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DIVISION II

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

STATE OF WASHINGTON
Respondent,

v.

REYES RUIZ,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Clark County,
Cause No. 05-1-01065-7
The Honorable John F. Nichols, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. Mr. Ruiz's Fourth Amendment rights were violated when he was arrested without probable cause.

2. The trial court erred in denying Mr. Ruiz's motion to suppress.

3. There was insufficient evidence to convict Mr. Ruiz of possession of methamphetamine with intent to deliver.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the police have sufficient probable cause to arrest Mr. Ruiz? (Assignment of Error No. 1)

2. Does a passenger in a vehicle have standing to challenge a search of the vehicle? (Assignment of Error No. 2)

3. Did the trial court err in denying the motion to suppress the drugs where the area in which the drugs were found was not part of the passenger compartment of the minivan and the use of the drug sniffing dog exceeded the permissible scope of the search incident to arrest? (Assignment of Error No. 2)

4. Can a defendant be convicted of unlawful possession of methamphetamine with intent to distribute where the only evidence that the defendant possessed the methamphetamine was inadmissible? (Assignment of Error No. 3)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On May 10, 2005, at 7:47 P.M. a Chevrolet Lumina minivan in which the appellant Mr. Reyes Ruiz was a passenger was pulled over by

Clark County Detective Dennison because the driver's side headlight was not working. CP 35, RP 6, 7-15-05.[1] During the course of the stop, Detective Dennison determined that there were outstanding warrants for the arrest of the driver of the vehicle, Mr. Jesus Buelna-Valdez. CP 35-36. Detective Dennison arrested the driver of the minivan and placed him in the back of his patrol car. CP 36. Detective Denison then informed Mr. Buelna-Valdez that he would be searching the interior of the minivan and asked Mr. Ruiz to get out of the van since he was going to search the van incident to Mr. Buelna-Valdez's arrest. CP 36, RP 7, 7-15-05.

At 7:53:02 P.M., Deputy Sean Boyle arrived on scene to assist Detective Dennison. CP 36, RP 5, 7-15-05. Mr. Buelna-Valdez was arrested five to ten minutes after Deputy Boyle arrived. RP 6, 7-15-06. After having Mr. Ruiz step out of the minivan, Detective Dennison and Deputy Boyle began to search the interior passenger compartment of the minivan. CP 36. During the search, the officers noticed that a interior panel under the dash as well as some of the door panels were loose and were missing the screws that held them in place. RP 7-8, 7-15-05. The officers also noticed that the panels were held in place with plastic temporary pushpins and that some of these screws were laying on the floor

[1] The transcript of the hearing held on July 15, 2005, is not numbered contiguously with the rest of the transcript. Reference to the July 15 hearing will be made by citation to the page number followed by the date.

of the vehicle. RP 7-8, 7-15-05. Deputy Boyle saw that the panel below the glove box was loose and when he pulled on it one of the pushpins holding it in place fell out. RP 9, 7-15-05. Deputy Boyle looked underneath the dashboard but did not observe anything under it. RP 11, 7-15-05. Upon the discovery of the loose interior panels in the minivan, Deputy Boyle suggested that Deputy Ellithorpe be called to the scene with his drug sniffing dog, Eiko. RP 8, 14-15, 7-15-05.

Deputy Ellithorpe arrived on scene at 8:20 P.M., at least 17 minutes after Mr. Buelna-Valdez had been arrested and placed in the back of a patrol car. RP 15, 7-15-05. At the time Deputy Ellithorpe arrived, Mr. Buelna-Valdez was already in custody in the back of a patrol car and Mr. Ruiz was standing 15 to 20 feet away from the minivan. RP 15, 30, 7-15-05. Detective Dennison told Deputy Ellison that the driver of he minivan was under arrest and that the dashboard was missing screws and plastic fasteners and appeared to have been tampered with. RP 15, 7-15-05. Detective Denison asked Deputy Ellithorpe to search the vehicle with the drug-sniffing dog. CP 36, RP 15-16, 7-15-05. Deputy Ellithorpe did an initial visual inspection of the vehicle and noticed that the interior door panels were not attached firmly to the metal body of the door. RP 16, 7-15-05.

Deputy Ellithorpe first took the dog around the outside of the vehicle and then allowed the dog to search the interior of the vehicle, attempting to direct the dog's attention to the dashboard and loose door panels. RP 17, 7-15-05. The dog did not alert on any part of the exterior of the minivan, nor did it alert on the dashboard or door panel areas of the minivan. RP 27, 7-15-05. The dog alerted to a vent located on the driver's side wall behind the driver's seat and in front of the second row of seats. RP 17, 7-5-05. Deputy Ellithorpe pulled the dog away from the area and began pulling on the panels on the wall of the van. RP 17, 7-15-05. The panels were secure in the area of the vent, so Deputy Ellithorpe worked his way towards the back of the van pulling on the panels on that wall. RP 17, 33-34, 7-15-05. Behind the second row of seats in the minivan, Deputy Ellithorpe located a cupholder mounted to the side of the minivan. RP 17, 7-15-05. Deputy Ellithorpe pulled on the cupholder and it "popped open." RP 17, 7-15-05. In the recess behind where the cupholder had been, Deputy Ellithorpe observed a piece of insulation "just laying there." RP 17-18, 7-15-05. Deputy Ellithorpe then reached into the recess and removed the piece of insulation and discovered two packages of what field tested positive as methamphetamine. CP 38, RP 18, 7-15-05. Detective Dennison then arrested Mr. Ruiz. CP 38. No warrant was requested prior to Deputy Ellithorpe's search. RP 27-28, 7-15-05.

Mr. Ruiz was transported by Detective Dennison to the Clark County Sheriff's Office, where he was Mirandized and then interviewed by Detective Shane Gardener. CP 38, RP 36, 7-15-05. Detective Gardener read Mr. Ruiz his Miranda rights in Spanish and Mr. Ruiz acknowledged that he understood his rights. CP 38. After being Mirandized, Mr. Ruiz indicated that he wished to speak with police. CP 38. Mr. Reyes confessed to Detective Gardener that he and Mr. Buelna-Valdez were partners and that they were bringing the two pounds of methamphetamine to Vancouver, Washington to sell it. CP 2.

On May 13, 2005, Mr. Ruiz was charged with Possession of a Controlled Substance with Intent to Deliver within 1,000 feet of a school bus stop. CP 3. An amended information with the same charges was filed on July 19, 2005. CP 32-33.

On June 30, 2005, counsel for Mr. Ruiz filed a motion to suppress the methamphetamine seized in the search of the minivan on grounds that the officers exceeded the scope of the search of the minivan pursuant to the arrest of the driver. CP 5-15. A hearing on this motion was heard on July 15, 2005 (RP 1-73, 7-15-05), and the motion was denied. RP 68, 7-15-05.

Jury trial was waived (CP 20) and a stipulated facts bench trial was held on July 18, 2005. CP 43-47, CP 6-8. The judge found Mr. Ruiz

guilty of the crime of Unlawful Possession of a Controlled Substance with intent to Deliver. CP 53.

Notice of appeal was timely filed on August 3, 2005. CP 75.

D. ARGUMENT

1. Mr. Ruiz's Fourth Amendment rights were violated when Mr. Ruiz was arrested without probable cause

A physical arrest is a seizure under the Fourth Amendment and must be preceded by a determination that there is probable cause to believe the person arrested has committed a crime. Dunaway v. New York, 442 U.S. 200, 213, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

Probable cause to arrest exists when facts and circumstances, within the arresting officer's knowledge and of which the officer has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution to believe that the defendant has committed an offense. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

At the time the police arrested Mr. Ruiz, the only facts of which they were aware was that Mr. Ruiz was a passenger in a vehicle which had a large quantity of methamphetamine hidden in an area far removed from the passenger seat. The officers had no knowledge of any facts linking Mr. Ruiz to the drugs, or even linking Mr. Ruiz to Mr. Buelna-Valdez, other than the fact that Mr. Ruiz was a passenger in the vehicle when it

was stopped. The police clearly did not initially suspect Mr. Ruiz of any crime since he was allowed to exit the vehicle and remain outside of police custody for almost twenty minutes before the police searched the minivan and found the drugs.

At the time he was arrested, there was insufficient evidence linking Mr. Ruiz to the drugs or to any criminal activity to support a finding that the police officers had probable cause to arrest Mr. Ruiz. The arrest of Mr. Ruiz violated his Fourth Amendment rights and his conviction should therefore be vacated.

2. Mr. Ruiz has standing to challenge the search of the minivan

Although automatic standing has been the subject of some controversy, and has been abandoned by the U.S. Supreme Court, it "still maintains a presence in Washington." State v. Williams, 142 Wn.2d 17, 22, 11 P.3d 714 (2000).

It is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment. *E.g.* State v. Hendrickson, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996); State v. Stroud, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); State v. Williams, 102 Wn.2d 733, 741-42, 689 P.2d 1065 (1984). Article I, section 7 provides that "[n]o person shall be disturbed in his

private affairs, or his home invaded, without authority of law." This provision is violated when the State unreasonably intrudes upon a person's private affairs. State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990); State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984).

A person may rely on the automatic standing doctrine only if the challenged police action produced the evidence sought to be used against him. Williams, 142 Wn.2d at 23, 11 P.3d 714. To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure. State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). As to the second requirement, possession may be actual or constructive to support a criminal charge. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969). A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item. Id. at 29, 459 P.2d 400.

Here, Mr. Ruiz has automatic standing to challenge the search of the minivan since possession is an element of the crime of possession of methamphetamine with intent to deliver (RCW 69.50.401(1), (2)(b)), and Mr. Ruiz had constructive possession of the drugs since he had dominion and control over the minivan.

3. The trial court erred in denying Mr. Ruiz's motion to suppress the evidence seized in the search of the minivan

Absent an exception to the warrant requirement, a warrantless search is impermissible under both article I, section 7 of the Washington Constitution and the fourth amendment to the United States Constitution. See State v. Johnson, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996). Generally, evidence seized during an illegal search is suppressed under the exclusionary rule. See State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). In addition, evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine. See State v. O'Bremski, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

"A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement [.]" Flippo v. West Virginia, 528 U.S. 11, 120 S.Ct. 7, 8, 145 L.Ed.2d 16 (1999); State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992).

The Washington State Supreme Court has stated: "The ultimate teaching of our case law is that the police may not abuse their authority to

conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception." State v. Ladson, 138 Wn.2d 343, 357, 979 P.2d 833 (1999).

A search incident to arrest is a well-recognized exception to the warrant requirement. State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001).

> Under the search incident to arrest exception to the warrant requirement, officers may search a suspect's person and the area within that person's immediate control at the time of the arrest even in the absence of exigent circumstances. This permission extends to the passenger compartment of the suspect's vehicle if the compartment was within the suspect's immediate control at the time of or immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car. To invoke this exception, the State must prove both close physical and close temporal proximity.

State v. Turner, 114 Wn.App. 653, 657, 59 P.3d 711 (2002) (internal citations omitted).

In Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the United States Supreme Court held that the scope of a search incident to arrest extends as far as, but no farther than, the area into which the arrestee might reach to grab a weapon or destroy evidence. In New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the United States Supreme Court held as a "bright-line rule" that

when an arrestee is occupying the passenger compartment of a car at the time of arrest, he might grab a weapon or destroy evidence located anywhere within the compartment. The Washington Supreme Court has held that the "passenger compartment" of a vehicle which may be searched by police incident to the driver's arrest is any area of the interior of a vehicle which the driver may reach without leaving the vehicle. See State v. Johnson, 128 Wn.2d 431, 450-456, 909 P.2d 293 (1996) (sleeper cab attached to back of semi truck was part of passenger compartment which could lawfully be searched by police after driver's arrest since it could be reached by the driver without exiting the vehicle); See also State v. Vrieling, 144 Wn.2d 489, 28 P.3d 762 (2001) (police were entitled to search the entire interior of a Winnebago motor home after arresting the driver since the driver could access the rest of the motor home without exiting the vehicle).

However, this is not an exception without limitations: the exception has been narrowly drawn to address officer safety and prevent the destruction of evidence. Vrieling, 144 Wn.2d at 494, 28 P.3d 762. While recognizing these dual justifications, in State v. Stroud, 106 Wn.2d 144, 148, 720 P.2d 436 (1986), the Washington Supreme Court observed that "because of our heightened privacy protection [under article I, section 7], we do not believe that these exigencies always allow a search."

Stroud, 106 Wn.2d at 151, 720 P.2d 436. In Stroud, the Washington Supreme Court followed Belton except for locked containers. The court reasoned:

> During the arrest process...officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.... [T]he danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container.

Stroud, 106 Wn.2d at 152, 720 P.2d 436. Thus, locked containers within a vehicle may not be searched incident to an occupant's arrest. State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989).

a. The search of the minivan with the drug dog exceeded the scope of a lawful search incident to arrest.

Here, because the officers had arrested the driver of the minivan, the officers had authority to search the interior of the minivan, barring locked containers, for weapons or destructible evidence. The officers searched the minivan and discovered the loose interior panels on the dashboard and loose door panels and then stopped the search, deciding to call in a drug-sniffing dog. Prior to the dog searching the minivan the officers merely suspected drugs might have been present.

The Stroud court held that "[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence." Stroud, 106 Wn.2d at 152, 720 P.2d 436.

In State v. Boursaw, 94 Wn.App. 629, 976 P.2d 130 (1999), Boursaw was lawfully arrested for driving with a suspended license. During a search of Boursaw's vehicle incident to his arrest, the arresting officer discovered in Boursaw's unlocked glove box plastic ziplock bags and several needles. Assuming these items to be narcotics paraphernalia, the officer called for a K-9 unit. The K-9 unit arrived at the scene within ten minutes. The dog did not give a positive response during a search of the exterior of the vehicle, but when the dog was placed inside the vehicle, he gave a positive response to an area under the center of the dashboard directly beneath the ashtray. The K-9 officer removed the ashtray and discovered a plastic bag containing a substance that tested positive for methamphetamine.

On appeal, Boursaw argued that the initial search incident to arrest to look for weapons and destructible evidence secured the scene; thus, the K-9 search was a search for additional evidence--an activity not related to the arrest process--and was not a proper search incident to arrest. Boursaw

contended that the initial search of the car removed the risk of destruction of evidence and the danger to the safety of the officers and the public. Boursaw further argued that with these dangers gone, justifications for a search incident to arrest were removed, and the officers were required to seek a warrant for the second, independent search by the K-9 unit.

Division 1 of the Court of Appeals disagreed with Boursaw's arguments and agreed with the State's contention that adopting Boursaw's reasoning would preclude officers from requesting assistance to perform a valid search incident to arrest. The State contended that "many instances arise where officers need assistance to perform their duties safely and properly." Boursaw, 94 Wn.App. at 634, 976 P.2d 130. Boursaw argued that the arresting officer had already secured the scene when the dog search and the search behind the ashtray were performed. Division 1, deciding that the case turned on what activities constituted "the securing of the suspect and the scene," held that,

> Considering that Stroud explicitly allows a search of an automobile incident to arrest after the suspect is handcuffed and in the patrol car, *see* Stroud, 106 Wn.2d at 152, 720 P.2d 436, one may conclude that the scene is not secured simply by an officer's exercise of control over the arrestee. Moreover, if we follow Boursaw's argument that the scene was secured in this case when [the arresting officer] performed the initial search, we might preclude a second officer from immediately searching, as an added precaution, the same area already searched by her fellow officer.

> We find that because the delay was only ten minutes and Boursaw was at the scene, the dog search and the search behind the ashtray were not beyond the duration of a search incident to arrest. The dog search and the search behind the ashtray may be viewed not as a second independent search but as a continuation of [the arresting officer's] search. Our holding is limited to the facts of this case, and delays caused by a request for assistance might be unreasonable under differing circumstances.

Boursaw, 94 Wn.App. at 634-635, 976 P.2d 130.

The Boursaw court went on to hold that the removal of the ashtray and the search behind it did not exceed the scope of a search incident to arrest because, "the area immediately behind the ashtray is within the reach of the occupants of the automobile. A driver or passenger may pull out the ashtray and reach into the area behind it without exiting the vehicle." Boursaw, 94 Wn.App. at 636, 976 P.2d 130.

As a Division 1 case, Boursaw is not binding authority on this court but is merely persuasive authority. Further, the Boursaw court limited its holding to the facts of that case, facts which are very different from the facts in this case.

i. *The time between the initial arrest of the driver and the search by the K-9 unit was unreasonable and exceeded the duration of a search incident to arrest*

"At some point, a significant delay between the arrest and the search renders the search unreasonable because it is no longer

contemporaneous with the arrest." State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992), *citing* United States v. Chadwick, 433 U.S. 1, 15-16, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (finding that a search of a footlocker conducted "more than an hour" after agents gained control of the locker and long after the arrestees were in custody was not a reasonable search incident to arrest); *see also* United States v. Vasey, 834 F.2d 782, 787-88 (9th Cir.1987) (finding that a search of an automobile conducted 30-45 minutes after the arrestee was arrested, handcuffed, and placed in the patrol car failed to meet the contemporaneous requirement of Belton and was therefore not a reasonable search incident to arrest).

In Smith, a 17-minute delay was reasonable where the delay was not caused by "unnecessarily time-consuming activities unrelated to the securing of the suspect and the scene" and the officer's activities during the delay were all incident to the arrest. 119 Wn.2d at 684, 835 P.2d 1025 (the 17-minute delay was not *per se* unreasonable).

Here, as in Boursaw, the driver of the vehicle had been handcuffed and placed in the back of a police cruiser. Mr. Ruiz was standing 15-20 feet away from the minivan, far outside the range where he could either retrieve a weapon from the minivan or destroy evidence secreted therein before the police could stop him. Pursuant to the arrest of the driver of the minivan, two police officers searched the minivan and then decided to call

in a K-9 unit to have the dog sniff the minivan for drugs. At the time the K-9 unit was requested, the scene had been secured and the vehicle had been searched.

Unlike Boursaw, the K-9 unit in the instant case arrived on scene at the earliest 17 minutes after Mr. Buelna-Valdez had been arrested. The time between the initial arrest of the driver and the search by the K-9 unit was unreasonable and exceeded the duration of a search incident to arrest.

ii. *The search of the minivan with the drug-sniffing dog exceeding the scope of a lawful search of the minivan incident to arrest of the driver*

As stated above, "the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception." Ladson, 138 Wn.2d at 357, 979 P.2d 833. The arrest of the driver or passenger of a vehicle gives the police license to search the passenger compartment of the vehicle and all unlocked containers therein in order to discover any weapons or any destructible evidence in order to protect the officers and preserve evidence.

Here, the police officers had secured the driver and Mr. Ruiz was standing 15-20 feet away from the minivan. Two police officers had

already searched the minivan prior to the drug dog being requested. The initial search of the minivan fulfilled the purpose of the search incident to arrest exception to the warrant requirement- the police officers were no longer in any danger and the arrestee and passenger were no longer in a position where they could destroy evidence before police could stop them. The reason the drug dog was requested was because the officers had a suspicion that there might be drugs hidden somewhere in the minivan which the officers had not been able to discover. The search by the drug sniffing dog for purposes of discovering drugs the officers suspected were hidden in the minivan exceeded the search incident to arrest warrant requirement exception and the officers should have obtained a search warrant prior to requesting the K-9 unit.

iii. *Use of the drug sniffing dog constituted an overly intrusive method of performing a search of a vehicle incident to the arrest of a driver or passenger*

Where a law enforcement officer is able to detect something at a lawful vantage point through his or her senses, no unlawful search occurs under article I section 7 of the Washington Constitution and the evidence is admissible against the defendant even if the officer had no warrant to obtain the evidence. State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). However, a substantial and unreasonable departure from a lawful

vantage point, or a particularly intrusive method of viewing, may constitute a search which exceeds the scope of the officer's authority and evidence obtained pursuant to the officer's actions may be inadmissible in court. State v. Young, 123 Wn.2d 173, 182-183, 867 P.2d 593 (1994).

For example, where police use an infrared thermal device to detect heat distribution patterns within a home that are not detectable by the naked eye or other senses, the surveillance was a particularly intrusive means of observation that exceeded allowable limits under article I, section 7. Young, 123 Wn.2d at 182-84, 867 P.2d 593.

In State v. Dearman, 932 Wn.App. 630, 962 P.2d 850 (1998), the court held that,

> [l]ike an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to "see through the walls" of the home. The record is clear that officers could not detect the smell of marijuana using only their own sense of smell even when they attempted to do so from the same vantage point as Corky [the narcotics dog]. As in Young, police could not have obtained the same information without going inside the garage. It is true that a trained narcotics dog is less intrusive than an infrared thermal detection device. But the dog does expose information that could not have been obtained without the device and which officers were unable to detect by using one or more of their senses while lawfully present at the vantage point where those senses are used. The trial court thus correctly found that using a trained narcotics dog constituted a search for purposes of article 1, section 7 of the Washington Constitution and a search warrant was required.

State v. Dearman, 932 Wn.App. 630, 632, 962 P.2d 850, *review denied*, 137 Wn.2d 1032, 980 P.2d 1286 (1999) (citations omitted).

While it is true that the Boursaw court held that the use of a drug sniffing dog did not exceed the scope of the search incident to arrest, the Boursaw court limited its holding to the facts of that case and stressed that the narcotics dog arrived on scene less than ten minutes after Boursaw was arrrested. Boursaw, 94 Wn.App. at 634-635, 976 P.2d 130. Because of the rapid arrival of the dog at the scene of Boursaw's arrest, the Boursaw court viewed the search by the drug sniffing dog to be a continuation of the initial search incident to arrest rather than a separate search. At best, Boursaw stands for the proposition that should an individual be arrested by a K-9 unit, that officer may use a drug sniffing dog as a tool in the initial search of the arrestee's vehicle incident to arrest since the dog was already on scene. However, whether or not use of a dog to search a vehicle incident to arrest constitutes an overly intrusive method of searching a vehicle was not addressed in Boursaw.

In the instant case, the officers had the right to search the minivan for weapons or destructible evidence. The officers performed this search manually and did not discover any drugs. As in Young and Dearman, the

use of the police dog was an overly intrusive method of searching the minivan without a warrant.

b. Even if this court finds that the use of the drug sniffing dog did not exceed the scope of a lawful search incident to arrest, the police exceeded the scope of the search incident to arrest by removing the cupholder and moving the insulation without a warrant since the area behind the cupholder was not a part of the passenger compartment

As stated above, a search of a vehicle incident to arrest of a driver or passenger gives the police the authority to search the passenger area of the vehicle and any unlocked containers found in the passenger area.

The area where the methamphetamine was found was not part of the passenger area of the minivan

While a police officer may conduct a search of the passenger cabin of a vehicle incident to the arrest of the occupants, *see* State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), it is well established that a warrant is required to search a locked trunk, *see* State v. White, 135 Wn.2d 761, 770-71, 958 P.2d 982 (1998).

Both Washington and Federal courts have held that police may not search the trunk area of a vehicle pursuant to the arrest of a passenger or driver. *c.f.* State v. Mitzlaf, 80 Wn.App 184, 189, 907 P.2d 328 (1995), *review denied*, 129 Wn.2d 1015, 917 P.2d 575 (1996); United States v. Perea, 986 F.2d 633, 643 (2d Cir.1993). This is because the "trunk is not

within the reach of the arrestee and thus its contents pose no immediate threat to the arresting officer." United States v. Wright, 932 F.2d 868, 878 (10th Cir.), *cert. denied*, 502 U.S. 962, 112 S.Ct. 428, 116 L.Ed.2d 448 (1991); *cited with approval in* Mitzlaf, 80 Wn.App at 189, 907 P.2d 328.

As this court stated in State v. Johnston, 107 Wn.App. 280, 28 P.2d 775 (2001),

> the key question when applying Belton and Stroud is whether the arrestee had *ready access* to the passenger compartment at the time of arrest. If he could suddenly reach or lunge into the compartment for a weapon or evidence, the police may search the compartment incident to his arrest. If he could not do that, the police may not search the compartment incident to his arrest

Johnston, 107 Wn.App. at 285, 28 P.2d 775 (2001), *review denied*, 145 Wn.2d 1021, 41 P.3d 483 (2002) (emphasis in original).

In Belton, the court construed the term "container" to mean "any object capable of holding another object." Belton, 453 U.S. at 460 n. 4, 101 S.Ct. 2860.

Here, the methamphetamine was found in a void between the exterior sheetmetal and the interior trim panel of the minivan. While this area might be accessible from the passenger area without leaving the vehicle, because this void is not an object, it is not a "container" as the term is defined in Belton. Yet neither is it an area such as a trunk or engine compartment which would require an occupant of the vehicle to

exit the vehicle in order to access it. However, the area where the drugs were found was not readily accessible by either Mr. Ruiz or the driver at the time the driver was arrested. Neither Mr. Ruiz nor the driver of the minivan could have destroyed the drugs or retrieved a weapon hidden in this void before the police stopped them.

The conclusion that the void was not a part of the passenger area is strengthened by the fact that Deputy Ellithorpe had to remove interior panelling and insulation before the drugs were accessible.

Here, the area in which the methamphetamine was found was not part of the passenger area. Applying the test set out in Johnston, the police officer should have obtained a warrant before removing the cupholder and searching the area behind it.

c. Removing the cupholder panel and searching the void exceeded the scope of a search incident to arrest

Assuming, *arguendo*, that the search of the minivan by a drug sniffing dog was proper as part of the search of the minivan incident to the arrest of the driver, Deputy Ellithorpe should not have dismantled the interior of the vehicle to search for drugs without a warrant.

Generally, an "alert" by a trained drug dog is sufficient to establish probable cause for the presence of a controlled substance. State v. Jackson, 82 Wn.App. 594, 606, 918 P.2d 945 (1996), *review denied*, 131

Wn.2d 1006, 932 P.2d 644 (1997). Here, the minivan was in police custody and all occupants of the minivan were either in police custody or outside of the minivan under direct observation by police. No exigent circumstances existed which would allow the police to search the minivan without a warrant and the void where the drugs were found was not a part of the passenger compartment of the minivan. The police had probable cause to seek a search warrant and ample opportunity to do so. Dismantling the interior of the minivan without a warrant exceeded the scope of the police officer's right to search the minivan.

d. The trial court erred in denying Mr. Ruiz's motion to suppress the evidence of the search of the minivan

A criminal defendant is entitled to suppress evidence if the state violates his or her Fourth Amendment rights against illegal search and seizure. U.S. Const. amend. 4; State v. Clark, 124 Wn.2d 90, 105, 875 P.2d 613 (1994). As discussed above, the search of the minivan was unconstitutional and violated Mr. Ruiz's Fourth Amendment rights, and the use of the drug sniffing dog was an overly intrusive method of searching absent a warrant. The trial court erred in denying Mr. Ruiz's motion to suppress the methamphetamine based on an unconstitutional search of the minivan.

4. There was insufficient evidence to convict Mr. Ruiz of possession of methamphetamine with intent to deliver

As stated above, evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine. *See* State v. O'Bremski, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

"Washington's version of the corpus delicti rule requires that the State produce evidence, *independent of the accused's statements,* sufficient to support a finding that the charged crime was committed by someone." State v. Bernal, 109 Wn.App. 150, 152, 33 P.3d 1106 (2001), review denied, 146 Wn.2d 1010, 52 P.3d 519 (2002) (emphasis in original). A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime. State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995).

It is well established that constitutional errors, may be so insignificant as to be harmless. Harrington v. California, 395 U.S. 250, 251-52, 89 S.Ct. 1726, 1727-28, 23 L.Ed.2d 284 (1969); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any

reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wn.2d at 425, 705 P.2d 1182. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. Guloy, 104 Wn.2d at 425, 705 P.2d 1182.

In Guloy, the Washington Supreme Court adopted the "overwhelming untainted evidence" test as the standard Washington courts should use in determining whether or not a Constitutional error was harmless. Guloy, 104 Wn.2d at 426, 705 P.2d 1182. Under the "overwhelming untainted evidence" test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wn.2d at 426, 705 P.2d 1182.

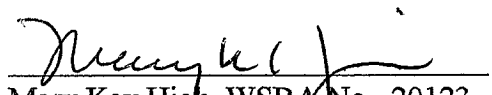
Here, the methamphetamine that was seized during an illegal search should have been suppressed. Without the actual methamphetamine, the only evidence that Mr. Ruiz possessed the methamphetamine with the intent to distribute it was his confession. Under Washington's corpus delicti rule, Mr. Ruiz's confession, standing alone, was insufficient evidence to convict him of possession of methamphetamine with intent to distribute. The untainted evidence in this case, Mr. Ruiz's confession, is not so overwhelming that it necessarily leads to a finding of guilt.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Ruiz's conviction and dismiss the case.

DATED this 13th day of March, 2006.

Respectfully submitted,



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IN THE COURT OF APPEAL FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. REYES RIOS RUIZ, Apellant.	NO. 33647-2-II **AFFIDAVIT OF SERVICE**

AFFIDAVIT OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 16th day of March, 2006, I delivered a true and correct copy of the Opening Brief of Appellant by United States Mail to the following:

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And, I mailed a true and correct copy of the Opening Brief of Appellant and the Verbatim Report of Proceedings to:

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