

FILED
DECEMBER 21, 2015
Court of Appeals
Division III
State of Washington

NO. 33698-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

TIMOTHY HARLAN LEONARD,

Defendant/Appellant.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. Defense counsel failed to provide the trial court with argument and case law concerning the private search doctrine;
2. Defense counsel failed to provide the trial court with argument and case law concerning searches involving small containers;
3. The trial court's Conclusions of Law 2 and 3 dealing with the CrR 8.3(b) motion are erroneous (CP 96; Appendix "A");
4. The stipulated facts concerning security officer Jack Hastings are inconsistent (CP 104; CP 106; CP 110; Appendices "B", "C" and "D")
5. Timothy Leonard was deprived of making an informed decision about entering into the Early Case Resolution Unit (ECR Unit).

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Would the evidence have been suppressed if defense counsel had advised the trial court that the private search doctrine is not recognized in the State of Washington?
2. Would the trial court have suppressed the evidence if defense counsel had called the trial court's attention to *State v. Russell*, 180 Wn.2d 860, 330 P.3d 151 (2014)?

3. Was defense counsel ineffective in not addressing the foregoing two (2) issues?

4. Should the inconsistencies in the stipulated facts concerning the search be construed in Mr. Leonard's favor and the rule of lenity applied?

5. Does the limited time frame relating to the acceptance of the entry into the ECR Unit deprive a defendant of effective assistance of counsel by denying counsel the opportunity to investigate and help a defendant to make an informed decision?

STATEMENT OF THE CASE

Mr. Leonard was charged with possession of a controlled substance (heroin) by an Information filed on August 29, 2014. (CP 6)

A CrR 3.6 motion was filed on April 9, 2015. (CP 36) The same date a CrR 8.3(b) motion was filed. (CP 18)

The motions were heard on April 30, 2015. Both motions were denied. Findings of fact and conclusions of law were entered on June 8, 2015. (Gipson RP 1, *et seq.*; CP 93; CP 95)

Mr. Leonard waived jury trial on July 9, 2015. The trial court conducted an appropriate colloquy with Mr. Leonard concerning the waiver.

A stipulated facts trial was held that date. (Stovall RP 5, l. 6 to RP 6, l. 20; RP 7, l. 19 to RP 8, l. 2; CP 100; CP 102)

The trial court entered its bench trial findings of fact and conclusions of law on July 15, 2015. (CP 113)

Judgment and sentence was entered on July 23, 2015. (CP 118)

Mr. Leonard filed his Notice of Appeal on July 29, 2015. (CP 130)

SUMMARY OF ARGUMENT

Defense counsel's failure to cite the appropriate authorities to the trial court in support of the CrR 3.6 motion deprived Mr. Leonard of the effective assistance of counsel under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

The State's arbitrary time frame for entry into the ECR Unit deprived Mr. Leonard of his right to due process under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3 by denying him effective assistance of counsel.

ARGUMENT

A. CrR 3.6 MOTION

Defense counsel argued an agency relationship between Jack Hastings, a Rosauers security officer, and the Spokane Police Department. (Gipson RP 9, ll. 13-20; RP 12, ll. 20-21; RP 13, ll. 2-5)

Mr. Hastings detained Mr. Leonard in connection with a shoplifting incident. He intended to trespass him from Rosauers. However, prior to releasing him, he called Crime Check. He learned that Mr. Leonard had an outstanding warrant. (CP 93; CrR 3.6 Findings of Fact 1, 2 and 3; Appendix "E")

Mr. Leonard was handcuffed after being detained by Mr. Hastings. He was further detained until law enforcement arrived in connection with the outstanding warrant. (Gipson RP 13, l. 20 to RP 14, l. 4; RP 16, ll. 7-9)

Mr. Leonard asked to use a restroom while waiting for law enforcement to arrive at Rosauers. Mr. Hastings searched him. He discovered a small container. It had two (2) small plastic bags and a piece of aluminum foil in it. Mr. Leonard admitted that the bags contained heroin. When law enforcement arrived they again searched Mr. Leonard and his belongings, including the small container. (CP 94; CP 105; CP 114; CrR

3.6 Findings of Fact 5 and 6; Stipulated Facts Exhibits 1, 2 and 4; Bench Trial Findings of Fact 6, 7, 8, 9 and 10; Appendices “F, “G”, and “H”)

Mr. Leonard contends that Mr. Hastings did not have authority to conduct a search of his person while he was being detained.

While no statute grants store personnel the authority to arrest shoplifters, criminal and civil statutes provide a defense for store owners who reasonably detain a person to investigate shoplifting where they have probable cause. RCW 9A.16.080; RCW 4.24.220. In addition, RCW 9A.04.060 provides that **the common law is applicable where not repugnant to the state’s constitution or statutes**. The affirmative right to detain shoplifters derives from the common law right of citizen arrest. *State v. Gonzales*, 24 Wn. App. 437, 604 P.2d 168 (1979), *review denied*, 93 Wn.2d 1028 (1980).

State v. Miller, 103 Wn.2d 792, 794-95, 698 P.2d 554 (1985). (Emphasis supplied.)

Mr. Leonard concedes that Mr. Hastings had the right to temporarily detain him in connection with the observed shoplifting. However, when Mr. Hastings only trespassed him, the continuing detention exceeded common law and statutory authority.

Mr. Hastings is not a commissioned police officer. Even as a security officer, he is merely a private citizen.

Mr. Hastings was concerned with his safety. However, his pat-down search of Mr. Leonard exceeded that necessary for determining whether or not Mr. Leonard possessed a weapon.

In *State v. Loewen*, 97 Wn.2d 562, 647 P.2d 489 (1982) the Court ruled at 566:

The instant search, unlike a search without a warrant incident to a lawful arrest, was not justified by any need to prevent the disappearance or destruction of evidence of crime. ... The sole justification of the patdown in the incident case was protection of the police officers from a possible concealed weapon. The ultimate intrusion in such a case must be confined in scope to the exigencies which justify its initiation, however. In short, **the ultimate search or intrusion must be one that is “reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.”** [Citations omitted.]

(Emphasis supplied.)

Mr. Hastings felt a small round object in Mr. Leonard's back pocket. It was a Jack Links jerky container (similar to a chewing tobacco container). (CP 104; Exhibit 1)

Defense counsel, in arguing an agency relationship between Mr. Hastings and the Spokane Police Department, overlooked two (2) cases which should have been called to the trial court's attention. If the trial

court had those two (2) cases in front of it the evidence seized by Mr. Hastings would have been suppressed.

In *State v. Russell, supra*, the Court dealt with the search of small containers where the facts indicated that the container could not contain a weapon. The Court stated at 869-70:

The scope of a valid *Terry* [*Terry v. Ohio*, 92 U.S. 1, 88 S. Ct. 1968, 20 L.Ed.2d 889 (1968)] frisk is limited to protective purposes. [Citation omitted]. The frisk must be brisk and nonintrusive. [Citation omitted.] “If the officer feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may only take such action as is necessary to examine such object.” *State v. Hudson*, 124 Wn.2d 107, 113, 874 P.2d 160 (1994). “[O]nce it is ascertained that no weapon is involved, the government’s limited authority to invade the individual’s right to be free of police intrusion is spent.” *State v. Allen*, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980).

The search of the container in this case violated Russell’s constitutional right to be free from police intrusion. The officer felt a small container, removed it, and then opened it without a warrant. He admitted that the contents of the container weighed only a fraction of what the pistol weighed. Therefore, we conclude that no reasonable person could believe that the container housed a gun. At the point at which he discovered that the container did not house a weapon, his authority to invade Russell’s privacy and search the container any further ended.

Once Mr. Hastings removed the jerky container from Mr. Leonard's pocket he knew it was not a weapon. Any further search of that container by Mr. Hastings exceeded any authority he may have had to even conduct the search.

Moreover, once law enforcement arrived, their search of the container was also impermissible due to the inapplicability of the attenuation doctrine.

The attenuation doctrine requires that the State establish

... that the evidence was purged of taint, [and] the State must show either that: (1) intervening circumstances have attenuated the length between the illegality and the evidence; (2) the evidence was discovered through a source independent from the illegality; or (3) the evidence would inevitably have been discovered through legitimate means.

State v. Tan Le, 103 Wn. App. 354, 361, 12 P.3d 653 (2000).

There were no intervening circumstances between Mr. Hastings' illegal search of Mr. Leonard and arrival of law enforcement. The evidence was only discovered through Mr. Hastings' illegal search. There is no evidence that the items inside the Jack Links container would have been inevitably discovered through legitimate means.

As the *Russell* Court noted at 870:

... [W]arrantless searches of small containers found during protective frisks are generally unconstitutional. The container itself was not a weapon, and the officer had no authority to search through it after realizing that it posed no threat.

(Emphasis supplied.)

Mr. Leonard asserts that the *Russell* case is equally applicable to a private citizen who conducts an illegal search. In his case the search is illegal because Mr. Hastings had no authority to conduct it.

[An] individual's privacy interests protected by article I, section 7 survives the exposure that occurs when it is intruded upon by a private actor. Unlike the reasonable expectation of privacy protected by the Fourth Amendment, the individual's privacy interest is not extinguished simply because a private actor has actually intruded upon, or is likely to intrude upon, the interest. The private search does not work to destroy the article I, section 7 interest, unlike the Fourth Amendment's because the Fourth Amendment's rationale does not apply to our state's constitutional protections.

We therefore reject the private search doctrine and adopt a bright line rule holding it inapplicable under article I, section 7 of the Washington Constitution.

State v. Eisfeldt, 163 Wn.2d 628, 638, 185 P.3d 580 (2008). (Emphasis supplied.)

The combination of the unconstitutionality of the private search doctrine and the search of a container that could not contain a weapon, not being brought to the trial court's attention, constitutes ineffective 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 the consideration of all of 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. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The prejudice prong is easily met. If the case law had been provided to the trial court the evidence would have been suppressed.

It appears that defense counsel had an inkling as to how to proceed; but did not locate the appropriate cases to present to the Court. Instead, defense counsel relied upon a citizen/police agency argument which held no merit since Mr. Hastings was not acting as an agent of the police.

The only evidence produced against Mr. Leonard was evidence that was illegally seized. It constitutes the "fruit of the poisonous tree." It should be suppressed under the authorities cited in this brief and *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963).

B. ECR

Defense counsel challenged the termination of Mr. Leonard's ECR offer from the State. Defense counsel raised the issue of due process and effective assistance of counsel.

The trial court's conclusions of law determined that no governmental misconduct occurred to allow a dismissal under CrR 8.3(b).

A criminal defendant has a right to effective assistance of counsel at every critical stage of a criminal proceeding. U.S. CONST. AMEND. VI; WASH CONST. ART. I, § 22; *United States v. Cronin*, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed.2d 657 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S. Ct. 1441, 25 L. Ed.2d 763 (1970)); *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). ... "Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010) (citing *State v. S.M.*, 100 Wn. App. 401, 413, 996 P.2d 1111 (2000)). "[A] defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *A.N.J.*, 168 Wn.2d at 109.

State v. Shelmidine, 166 Wn. App. 107, 111-12, 269 P.3d 362 (2012).

(Emphasis supplied.)

An ECR offer requires defense counsel to evaluate all evidence in the case before addressing options with a defendant. If defense counsel

ignores his duty to investigate, his client may well be adversely impacted by making an uninformed decision.

Fairness in the criminal justice system is all encompassing. Prosecutors must exercise fairness in their decision-making. They have discretionary authority with regard to what charges will be filed, or, whether to offer some type of diversion program, or, not file charges at all.

There are constitutional requirements for a fair and impartial jury. *See: Const. art. I, § 22.*

A defendant is entitled to fairness from his/her defense counsel. Fairness, in this context, requires informed decision-making and knowledge of the law. The purpose behind legal representation in criminal proceedings is based upon the premise that the attorney normally has the lengthy legal experience and knowledge to properly advise a client as to his/her options.

The State's limited time frame for entry into the ECR Unit imposes an unfair restraint on both defense counsel and the defendant. Defense counsel cannot act until all discovery is completed. Once discovery is completed defense counsel is able to advise his/her client on the available options.

If defense counsel believes that there are suppression issues, proof issues, or other issues, then there are options of a CrR 3.5 motion, CrR 3.6 motion, *Knapstad*¹ motion or other CrR 8.3 motions.

The deprivation of fully informed and prepared counsel by imposing a strict limited time frame for acceptance into the ECR Unit is a denial of effective assistance of counsel. The trial court's conclusions of law in this regard are erroneous.

CONCLUSION

Defense counsel was ineffective in not drawing the trial court's attention to *State v. Russell, supra*; and/or *State v. Eisfeldt, supra*.

The private search doctrine is unconstitutional under Const. art. I, § 7. Mr. Hastings' search of Mr. Leonard is therefore unconstitutional.

Mr. Hastings' opening of the Jack Links container was also unconstitutional. He had no basis to believe that it contained a weapon.

The inconsistencies in the exhibits provided for the stipulated facts trial concerning Mr. Hastings' actions require viewing them in Mr. Leonard's favor since the State carries the burden of proof beyond a reasonable doubt.

¹ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986)

Law enforcement's subsequent search of the container after arresting Mr. Leonard on his outstanding warrant was not attenuated from Mr. Hastings' actions. Under the fruit of the poisonous doctrine the evidence must be suppressed.

The limited time frame for accepting diversion into the ECR Unit is a denial of due process. It restricts a defendant's entitlement to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

Mr. Leonard's conviction must be reversed and dismissed.

DATED this 21st day of December, 2015.

Respectfully submitted,

s/ Dennis W. Morgan

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APPENDIX “A”

1 5. While in the ECR Unit, the case was continued four times. On its own terms, the
2 offer extended by the ECR Unit expired on October 28, 2014.

3 6. On November 12, 2014, a request was made by an investigator of the Public
4 Defender's Office to interview a witness.

5 7. No longer meeting the criteria for early resolution, the case was transferred out of
6 the ECR Unit to traditional prosecution.

7 8. On December 2, 2014, the assigned prosecutor asked defense counsel if the
8 defendant had rejected the offer of entering into the Friendship Diversion Program.

9 9. On December 4, 2014, the assigned prosecutor advised defense counsel that
10 any offer not previously accepted was withdrawn.

11 From the foregoing Findings of Fact the Court now makes the following:

12 CONCLUSIONS OF LAW

13 1. The defendant did not detrimentally rely on any offer to his prejudice.

14 2. Neither the offer made, nor the withdrawal of the offer made, constituted
15 governmental misconduct that materially prejudiced the defendant's right to a fair trial.

16 3. The extension of the offer did not create a constitutionally protected or
17 irrevocable entitlement that the defendant could accept at any time.

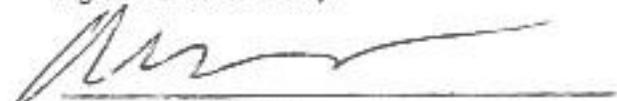
18
19 June 8, 2015

20 
JUDGE

21 Presented by:

22 
23 MICHAEL A. NELSON
24 Deputy Prosecuting Attorney
25 WSBA#13789

Agreed as to form only:


NATHAN POSTON
Attorney for Defendant
WSBA#41901

Page 2

SPOKANE COUNTY PROSECUTING ATTORNEY
COUNTY CITY PUBLIC SAFETY BUILDING
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APPENDIX “B”

FILED

JUL 09 2015

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

14-1-03026-7

**STATEMENT OF INVESTIGATING OFFICER
AFFIDAVIT OF FACTS**

STATE OF WASHINGTON
COUNTY OF SPOKANE

REPORT NUMBER: 14-286266

DEFENDANT: Leonard, Timothy H 10-28-1987

The undersigned, a law enforcement officer, competent to testify, states as follows: That he/she believes a crime was committed by the above named defendant/defendants in the City and County of Spokane, State of Washington, because:

Jack Hastings can testify to:

- Working for Rosauers at 1808 W. 3rd Ave as loss prevention.
- Detaining the Def. for shoplifting and contacting the police department regarding having the Def. detained.
- Being told by police dispatch that the Def. had an active/valid warrant and continuing to detain the Def.
- While waiting for police to arrive, the Def. acting nervous and saying he needed to use the bathroom.
- Agreeing to allow the Def. to use the bathroom, but the Def. had to agree to be searched first.
- Searching the Def. and finding a round Jack Links jerky container (similar to a chewing tobacco container) in his back left pant pocket.
- Asking the Def. what was inside the container and the Def. admitting to it being Heroin.

Exhibit 1

APPENDIX “C”

INCIDENT REPORT

Spokane Police/Spokane County Sheriff

74-1-03026-7

Page 1

AGENCY NAME/SUBSTATION SPD		EVIDENCE NUMBER		INCIDENT NUMBER 14-286266	
INCIDENT TYPE Arrest		INCIDENT CLASSIFICATION #1 DRUGS-POSSESS		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #2		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #3		ATTEMPTED <input type="checkbox"/>	
		INCIDENT CLASSIFICATION #4		ATTEMPTED <input type="checkbox"/>	
RESPONDING TO (Officer Assign)				ASSIGNMENT (Officer Assign)	
REPORTED ON Tue 08/26/2014 15:54	DATE/TIME	OCCURRED ON Tue 08/26/2014 15:54	DATE/TIME	OCCURRED TO Tue 08/26/2014 15:54	DISTRICT
DISPATCH TIME	ARRIVED TIME	CLEARED TIME	REPORT DATE 08/26/2014	REPORT TIME 19:03	EST. TOTAL PROPERTY LOSS
PRIMARY CHARGE 69.50.4013(1) CNTL SUB(POSS-FEL)					LICENSING CODE /35A
LOCATION OF INCIDENT 1808 W 3rd Avenue, Spokane, WA 99201				LOCATION NAME (IF APPLICABLE)	
SOLVABILITY FACTORS Suspect Arrested					
RELATED INCIDENT NUMBERS					INCIDENT XREF
ADDITIONAL REPORTING OFFICERS none					
[REDACTED]					
CODE A-1	NAME, LAST, FIRST, MIDDLE Leonard, Timothy H			SEX M	RACE/ETHNICITY W-White/Non-Hispanic
				DATE OF BIRTH/AGE 10/28/1987 26	
HEIGHT 5'10"	WEIGHT 150	BUILD Light	HAIR Brown	EYES BLU - Blue	DESCRIPTORS
COMPONENT ACTIVITY <input type="checkbox"/>	ADDRESS: STREET, CITY STATE ZIP transient			RESIDENTIAL STATUS	PHONE
PLACE OF EMPLOYMENT/SCHOOL/UNEMP			OCCUPATION	EMPLOYER PHONE	
ADDITIONAL PHONES NONE					
CHARGE LEVEL Felony Class C		DESCRIPTION 69.50.4013(1) CNTL SUB(POSS-FEL)			LICENSING CODE /35A
WARRANT #	SALE	TYPE OF ARREST Taken Into Custody			MULTIPLE ARRESTEE RECORDS INDICATOR <input type="checkbox"/>
CITATION #	DATE	TIME	BOOKED WHERE Spokane County Jail		DATE 08/26/2014
					TIME 15:54
ARREST LOCATION 1808 W 3rd Avenue, Spokane, WA 99201				STATEMENT <input checked="" type="checkbox"/> ORAL <input type="checkbox"/> WRITTEN	CHARGES <input checked="" type="checkbox"/> ADMITTED <input type="checkbox"/> DENIED
SUSPECT ARMED WITH		DISPOSITION OF JUVENILE			
ANY PARKING VIOLATED <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	NAME/RELATIONSHIP OF PERSON NOTIFIED	DATE & TIME NOTIFIED	NOTIFIED BY		
DRIVERS LICENSE 920281138	<input type="checkbox"/> HND STATE AR	SOCIAL SECURITY NO. <input type="checkbox"/> HND 535-06-9424	OTHER ID (FBI No.) 12859NC1		

FILED

JUL 09 2015

**Timothy W. Fitzgerald
SPOKANE COUNTY CLERK**

ID #/NAME OF REPORTING OFFICER #841 - Storch, Deanna		DISTRIBUTION	
APPROVAL #329 - Teigen, Troy		DATE/TIME 08/26/2014 19:59	

Incident Report #1

08/26/2014 20:08:16.752

Exhibit 2

APPENDIX “D”

ROSAUERS ADDITIONAL REPORT

14-1-03026-7

DATE: 8-26-14	TIME: 1430	INCIDENT TYPE: Theft	PAGE: 1	NUMBER OF SUSPECTS: 1
SUSPECT: (LAST, FIRST M.) Leonard Timothy Harlan		RACE: C	SEX: M	DOB: 10-28-87
STREET ADDRESS: Homeless		CITY: Spokane	STATE: Wa	PRODUCT AMOUNT: 1.69
SUSPECT: (LAST, FIRST M.)		RACE:	SEX:	DOB:
STREET ADDRESS:		CITY:	STATE:	PRODUCT AMOUNT:
STORE DETECTIVE: (LAST, FIRST M.) Hastings Jack		COMMISSION NUMBER:	LOCATION OF INCIDENT: 1808 W 3rd	STORE NUMBER: 2

At approximately 1430 the store manager Ken Bester paged me and said that a male subject ha just concealed two drinks in his pant pockets. As I came up stairs the subject later identified as Timothy leonard was getting ready to exit the store.

I could see something he front of his pants what looked like two large items in his pockets. I stopped and identified myself as store security and that I wanted the drinks he put in his pockets. leonard then handed me the items. Leonard said "I'm sorry my girl and I are really thirsty." Leonard was taken to the office for processing. I called crime check to make sure he did not have any warrants for his arrest before letting him go with a trespass. I was advised that he did have a warrant and they would be en route to get him.

Leonard then began to get really nervous asked if he could use the restroom once I advised him that he had an active warrant for his arrest. I asked if he had anything on him and if I could search him and he said yes that fine I have nothing. I removed a plastic container from his left back pocket. I looked in side of the container and saw 2 small plastic bags and a small piece of aluminum foil. I then held on to the evidence until Spokane Police arrived.

A short time later Spokane Police arrived and I advised them of the situation. Leonard was taken into custody for the warrant for his arrest and also for possession of narcotics.

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JUL 09 2015

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK



PRODUCT AMOUNT	CIVIL AMOUNT:	TOTAL AMOUNT:	OFFICER NAME	NUMBER:	APPROVED BY:
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Exhibit Y

APPENDIX “E”

FILED

JUN 08 2015

SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON

Plaintiff,

v.

TIMOTHY H. LEONARD
WM 10/28/87

Defendant(s).

No. 14-1-03026-7

PA# 14-9-53774-0

RPT# 002-14-286266

RCW 69.50.4013(1)-F (#56640)

FINDINGS OF FACT AND

CONCLUSIONS OF LAW ON DEFENDANT'S

MOTION TO SUPPRESS/DISMISS

THIS MATTER having come on for hearing on April 30, 2015, and the defendant, TIMOTHY H. LEONARD, having been present as well as counsel for defendant, NATHAN POSTON, and counsel for the State of Washington, MICHAEL A. NELSON, Deputy Prosecuting Attorney, and the court having heard from all the above, the court now makes the following:

FINDINGS OF FACT

1. The defendant was detained for shoplifting on August 26, 2014, at Rosauer's, a retail establishment in the City and County of Spokane, Washington.

2. The defendant was detained by Jack Hastings, a security employee of the store. Mr. Hastings did not have a police commission and was not a sworn police officer.

3. Mr. Hastings called Crime Check, a crime reporting service, to determine if the defendant had any outstanding warrants before releasing the defendant with a trespass notice.

4. After being advised there was a warrant, Mr. Hastings elected to detain the defendant until a patrol car could be dispatched to transport the defendant to jail. The Crime Check operator advised Mr. Hastings that a patrol car would be dispatched.

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SPOKANE COUNTY PROSECUTING ATTORNEY
COUNTY CITY PUBLIC SAFETY BUILDING
SPOKANE, WA 99260 (509) 477-3862

APPENDIX “F”

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5. While waiting for the patrol car, the defendant requested to use the restroom.

6. Mr. Hastings searched the defendant before allowing him to go to the restroom, and heroin was found in the defendant's pocket.

7. Upon arrival, the defendant and the heroin were turned over to the police officer who responded, and the defendant was charged with Possession of a Controlled Substance.

From the foregoing Findings of Fact the Court now makes the following:

CONCLUSIONS OF LAW

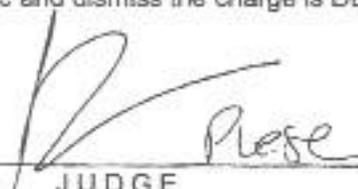
1. The conversation between the Crime Check operator and the Rosauer's employee, Jack Hastings, did not create a principle/agent relationship between them.

2. The detention of the defendant was not done by Mr. Hastings as an agent for law enforcement.

3. The search of the defendant was not performed in an agency capacity between Mr. Hastings and law enforcement.

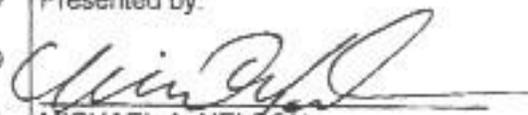
WHEREFORE, the Defendant's Motion to Suppress evidence and dismiss the charge is DENIED.

Dated this 8th June day of ~~May~~ 2015.



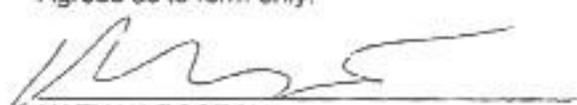
JUDGE

Presented by:



MICHAEL A. NELSON
Deputy Prosecuting Attorney
WSBA # 13789

Agreed as to form only:



NATHAN POSTON
Attorney for Defendant
WSBA # 41901

APPENDIX “G”

REPORT NUMBER: 14-286266

Officer D. Storch can testify to:

- Working for the Spokane Police Department and responding to Rosauers reference a shoplifter.
- Making contact with Hastings and obtaining his statement.
- Advising the Def. he was under arrest for his warrants.
- Searching the Def and his belongings incident to arrest.
- Looking inside the Jack Links jerky container and finding a small zip top baggie with a brown tar like substance.
- Field testing the substance, which tested positive as Heroin.
- P.C. existing to charge the Def. with PCS-Heroin.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. (9A.72.085)

DATE: 8-26-14 PLACE: SPOKANE, WASHINGTON SIGNATURE:



APPENDIX “H”

- 1 3. As Mr. Leonard was exiting the store he was stopped by Jack Hastings a loss
2 prevention officer. Mr. Hastings requested Mr. Leonard to return the two drinks in his
3 pocket. Mr. Leonard returned the items, and said "I'm sorry my girl and I are really
4 thirsty."
- 5 4. Mr. Leonard was taken to the store office for a pressing and the issuance of a trespass
6 notice.
- 7 5. Mr. Hastings learned that Mr. Leonard had an active warrant and law enforcement were
8 on their way to detain him.
- 9 6. Once Mr. Leonard was advised that law enforcement were on their way to arrest for an
10 active warrant, Mr. Leonard "got really nervous" and asked to use the restroom.
- 11 7. Mr. Hastings asked Mr. Leonard if he had anything on him and if he could search him.
12 Mr. Leonard said "fine I have nothing."
- 13 8. Mr. Hastings located a jerky container with two small plastic bags, and a small piece of
14 aluminum foil in Mr. Leonard's left back pocket.
- 15 9. Mr. Leonard admitted to Mr. Hastings that the baggie contained heroin.
- 16 10. When law enforcement arrived and arrested Mr. Leonard for the active warrant(s), they
17 searched Mr. Leonard's belongings incident to a lawful arrest. The officers found a
18 bagging containing a brown tar like substance and field tested it.
- 19 11. The officers placed the baggie with the substance and paraphernalia in property.
- 20 12. Washington State Patrol Crime Laboratory forensic scientist Devon House conducted
21 two gas chromatography tests and one flame ionization detection and one mass
22 spectrometry.
- 23 13. The material contained less than .1 gram of heroin.
- 24
- 25

NO. 33698-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	SPOKANE COUNTY
Plaintiff,)	NO. 14 1 03026 7
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
TIMOTHY HARLAN LEONARD,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 21st day of December, 2015, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

COURT OF APPEALS, DIVISION III
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

E-FILE

SPOKANE COUNTY PROSECUTOR'S OFFICE

Attn: Brian O'Brien

SCPAAppeals@spokanecounty.org

E-FILE

TIMOTHY HARLAN LEONARD

4827 North Howard Street

Spokane, Washington 99205-5603

U.S. MAIL

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

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