been permitted to be seized for a reasonable period of time include *State v. Jackson*, 82 Wn.App. 594, 918 P.2d 945 (1996) (brief seizure of package permissible, package detained for “only a few minutes before acquiring probable cause to search”); *State v. Gross*, 67 Wn.App. 549, 789 P.2d 317, review denied, 115 Wn.2d 1014 (1990) (seizure of package reasonable where K-9 was summoned “in a matter of hours” and K-9 sniff established probable cause); and *State v. Stanphil*, 53 Wn.App. 623, 769 P.2d 861 (1989) (seizure of package at the Walla Walla post office by mail authorities, postal inspector notifies authorities sometime Thursday, July 2, 1987, precise time not indicated in record, with a dog sniff at 3:00 p.m. Division III declares delay not unreasonable).

The only automobile case which Mr. Harvey has been able to find was *State v. Flores-Moreno*, 72 Wn.App. 733, 866 P.2d 648 (1994),

wherein police detained Flores-Moreno's automobile for about forty-five minutes after they acquired probable cause to search and about fifty minutes total. These figures suggest that the car was held for about *five minutes* before the police obtained probable cause. According to Division II, "The police did not detain the car for more than a reasonable time. Both periods were reasonable under the circumstances." 72 Wn.App. at 741. Holding a car for about five minutes before obtaining probable cause with a total of less than one hour including obtaining the warrant is a far cry from holding a car "indefinitely" which Officer Lackey testified was anywhere from two hours to two days. Mr. Harvey has found absolutely no appellate authority whatsoever in the State of Washington standing for the proposition that law enforcement officials are justified in seizing an automobile for an indefinite period of time while they go about obtaining probable cause. He respectfully submits that this is because no appellate court in this State has, or will, take the position that an indefinite seizure of a motor vehicle, as opposed to a package, is acceptable under either the Fourth Amendment to the United States Constitution or Article 1, § 7 of the Washington State Constitution.

Quite probably the reason no appellate court in this State has

approved a lengthy detention of an automobile without probable cause is that automobiles, while not enjoying the same expectation of privacy as a residence, nevertheless enjoy a heightened expectation of privacy. As our Supreme Court pointed out in *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003),

Article 1, § 7 provides greater protection of a person's right to privacy than the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996). The state provision recognizes a person's right to privacy with no express limitations. *Ferrier*, 136 Wn.2d at 111, 960 P.2d 927; *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). The right to be free from unreasonable governmental intrusion into one's private affairs *encompasses automobiles and their contents*. *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999); *Hendrickson*, 129 Wn.2d at 69 n.1, 917 P.2d 563; *City of Seattle v. Mesiana*, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988).

(Italics supplied.) Given that expressed right to privacy with regard to automobiles, Mr. Harvey respectfully submits that under Article 1, § 7 of the Washington State Constitution, there simply cannot be an acceptable practice of seizing and holding automobiles on less than probable cause for “an indefinite period of time.” Under the unique facts of this case, there can be no good-faith argument advanced by the State that it was likely Officers Lackey and Pellicer would have developed probable cause within a

reasonable period of time. That is so because, as the officers admitted, they did not know the last names of the individuals to whom Mr. Harvey had allegedly bragged about dealing marijuana; they did not know their addresses or telephone numbers; they did not know anything about the reliability of those two individuals; and they did not know whether they would be able to obtain specific information about the names, addresses and telephone numbers of them without subpoena or further court order. (RP 15, 27, 38-40). Moreover, when Officer Lackey recontacted the store manager, Ms. Davidson, he did not learn anything significantly different than what he had learned in his earlier contact with her. (RP 26). Without any additional information from Ms. Davidson, it would have been extremely difficult for the officers to have established any contact with the two individuals, Chris or Nicky. Officer Pellicer admitted that without Ms. Davidson providing information, they had no way of establishing contact with either of them. (RP 40).

Given that scenario, Officer Lackey's threat to seize Mr. Harvey's vehicle for an indefinite period of time could very well have resulted in its being held for far more than a "reasonable period of time." Thus, this threat did constitute or create a coercive environment in which Mr.

Harvey's will to deny consent was overborne.

One other factor for this Court's consideration is that the repeated requests by the officers could also affect the voluntariness of Mr. Harvey's consent. As our State Supreme Court declared in *O'Neill, supra*,

A number of courts have found that repeatedly requesting consent is a factor to consider in assessing the voluntariness of consent. E.g. *United State v. Raibley*, 243 F.3d 1069, 1075-76 (7th Cir. 2001); *United States v. Pulvano*, 629 F.2d 1151, 1157 (5th Cir. 1980) (fact that consent is initially refused is a factor to consider); *Dotson v. Warden, Conn. Corr. Inst.*, 175 Conn. 614, 621-22, 402 A.2d 790 (1978) (Same); *People v. Cardenas*, 237 Ill. App. 3d 584, 588, 604 N.E. 2d 953, 178 Ill. Dec. 430 (1992) (initial refusal is an important factor in considering whether consent is voluntary); *State v. Garcia*, 250 Kan. 310, 311-12, 827 P. 2d 727 (1992) (repeated requests for consent indicate consent was not voluntary); *State v. Jackson*, 110 Ohio App. 3d 137, 143, 673 N. El 2d 685 (1996) (once an initial request for consent is clearly and definitively denied, an encounter takes on a coercive tone where repeated requests are made and colloquy ensues on the issue of police power to search a vehicle). We agree with these courts that repeated requests for consent that the consent was not voluntary.

Under the totality of the circumstances, the superior court's ruling that under the Fourth Amendment there was no valid consent to search must be upheld.

O'Neill, 148 Wn.2d at 591.

In this case, Officer Pellicer requested permission to search Mr. Harvey's vehicle, and instead of consenting, Mr. Harvey asked "why?" (RP 30). Then, Officer Pellicer said "Well, if you don't have anything to

hide really then there is no reason to refuse consent.” (RP 31). Mr. Harvey made no response to that statement, nor did he give consent at that point. (RP 31). Then, Officer Lackey approached Mr. Harvey and asked him for consent to search his vehicle and, instead of consenting, Mr. Harvey “asked me why I would want to.” (CP 23). Officer Lackey then told him of his belief that he was selling some sort of narcotics out of his vehicle and explained to him that “if he gave me consent to search that I would not arrest him at this time.” (CP 23). Officer Lackey then added to the threat of arrest by telling him that “we would seize his vehicle temporarily if I did have to go apply for a warrant.” (RP 11). Upon cross-examination, Officer Lackey admitted that he probably used the word “indefinitely” rather than “temporarily”.)RP 11-12).

Given Mr. Harvey’s initial reluctance and lack of consent to allow the search of his vehicle, these repeated requests coupled with the threat to arrest and the threat to seize his vehicle indefinitely worked to create a situation where Mr. Harvey involuntarily gave consent and handed over the baggie of marijuana, his back pack, and five hundred dollars.

For the above reasons, Mr. Harvey respectfully requests this Court to declare that his “consent” was no more than acquiescence and the

product of coercion, and to order suppression of the evidence turned over by Mr. Harvey to Officer Lackey as well as the cash turned over to Officer Pellicer, and to order dismissal of the charges herein.

III. Mr. Harvey's Statements to the Officers Should be Suppressed as the Fruits of the Poisonous Tree.

The exclusionary rule requires courts to suppress evidence obtained by a violation of a defendant's constitutional rights. *State v. White*, 97 Wn.2d 92, 111-12, 640 P.2d 1061 (1982). The purpose of the rule is to deter police from exploiting illegal conduct and to also protect individual rights. *State v. Avila-Avina*, 99 Wn.App. 9, 18, 991 P.2d 720 (2000).

According to our United States Supreme Court, the doctrine of the fruit of the poisonous tree requires exclusion of evidence derived directly and indirectly from illegal police conduct. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S.Ct. 407, 9 L.Ed. 2nd 441 (1963). Only if the State can show by a preponderance of the evidence that the evidence was not obtained by exploitation of the initial illegality or by means sufficiently distinguishable to be purged of the primary taint will such evidence not be excluded. *Wong Sun* at 488. In order to prove that the evidence was purged of taint, the State has to demonstrate that (1) intervening circumstances have attenuated the link between the illegality and the evidence, *State v.*

Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995), or that the evidence was discovered through a source independent of the illegality. *State v. Richman*, 85 Wn.App. 568, 575-76, 933 P.2d 1088 (1997). Until recently, a third way of showing that the taint was purged was to demonstrate that the evidence would have been discovered inevitably through legitimate means. However, the “inevitable discovery” doctrine has been specifically disapproved in *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009).

Where Mr. Harvey’s confession was tainted as the “fruit of a poisonous tree” it must be suppressed. *State v. Sweeny*, 56 Wn.App. 42, 50, 782 P.2d 562 (1989). As this Court explained in *State v. Gonzales*, 46 Wn.App. 388, 401, 731 P.2d 1101 (1986),

When confronted with the fruits of an illegal seizure, it is readily apparent that a suspect confessed due to “exploitation of that illegality”, whether or not the confession is “voluntary” for Fifth Amendment purposes. *Wong Sun; [State v.] Byers*, [88 Wn.2d 1, 559 P.2d 1334 (1977), overruled in part in *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984)] at 9; 3W. LAFAVE § 11.4, at 639. The realization that “the cat is out of the bag” certainly played an important role in Mr. Gonzales’ decision to confess.

(Bracketed material supplied.) In the instant case, where Mr. Harvey’s “confession” or statement was made to Officers Lackey and Pellicer within

a matter of a few minutes after he had handed over the baggie of marijuana and no *Miranda* warnings were given to him, the State cannot possibly argue in good faith that there had been intervening circumstances which have attenuated the link between the illegality and the confession. Neither could they, in good faith, argue that the confession was obtained through a source independent of the illegality. But for the actions of Officer Lackey in making the threats of arrest and illegal seizure of Mr. Harvey's vehicle for "an indefinite period of time" he would not have turned over the baggie of marijuana and the backpack, and most certainly would not have turned over the five hundred dollars in cash to Officer Pellicer and made the statements to Officers Lackey and Pellicer about "turning it over because they were going to get it anyway so they might as well take it now." (RP 10, 34).

The trial court had no problem with the concept that the statement made by Mr. Harvey to the officers was the product of the earlier consent and handing over the marijuana and backpack. During the court's oral ruling, defense counsel inquired, "Your honor, I would ask the Court to make a finding as to whether or not that statement, however, was the product of the earlier turning over of the drugs?" (RP 58). The State

objected, indicating that since the court had already ruled that the consent was valid, there was no point in having the court make a finding on that issue. (RP 58). The court responded

Yeah, I understand. Maybe it relates to the burden of proof. But I don't have any problem with the findings if you want to include that in the written findings. But counsel's point is well taken, that I find that the previous evidence that had already been obtained was done in a legal manner and therefore, whether or not the statement was a product of that is somewhat of a moot issue. But it does relate to it, obviously. It was a sequence of events that resulted in that statement.

Because Mr. Harvey's statement was the product of the prior involuntary consent and turning over of the baggie, backpack and money, he respectfully requests this Court to order suppression of the statement as a "fruit of the poisonous tree."

D. CONCLUSION

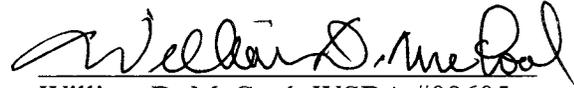
For the reasons stated above, Mr. Harvey respectfully requests this Court to rule that there was not substantial evidence in the record to support the trial court's implied finding that Officer Lackey's testimony with regard to his threat to seize and hold Mr. Harvey's vehicle "temporarily" was more credible than Mr. Harvey's testimony that his vehicle would be seized for "an indefinite period of time."

Additionally, Mr. Harvey requests this Court to find that his “consent” was an involuntary consent as the product of both express and implied threats that if he did not consent, he would be arrested and his vehicle seized and held for “an indefinite period of time”. Thus, Mr. Harvey is asking this Court to suppress all evidence turned over by Mr. Harvey to Officers Lackey and Pellicer including the baggie of marijuana, the backpack, and the five hundred dollars in cash.

Further, Mr. Harvey requests this Court to declare that his “confession” made to Officers Lackey and Pellicer following the turning over of the five hundred dollars to Officer Pellicer was the product of the illegally obtained consent and thus constitutes the fruit of the poisonous tree, requiring suppression of that evidence.

Finally, without the illegally-obtained baggie of marijuana, the backpack, and the five hundred dollars turned over to Officer Pellicer, and without the benefit of the statement made to Officers Lackey and Pellicer, the State has no evidence upon which to proceed; therefore, Mr. Harvey respectfully requests this Court to enter an Order dismissing the charge against him herein.

Respectfully submitted at Walla Walla, Washington, this 4th day
of June, 2010.

A handwritten signature in cursive script that reads "William D. McCool". The signature is written in black ink and is positioned above a horizontal line.

William D. McCool, WSBA #09605
Counsel for Appellant