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NO. 23192-5-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

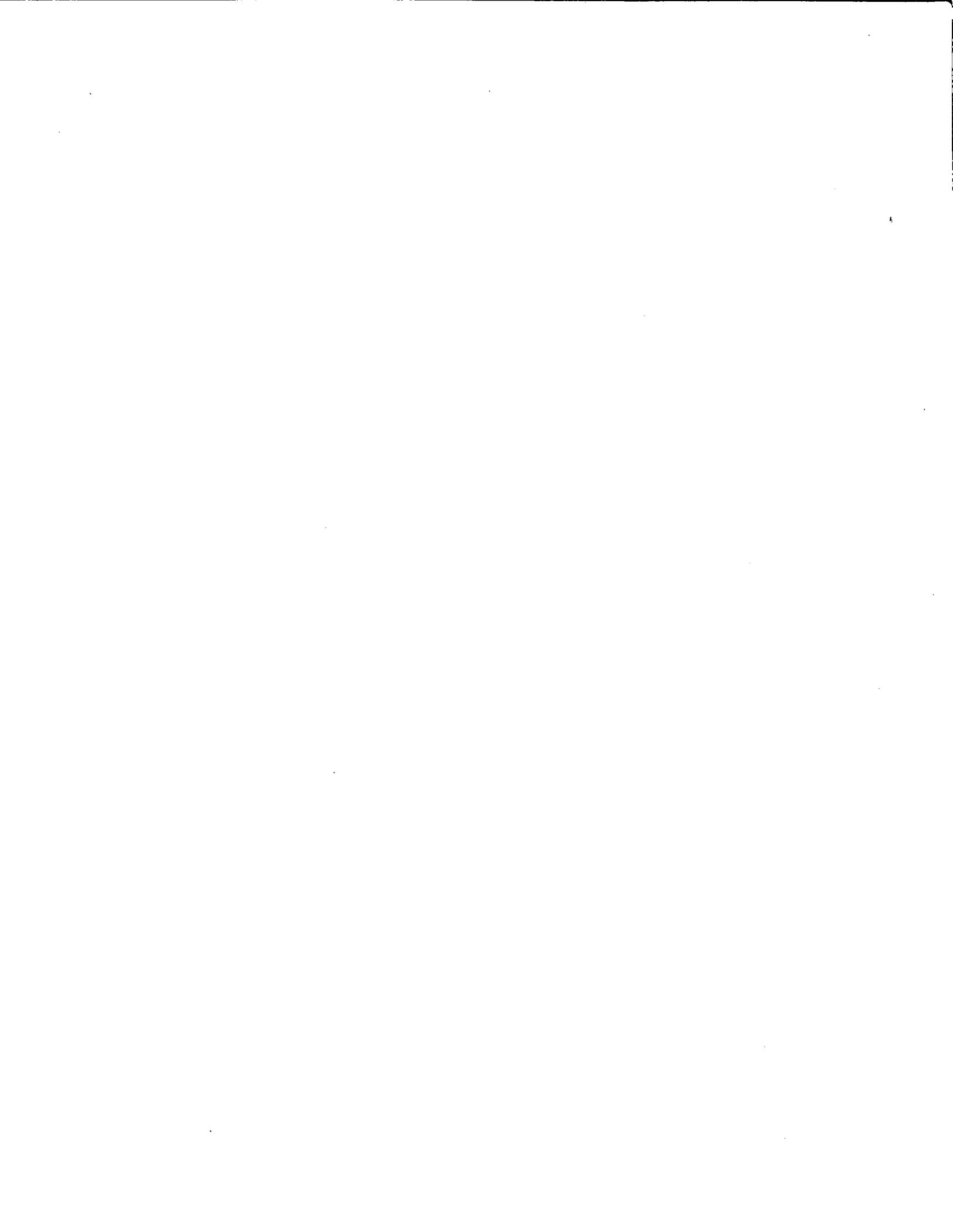
V.

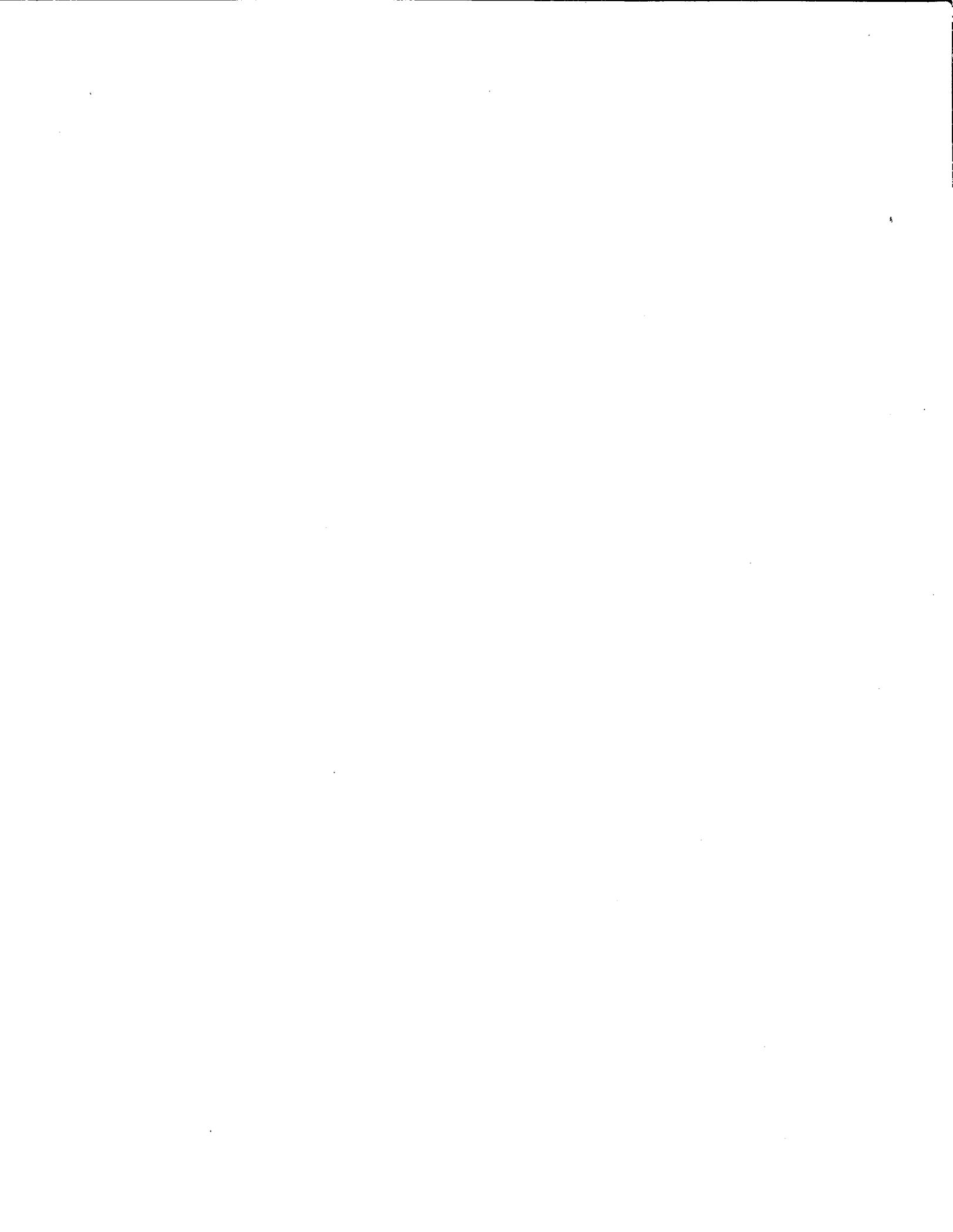
CHARLIE BERNNETT DAY

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court's conclusions of law 1, 2, and 3 (Appendix "A") entered after the CrR 3.6 hearing conducted on March 22, 2004, are neither supported by the findings of fact nor existing caselaw.

2. The trial court's findings of fact and conclusions of law entered on June 11, 2004 following the stipulated facts trial are superfluous and without merit if the evidence which was seized from Charlie Bernnett Day's vehicle is suppressed.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Is it permissible for a law enforcement officer to conduct a warrantless search of a motor vehicle parked in a public access area?

2. Under what circumstances may contact with an individual for purposes of issuing a civil infraction be expanded to authorize a warrantless search of a motor vehicle?

3. Does an open handgun case in a motor vehicle authorize a warrantless search of the vehicle when the initial contact was for purposes of a civil infraction only?

4. Are the trial court's conclusions of law entered after the CrR 3.6 hearing constitutionally valid based upon current decisional law?

STATEMENT OF THE CASE

On March 29, 2003 Charlie Bernnett Day and his wife Alice were in their car parked at a public access area near the Yakima River outside Benton City, Washington. (03/22/04 RP 13, ll. 18-22; RP 14, ll. 2-3; RP 14, l. 20 to RP 15, l. 8; Ex. 4)

Deputy Hayter contacted Mr. and Mrs. Day. He wanted to find out if they had a permit to park at the public access area. (03/22/04 RP 14, ll. 9-15)

The car was parked next to some trees. It was backed in toward the river. Deputy Hayter walked around the vehicle to see if he could find a permit on it. (Ex. 4)

When the deputy did not see a permit he contacted Mr. Day who was sitting in the driver's seat. The contact occurred at 8:30 a.m. on a Sunday morning. (03/22/04 RP 15, ll. 21-23; RP 16, ll. 8-11)

Deputy Hayter had the video camera in his patrol vehicle operating at the time of the contact. The videotape reflects that the public access area is adjacent to a highway. Traffic can be heard in the background. There are various buildings in the area. (Ex. 4)

When Deputy Hayter walked around the vehicle he saw that the interior of the vehicle was a mess. He noted some lighters, rubber gloves and an empty handgun case. (03/22/04 RP 18, ll. 20-23; RP 19, ll. 1-5)

Deputy Hayter asked Mr. Day if there was a gun in the car. Mr. Day admitted that there was a gun in the car. (03/22/04 RP 19, ll. 20-23)

The deputy asked Mr. Day to step out of the car. He did a pat-down search and handcuffed Mr. Day. (03/22/04 RP 20, ll. 6-18)

The deputy also had Mrs. Day exit the vehicle. She was also handcuffed and detained. (Ex. 4)

Deputy Hayter then began to search the car. He located the gun under the driver's seat. He removed it and contacted dispatch to determine if it was a stolen firearm. (03/22/04 RP 21, ll. 3-4)

When the deputy learned that the gun had been stolen out of Pierce County Mr. Day was arrested. (03/22/04 RP 21, ll. 16-20)

A warrantless search incident to arrest was conducted. Numerous items related to the manufacturing of methamphetamine were located in the car. (Ex. 4)

An Information was filed on April 1, 2003 charging Mr. Day with manufacturing methamphetamine. (CP 64)

A suppression motion was filed on July 24, 2003. (CP 50)

The CrR 3.6 hearing was not conducted until March 22, 2004. The trial court denied the motion. It entered findings of fact and conclusions of law on June 11, 2004. (CP 20)

A stipulated facts trial was also conducted on June 11, 2004. The trial court entered its findings of fact and conclusions of law the same date. (CP 18)

The trial court found Mr. Day guilty of manufacturing methamphetamine. Judgment and Sentence was also entered on June 11, 2004. (CP 8)

Mr. Day filed his Notice of Appeal on June 29, 2004. (CP 6)

SUMMARY OF ARGUMENT

When a law enforcement officer contacts an individual to issue a civil infraction he is limited to what he and/or she can do.

The *Terry* [*Terry v. Ohio*, 392 U.S. 1, 20 L. Ed.2d 889, 88 S. Ct. 1868 (1968)] stop exception to the search warrant requirement of the Fourth Amendment to the United States Constitution and Const. art. 1, § 7 has not been extended to non-traffic civil infractions.

The parking of a motor vehicle in a public access area without the necessary permit is a civil infraction only.

Deputy Hayter's observation of an empty handgun case in the car is not sufficient to give rise to a reasonable and articulable suspicion that Mr. Day or his wife were engaged in criminal activity.

The observation of lighters and rubber gloves cannot give rise to a reasonable and articulable suspicion of criminal activity.

Mr. Day had the right to be secure in his person and property within his car. Deputy Hayter's actions exceeded the boundaries of the constitutional prohibition against warrantless searches.

The trial court's conclusions of law entered following the CrR 3.6 hearing are not supported by the evidence of what occurred.

If the suppression motion is granted, then no evidence remains to prosecute Mr. Day. His conviction for manufacturing methamphetamine should be reversed and the case dismissed.

ARGUMENT

Mr. Day analogizes his situation to the fact pattern contained in *State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980).

The officers in *Larson* had observed a car parked in a city park. It was parked after hours and was not close to the curb. As the officers approached the car it started to drive away. The officers activated their emergency equipment and stopped the vehicle.

The *Larson* Court ruled at 643:

When considered in totality ... the circumstances known to the officers at the time they decided to stop the car did not

give rise to a reasonable and articulable suspicion that the occupants were engaged or had engaged in criminal conduct ... but at best amounted to nothing more substantial than an inarticulate hunch. ... This does not meet the constitutional criteria of reasonableness for stopping a vehicle and questioning its occupants.

Deputy Hayter observed the Days in their car next to the Yakima River. It was a public access area. He was concerned about migrant workers camping in the area. (CP 60)

There was no reason for the contact other than to determine if there was a public access parking permit on the vehicle.

WAC 352-20-010 provides, in part:

(1) No operator of any automobile ... shall park such vehicle in any state park area, except where the operator ... possesses a state park nonrecreation permit

...

(5) Except as provided in WAC 352-20-070, any violation of this section is an infraction under Chapter 7.84 RCW.

RCW 7.84.020 states:

Unless the context clearly requires otherwise, the definition in this section applies throughout this chapter.

“Infraction” means an offense which, by the terms of Title 76, 79, or 79A RCW or * Chapter 43.30 RCW and rules adopted under these titles and chapters, is declared not to be a criminal offense and is subject to the provisions of this chapter.

WAC 352-20-070 states:

Any violation designated in this chapter as a civil infraction shall constitute a misdemeanor until the violation is included in a civil infraction monetary schedule adopted by rule by the state supreme court pursuant to chapter 7.84 RCW.

IRLJ 6.2(d)(3) references the monetary penalty for a violation of WAC 352-20-010. The schedule was adopted by the Supreme Court. It became effective September 1, 1992, and was amended on June 25, 1993; May 1, 1994; August 15, 1995; June 5, 1996; December 28, 1999; and July 22, 2001.

IRLJ 1.1(a) provides:

These rules govern the procedure in courts of limited jurisdiction for all cases involving "infractions." **Infractions are noncriminal violations of law defined by statute.**

(Emphasis supplied.)

There can be no argument that Deputy Hayter's initial investigation was for a civil infraction. The investigation exceeded its scope when he detained and seized Mr. and Mrs. Day.

"... [I]t is elementary that all investigatory detentions constitute a seizure." *State v. Rankin*, 151 Wn.2d 689, 695 (2004).

There can be no dispute that Mr. and Mrs. Day were seized. The seizure calls into play the Fourth Amendment and Const. art. 1, § 7.

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...

Const. art. 1, § 7 states: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

No *Gunwall* [*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R. 4th 517 (1986)] is provided since it is well established that Const. art. 1, § 7 provides greater protection to Washington citizens than the Fourth Amendment.

Moreover, as the Court noted in *State v. Mendez*, 137 Wn.2d 208, 219, 970 P.2d 722 (1999):

... [P]reexisting Washington law indicates a general preference for greater privacy for automobiles and a greater protection for passengers than the Fourth Amendment

Furthermore, the Washington Supreme Court has declined to extend the *Terry* exception to non-traffic civil infractions. In *State v. Duncan*, 146 Wn.2d 166, 175, 43 P.3d 513 (2002), it clearly stated:

... [T]he traffic violation exception to the application of *Terry* stops for criminal violations is distinguishable from the civil infraction before the court. We decline to extend the *Terry* stop exception under the Fourth Amendment and article I, section 7 of the Washington State Constitution to nontraffic civil infractions.

The only other basis that could possibly justify Deputy Hayter’s actions would be the issue of officer safety. (CP 60)

Warrantless searches are *per se* unreasonable. The exceptions to the warrant requirement are “‘jealously and carefully drawn’ exceptions.” Officer safety, in and of itself, is not a designated justification for a warrantless search. *See: State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

Deputy Hayter indicated that he had a concern for his safety when he observed the open and empty handgun case in the rear of the car. However, it is apparent that such an observation, cannot uphold an invasion of the rights guaranteed under the Fourth Amendment and Const. art. 1, § 7.

In the *Duncan* case, the officer remembered Mr. Duncan from a prior contact. He had recovered a firearm from Mr. Duncan when he was wrestled to the ground. The officer also remembered that Mr. Duncan had a history of violent criminal offenses including murder. Mr. Duncan was wearing a bulky jacket. The officer conducted a pat-down of Mr. Duncan and located a gun in his waistband. *State v. Duncan, supra*, 170.

The *Duncan* Court then proceeded to discuss the issue of officer safety in the context of a non-traffic civil infraction contact. The Court stated at 176:

The policy concerns for police safety are in tension with the constitutional guarantees of personal privacy. The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means. *State v. Putman*, 65 Wn. App. 606, 612, 829 P.2d 787 (1992). In *Rife* [*State v. Rife*, 133

Wn.2d 140, 943 P.2d 266 (1997)], we articulated several policy considerations in support of the exclusionary rule: to protect the privacy interests of individuals against unreasonable government intrusions, to deter law enforcement officers from unlawfully obtaining evidence, and to preserve the dignity of the judiciary by providing a mechanism for the courts to refuse to consider unlawfully obtained evidence. 133 Wn.2d at 148 (*citing State v. Boland*, 115 Wn.2d 571, 581, 8 P.2d 1112 (1990)).

In addition to seeing the open handgun case, Deputy Hayter had also observed Mr. Day moving around in the car. This occurred prior to any face-to-face contact with Mr. Day. Other than those movements, Mr. Day was cooperative and did not take any threatening action toward the deputy.

Mr. Day maintains that the conclusions of law entered by the trial court following the CrR 3.6 hearing do not come within the parameters of any exception to the warrant requirement. In particular, conclusion of law 3, insofar as it pertains to “potentially erratic behavior,” finds no support in the decisional law of this State.

Every contact between a law enforcement officer and a person being investigated has the potential to get out of hand. The videotape clearly indicates that this was not the situation.

CONCLUSION

The trial court should have granted Mr. Day's motion to suppress the evidence.

The trial court's conclusions of law are not in accord with existing caselaw in the State of Washington.

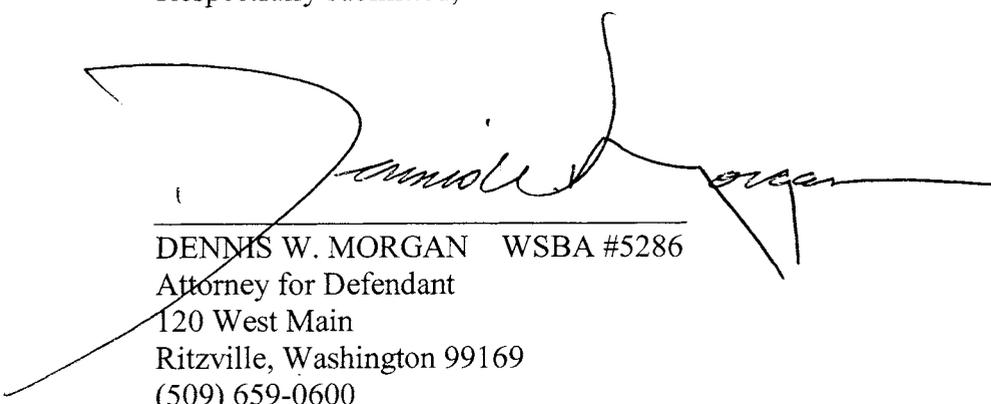
Deputy Hayter's search violated Mr. Day's constitutional rights under the Fourth Amendment and Const. art. 1, § 7.

All of the evidence must be suppressed.

If the evidence is suppressed then Mr. Day's conviction must be reversed and the case dismissed.

DATED this 26th day of January, 2005.

Respectfully submitted,



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APPENDIX "A"

CONCLUSIONS OF LAW

1. Deputy Hayter's contact with the defendant and Mrs. Day was legitimate.
2. Deputy Hayter had a legitimate concern for his safety based on what he observed when he walked up to the car.
3. Given the potentially erratic behavior of the defendant and codefendant, Deputy Hayter took appropriate steps for his safety.