

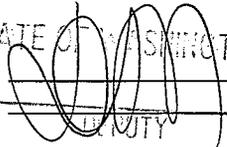
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COURT OF APPEALS  
DIVISION II

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NO. ~~33095-4-II~~  
33642-1-II

STATE OF WASHINGTON

BY  COUNTY

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

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STATE OF WASHINGTON,

Respondent,

v.

DENNIS R. KIRWIN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
CAUSE NO. 05-1-00165-1

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HONORABLE GARY R. TABOR, Judge

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RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUE

1. Whether the arrest of the passenger in the car driven by the defendant was unlawful, and whether the following search incident to arrest was therefore unlawful as well.

B. STATEMENT OF THE CASE

The State is satisfied with the Statement of the Case set forth in Appellants' Brief.

C. ARGUMENT

1. The defendant's failure to move for suppression of evidence in the trial court waives any error associated with admission of the evidence, but in any event there was legal authority for the misdemeanor arrest of the passenger in the vehicle driven by the defendant because the offense took place in the presence of the arresting officer, and so the following search of the passenger area of the vehicle incident to that arrest was also lawful.

While on patrol, Olympia Police Officer Kory Pearce observed the passenger in a vehicle ahead of him throw a beer can out the window of a vehicle. The beer can hit the sidewalk and its contents spilled out. The passenger was contacted and arrested for littering. The officer then searched the passenger area of the vehicle incident to that person's arrest. Under the

passenger seat, the officer found a bag containing eight small bags of what the officer suspected to be methamphetamine.

The officer then went to the defendant, who was the driver of the vehicle, and asked for consent to search a locked center console in the vehicle. The defendant agreed to the officer using the keys in the ignition of the vehicle in order to open the console. The officer then unlocked the console and found a baggie of powder inside, which was later tested at the Washington State Patrol Crime Laboratory, and found to contain methamphetamine. Trial RP 8-15, 30.

Under state law, littering in an amount less than one cubic foot is a Class 3 civil infraction. RCW 70.93.060(2)(a). The maximum penalty for a Class 3 civil infraction is a fine of fifty dollars. RCW 7.80.120(1)(c). A notice of civil infraction may be issued if the violation occurs in the officer's presence. The law allows a police officer to detain an individual long enough to reasonably identify the person and issue a

notice of civil infraction. RCW 7.8.050, RCW 7.80.060. There is no legal authority to arrest an individual for a civil infraction. Therefore, the defendant in this case contends that his arrest for littering was illegal, and therefore the search incident to that arrest was illegal.

However, in the Olympia Municipal Code, littering is a misdemeanor pursuant to Olympia Municipal Code (OMC) 9.40.110. That provision states as follows:

No person shall throw, drop, deposit, discard, or otherwise dispose of litter, as that term is defined in RCW 70.93.030(4), upon any public property within the city or upon private property within the city not owned by him or in the waters of the city whether from a vehicle or otherwise, including but not limited to any sidewalk, street, alley, highway or park, except:

A. When such property is designated by the city for the disposal of garbage and refuse, and such person is authorized to use such property for such purpose;

B. Into a litter receptacle in such a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of such private or public property or waters;

C. Any person violating any provisions of this section is guilty of a misdemeanor and the fine or bail forfeiture for such violation shall not be less than ten dollars

for each offense, and, in addition thereto, in the sound discretion of the judge, such person may be directed by the judge to pick up and remove from any public place or private property, with prior permission of the legal owner, upon which it is established by competent evidence that such person has deposited litter.

See Appendix A. The penalty for a misdemeanor violation of the Olympia Municipal Code is set forth in OMC 9.64.101, which states in pertinent part:

A. Misdemeanors. Any person who violates any chapter of Title 9 shall be deemed to have committed a misdemeanor, unless the offense is designated a gross misdemeanor and, if found guilty, shall be subject to a fine not to exceed one thousand dollars, or to imprisonment not to exceed ninety days (90), or to both such fine and imprisonment.

See Appendix A.

A police officer may arrest a person without a warrant for committing a misdemeanor when that offense is committed in the presence of the officer. RCW 10.31.100. In this case, the officer observed the offense occur in front of him, and he immediately took enforcement action. His arrest of the passenger was therefore legal,

as was the search incident to that arrest.

The search of the vehicle in this case was never challenged in the trial court. The failure of the defendant to move to suppress evidence he now contends was illegally obtained constitutes a waiver of any error associated with the admission of the evidence. State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). The defendant argues that this case falls within an exception to that rule in cases where the trial record is sufficiently complete to show that the trial court would have likely granted a motion to suppress had one been made. State v. Contreras, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). The defendant contends that this is such a case.

However, this appeal makes clear the fallacy of that argument. Without a record from a suppression hearing, Appellant's counsel was forced to guess what legal authority the officer had acted under in making the arrest. Thus, the argument is made that the arrest was for a violation of a state code provision which is, in

fact, a civil infraction. No mention is made of the fact that legal authority existed in the Olympia Municipal Code for the criminal arrest in this case.

This sort of problem on appeal speaks to the wisdom of the general rule, and the appropriateness of its application here. Consequently, given the lack of a suppression hearing in the trial court, it should be found that there has been no manifest error shown in this case justifying consideration of the claim of an illegal search.

The defendant also argues that his trial counsel rendered ineffective assistance in not raising a motion to suppress on the basis of an illegal arrest. When such a claim is made, the defendant has the burden of showing that the trial attorney's representation fell below an objective standard of reasonableness and that, but for the errors of counsel, there is a reasonable probability that the result of the proceedings would have been different. State v. Garrett, 124

Wn.2d 504, 518-519, 881 P.2d 185 (1994).

In this case, no such showing has been made.

The argument is that there was no authority for the arrest or the resulting search, and so counsel was deficient in not addressing that problem, and had she done so suppression of the evidence would necessarily have occurred. However, there was legal authority for the arrest. Therefore, the defendant has not shown a reasonable probability of a different result had a motion to suppress been made.

D. CONCLUSION

Based on the above arguments, the State respectfully requests that the defendant's conviction for unlawful possession of a controlled substance be affirmed.

DATED this 7th day of June, 2006

Respectfully submitted,

  
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JAMES C. POWERS/WSBA #12791  
DEPUTY PROSECUTING ATTORNEY

# APPENDIX

## A

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**09.40.110 - Disposal of litter-Penalty for violation**

No person shall throw, drop, deposit, discard, or otherwise dispose of litter, as that term is defined in RCW 70.93.030 (4), upon any public property within the city or upon private property within the city not owned by him or in the waters of the city whether from a vehicle or otherwise, including but not limited to any sidewalk, street, alley, highway or park, except:

**A.** When such property is designated by the city for the disposal of garbage and refuse, and such person is authorized to use such property for such purpose;

**B.** Into a litter receptacle in such a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of such private or public property or waters;

**C.** Any person violating any provisions of this section is guilty of a misdemeanor and the fine or bail forfeiture for such violation shall not be less than ten dollars for each offense, and, in addition thereto, in the sound discretion of the judge, such person may be directed by the judge to pick up and remove from any public place or private property, with prior permission of the legal owner, upon which it is established by competent evidence that such person has deposited litter.

(Ord. 3957 §3(J), 1976).

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**09.64.010 - Penalty-Violation**

**A. Misdemeanors.** Any person who violates any chapter of Title 9 shall be deemed to have committed a misdemeanor, unless the offense is designated as a gross misdemeanor and, if found guilty, shall be subject to a fine not to exceed one thousand dollars, or to imprisonment not to exceed ninety days (90), or to both such fine and imprisonment.

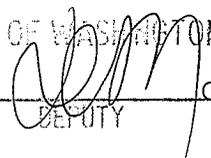
**B. Gross misdemeanors.** Any person who violates any chapter of Title 9 which is a gross misdemeanor shall, if found guilty, be subject to a fine not to exceed five thousand dollars (\$5,000), or to imprisonment not to exceed one year, or to both such fine and imprisonment.

(Ord. 5164 §1(part), 1991).

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NO. 33642-1-II

STATE OF WASHINGTON )  
BY  ) IN THE COURT OF APPEALS  
DEPUTY ) OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
Respondent ) DECLARATION OF  
v. ) MAILING  
DENNIS R. KIRWIN, )  
Appellant )

STATE OF WASHINGTON )  
COUNTY OF THURSTON ) ss.

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 7th day of June, 2006, I caused to be mailed to appellant's attorney, PATRICIA A. PETHICK, a copy of the Respondent's Brief, addressing said envelope as follows:

Patricia A. Pethick,  
Attorney at Law  
P.O. Box 7269  
Tacoma, WA 98406-0269

I certify (or declare) under penalty of perjury  
under the laws of the State of Washington that the  
foregoing is true and correct to the best of my  
knowledge.

DATED this 7<sup>th</sup> day of June, 2006 at Olympia, WA.

  
James C. Powers/WSBA #12791  
Senior Deputy Prosecuting Attorney