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SUPREME COURT  
STATE OF WASHINGTON

2008 JUN 30 8:31

No. 80308-1

BY RONALD R. CARPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MICAH TIBBLES,

Petitioner.

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ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUMMARY OF ARGUMENT

Mr. Tibbles presents two issues under Washington Constitution article 1, § 7. In Hammond,<sup>1</sup> the Court of Appeals authorized prearrest vehicle searches incident to arrest under the Fourth Amendment when an officer smells marijuana in the car. O'Neill,<sup>2</sup> a later Supreme Court case, held that article 1 § 7 requires an actual arrest precedent to searches incident to arrest. Accordingly, to the extent that Hammond conflicts with O'Neill, it must be overturned.

Second, in Duncan this Court held that it imposes a higher burden on officers when they are investigating lesser crimes, and will tolerate a lower level of intrusion into private areas. And in Parker, this Court held that article 1 § 7 prohibits the full blown search of nonarrested vehicle occupants. For these reasons, this Court should hold that investigation of misdemeanor marijuana possession does not justify application of the exigent circumstances exception permitting warrantless intrusion into the privacy of a citizen's vehicle.

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<sup>1</sup> 24 Wn. App. 596, 600, 603 P.2d 377 (1979).

<sup>2</sup> 148 Wn.2d 564, 62 P.2d 489 (2003).

## B. ISSUES PRESENTED

1. Does O'Neill's requirement of an actual arrest precedent to a search incident to arrest apply in the context of investigation of misdemeanor marijuana possession during a traffic stop?

2. Does article 1, § 7 protect citizens against warrantless prearrest vehicle searches during a traffic stop when the crime suspected is misdemeanor marijuana possession?

## C. STATEMENT OF THE CASE

Mr. Tibbles was stopped for having a defective taillight.<sup>3</sup> While speaking with Mr. Tibbles about his registration, the officer smelled what he believed was the odor of marijuana coming from the vehicle. Id. When confronted, Mr. Tibbles denied possessing any marijuana, yet the officer searched both him and the car without consent. Id. After Mr. Tibbles denied that a glass pipe and marijuana residue found in the car were his, the officer arrested Mr. Tibbles. Id.

Mr. Tibbles raised O'Neill at suppression but, citing Hammond, the trial court decided that the search was authorized by the "probable cause/exigent circumstances" exception to the

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<sup>3</sup> Memorandum Decision of Island County District Court, attached as Appendix A, page 2.

warrant requirement. Id. Completely ignoring the minor nature of the offense, the court admitted the evidence despite failing to find that either Trooper Larsen or the public were in any danger, that there was any urgency to effect the search, or that there was insufficient time to obtain a warrant. Id. Additionally, the court noted, “nor was any evidence offered as to the exigent circumstances justifying a warrantless search.”<sup>4</sup>

#### D. ARGUMENT

##### 1. O’NEILL PROHIBITS THE APPLICATION OF HAMMOND IN THIS CASE

a. O’Neill prohibits searches incident to arrest before an actual arrest has occurred. Since authority of law for a search incident to arrest derives from the arrest itself, the arrest must precede the search. 148 Wn.2d at 585. This rule directly conflicts with Hammond’s statement that “[a]s long as probable cause to arrest exists at the time of the search, however, the search can occur before the officers place the subject under formal arrest if the search and arrest constitute a unified and reasonable undertaking.” 24 Wn. App. at 600.

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<sup>4</sup> Order of the Oak Harbor District Court, attached as Appendix B, “Further Observations” page 4.

In Hammond, an officer smelled marijuana during a traffic stop, searched the driver, then searched the vehicle and its passengers before arrest. Id. at 597. Analyzing only under the Fourth Amendment, the Hammond court held that these searches were constitutional: “If the marijuana odor constitutes probable cause to arrest the vehicle's occupants, police may of course search them incident to the arrest.” Id. It is worth noting that even the Hammond court characterized such searches as searches incident to arrest, not pursuant to exigent circumstances.

Hammond continued, “[a]s long as probable cause to arrest exists at the time of the search, however, the search can occur before the officers place the subject under formal arrest if the search and arrest constitute a unified and reasonable undertaking.” It is this portion of Hammond which directly conflicts with O’Neill and must be overruled. While it is an open question whether Hammond represents a correct analysis under the Fourth Amendment, this Court has since ruled that under article 1 § 7, actual arrest must precede the search.

b. Mr. Tibbles’ case falls under O’Neill. Hammond correctly characterized searches of this type as incident to arrest, as has this Court; See State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184

(2004). It is only because the officer failed to follow O'Neill and did not arrest before searching that the state portrays this as an exigent circumstances search. Recharacterizing this as an exigent circumstances search, however, would create an absurd situation, one in which the "exigency" would be created by the officer's failure to arrest before searching. Such reasoning would run directly counter to this Court's holding in Stroud that an arrest creates a heightened need for intrusion into a citizen's private affairs. State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986); See also Berkemer v. McCarty, 468 U.S. 420, 434 n.5, 82 L.Ed.2d 317, 104 S.Ct. 3138 (1984)("the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.") The state's position that this is an exigent circumstances search simply makes no sense. Accordingly, this Court should hold that Mr. Tibbles' case is governed by O'Neill.

## 2. EXIGENT CIRCUMSTANCES DOES NOT PROVIDE AUTHORITY TO SEARCH MR. TIBBLES' VEHICLE

Exigent circumstances will not support the warrantless search of a home to investigate misdemeanor marijuana possession. State v. Ramirez, 49 Wn. App. 814, 746 P.2d 344

(1987). Further, this Court has been unwilling to allow even the search incident to arrest exception to be used to search a private residence for evidence of misdemeanor marijuana possession.

State v. Chrisman, 100 Wn.2d 814, 821-22, 676 P.2d 419 (1984).

No published Washington case, however, clarifies whether article 1, § 7 permits a search of a vehicle for misdemeanor marijuana based on exigent circumstances. To determine whether such a search is permissible, one must examine the reasoning of this Court's exigent circumstances cases and analyze the degree of protection article 1 § 7 accords vehicle occupants. Finally, this court's cases and the decisions of other jurisdictions provide guidance regarding the appropriate balance in a misdemeanor marijuana possession case between exigent circumstances and the privacy interest in automobiles.

a. Washington applies the exigent circumstances exception to the warrant requirement very narrowly. In 1983, this Court decided Counts, three consolidated cases in which the state claimed that exigent circumstances authorized warrantless entry into defendants' private areas. 99 Wn.2d 54, 63, 659 P.2d 1087 (1983). Mr. Counts was suspected of burglarizing a golf clubhouse because an alleged accomplice found hiding in nearby bushes

named Mr. Counts as his accomplice. Id. at 59. A K-9 search led to Mr. Counts' home and the police entered without a warrant. This Court held exigent circumstances did not permit warrantless entry since "[t]he police easily could have maintained surveillance while waiting for a warrant." Id. at 60.

Mr. Holmes was suspected of rape and after the victim pointed out the house where she was very recently raped, police entered without a warrant. Id. at 61-2. This Court held exigent circumstances did not permit the warrantless entry because there was no danger of imminent destruction of evidence and, "[a]gain, the police could have maintained surveillance while obtaining the requisite warrant." Id. at 62. The Court noted, "the exigent circumstances doctrine is applicable only within the narrow range of circumstances that present a real danger to the police or the public or a real danger that evidence . . . might be lost." Id. at 63.

Mr. Barilleaux was suspected of burglary and the police received a tip that he was about to leave the area. Id. at 63. They went to his house, entered without warrant or consent, and arrested him. Id. This Court held that "there were no exigent circumstances to excuse the warrantless entry. Knowing that Barilleaux was

inside, the police had ample time to secure a warrant before entering.” Id. at 64-5.

This reasoning has been consistently followed since Counts. In Wolters, 133 Wn. App. 297, 135 P.3d 562 (2006), the Court of Appeals explained that “[t]he idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a warrant.” State v. Bessette, 105 Wn. App. 793, 798, 21 P.3d 318 (2001). Exigency is measured in significant part, by considering whether it was feasible for the police to guard the premises while seeking a warrant. State v. Welker, 37 Wn. App. 628, 633, 683 P.2d 1110 (1984) (citations omitted). The State must show reasons why it was impractical, or unsafe, to take the time to get a warrant. Bessette, 105 Wn. App. at 798. 133 Wn. App. at 303. See State v. Leupp, 96 Wn. App. 324, 330, 980 P.2d 765 (1999) (“exigent circumstances are present where it may be impractical to obtain a search warrant”), review denied, 139 Wn.2d 1018, 994 P.2d 849 (2000). They must then show reasons why it is impractical, or unsafe, to take the time to acquire a warrant or why a warrant would, other than for constitutional reasons, be unavailable.”

This Court has also held that the potential mobility of a vehicle does not by itself provide exigent circumstances sufficient to justify a warrantless search. State v. Patterson, 112 Wn.2d 731, 734-35, 774 P.2d 10 (1989): “exigencies in addition to potential mobility” are required. Id. at 735.

As these cases demonstrate, Washington applies the exigent circumstances exception quite sparingly. The automobile exception does not exist in Washington, and even a charge as serious as rape cannot necessarily support a finding of exigent circumstances to enter a private area when no harm would come of waiting for a warrant.

b. Washington traditionally recognizes a heightened privacy interest in the contents of one’s automobile. In State v. Parker, 139 Wn.2d 486, 501-02, 987 P.2d 73 (1999), a case concerning warrantless searches of nonarrested vehicle occupants, this Court recognized Washington’s long history of protecting the privacy of citizens’ vehicles. Quoting with approval from a 1922 case,<sup>5</sup> this Court wrote:

More than 75 years ago, in Gibbons, we explicitly recognized the citizens of this state have a right to the privacy of their vehicles.

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<sup>5</sup> State v. Gibbons, 118 Wash. 171, 187-88, 203 P. 390 (1922).

We note that the case before us does not involve a search . . . in the home of appellant; but manifestly the constitutional guaranty that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law," *protected the person of appellant, and the possession of his automobile and all that was in it*, while upon a public street of Ritzville, against arrest and search without authority of a warrant of arrest, or a search warrant, *as fully as he would have been so protected had he and his possession been actually inside his own dwelling*; that is, his "private affairs" were under the protection of this guaranty of the constitution, whether he was within his dwelling, upon the public highways, or wherever he had the right to be.

Gibbons, 118 Wash. at 187-88 (quoting Wash. Const. art. 1 § 7).

(emphasis in Parker and Gibbons.)

Citing Mesiani,<sup>6</sup> Hendrickson,<sup>7</sup> and Mendez,<sup>8</sup> Parker

declared, "[t]he foregoing underscores our continued recognition of a constitutionally protected privacy interest the citizens of this state have held, and should continue to hold, in their automobiles and the contents therein." 139 Wn.2d at 496. Parker emphasized further that "while the search incident to arrest exception functions to secure officer safety and preserve evidence of the crime for which the suspect is arrested, in the absence of a lawful custodial arrest a full blown search, regardless of the exigencies, may not validly be made." Id. at 496-97 (emphasis added).

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<sup>6</sup> 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988).

<sup>7</sup> 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996).

<sup>8</sup> 137 Wn.2d 208, 219, 970 P.2d 722 (1999).

Finally, regarding the privacy rights of nonarrested vehicle occupants, Parker said, “the balance has already been struck . . . [e]ven in the context of an automobile stop, when a person is not under arrest the scope of any search of such individual is limited to ensure officer safety only and must be supported by objective suspicions that the person searched may be armed or dangerous.” Id. at 501-02.

From these strong statements it is apparent that article 1 § 7 vigilantly protects the privacy interests of nonarrested vehicle occupants.

c. Application of the exigent circumstances exception must be balanced against the privacy interest at stake. It would be appropriate to conclude that, as Parker said, “the balance has already been struck,” in favor of the privacy interest at stake in Mr. Tibbles’ vehicle. Should this Court wish to take the inquiry further, however, there is plentiful support for the conclusion that the state’s need to investigate possible past misdemeanor marijuana possession does not provide authority of law sufficient to outweigh a nonarrested citizen’s right to privacy in the contents of their vehicle.

A primary consideration when analyzing exigent circumstances is the gravity of the offense:

Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Welsh v. Wisconsin, 466 U.S. 740,750, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984).

In State v. Duncan, 146 Wn.2d 166, 43 P.3d 513, 515, 521 (2002) , this Court held that police could not initiate a Terry stop and frisk after they observed a suspect who might have committed a civil infraction (drinking alcohol in public). The Duncan court acknowledged the principle that the traditional interest in officer safety and crime prevention "may not be present when dealing with past crime." Id. at 518 ("The . . . focus on preventing *crimes*, and promoting the interests of justice in arresting *felons* in *Hensley*, suggests that the interest in preventing civil infractions may not be accorded the same weight."). This Court also underscored the distinction between felonies and misdemeanors that bears on the

delicate balance between public safety and personal security from governmental intrusion:

[T]his court has cited favorably the common law rule requiring a warrant prior to arresting an individual for the commission of a misdemeanor. . . . This rule illustrates the higher burden this court imposes upon officers when investigating lesser crimes. Accepting the presumption that more serious crimes pose a greater risk of harm to society, we place an inversely proportional burden in relation to the level of the violation. Thus, society will tolerate a higher level of intrusion for a greater risk and higher crime than it would for a lesser crime.

Id. at 518-19 (internal citations omitted). It is thus apparent that any analysis of possible exigent circumstances must begin with an assessment of the gravity of the suspected crime. In Mr. Tibbles' case, the gravity of the suspected crime was never considered by the trial court or any of the reviewing courts.

Other jurisdictions have struck the balance in favor of individual privacy interests in cases involving misdemeanor marijuana possession in a vehicle.

In People v. Hilber, 403 Mich. 312, 269 N.W.2d 159 (1978), the driver and sole occupant of a car was stopped for speeding. Id., 403 Mich. at 319. The officer smelled a "distinct, strong odor of marijuana coming from the car." Id. at 321. Although the officer believed that the marijuana had been smoked "quite recently," id. at 322, the Michigan Supreme Court found no basis for that opinion:

A persistent automobile odor may be strong and appear to be recent although it has lingered for hours, days or even longer. (Where, for example, beer has been spilled or a large number of cigars have been smoked in an automobile there will be a strong odor even though no beer or cigars have been consumed for a considerable time.) . . . [I]t is not reasonable to infer present use of marijuana, or to conduct a search for it, on the basis of past use of marijuana evidence solely by a residual odor of marijuana in an automobile occupied by the defendant, absent determination with reasonable accuracy of the time frame of use in relation to defendant's occupancy.

Id. at 326-26 (emphasis added). In Kansas City v. Butters, 507 S.W.2d 49, 54 (1974), a Kansas Court of Appeals confronted the issue when an officer stopped a car for a defective headlight, smelled a "medium to strong" odor of marijuana, and searched the defendant driver, finding marijuana. Id. at 52. Overturning the conviction, the Butters court concluded that since the officer did not arrest the defendant before searching him, "the patrolman himself concluded that he had no grounds, reasonable or otherwise, to believe that defendant was perpetrating an offense." Id. at 54. Since the arrest followed the search, Butters characterized the search as a failed search incident to arrest and held it unconstitutional. Id.

The Montana Supreme Court held that even when a K9 drug dog alerts to a vehicle, that by itself does not provide authority of

law to apply the exigent circumstances exception to the warrant requirement. State v. Logan, 311 Mont. 239, 244, 53 P.3d 1285 (2002). While the lower court held that a delay to obtain a warrant could result in destruction of the evidence, the Montana Supreme Court found the potential for destruction of the marijuana was not weighty enough to provide lawful authority for the search. Logan emphasized that under Montana's state constitution, "the category of warrantless searches which may be lawfully conducted under the Montana Constitution is narrower than the category of warrantless searches which may be conducted under the Fourth Amendment." Id. at 243. Because the state had shown no concrete reason that a warrant could not have been obtained, the case was "a far cry from the "specific and articulable facts" required to establish the existence of exigent circumstances" under the Montana Constitution. Id.

This decision is consistent with an earlier Montana Supreme Court case in which, after detecting the "strong" odor of marijuana in a stopped car, officers searched the car without warrant, consent, or arrest. State v. Schoendaller, 176 Mont. 376, 382, 578 P.2d 730 (1978). The Montana court held that the odor of marijuana alone, even if strong, did not provide exigent

circumstances to search the vehicle, and indeed “falls closer to the realm of bare suspicion than probable cause.” Id.

There is no automobile exception in Washington, yet if the Court holds exigent circumstances exist in this case it will be tantamount to bringing the automobile exception to Washington. Adopting the state’s rationale would effectively abolish the warrant requirement for automobile searches, since they are all potentially mobile. The claimed “exigency” in Mr. Tibbles’ case is an example of the type of boilerplate rationale that could be used to justify warrantless prearrest search of any vehicle stopped at night where there is suspicion that any offense, no matter how slight, has been committed at any time in the past.

Moreover, the repeated refusals of the lower courts in this case to even consider the gravity of the suspected offense demonstrate that this Court needs to provide guidance to the courts and law enforcement in this area. As this Court noted last year, “there are thousands of misdemeanor arrest warrants in the state that have not been served.” State v. Hatchie, 161 Wn.2d 390, 401, 166 P.3d 698 (2007). This reality undercuts the state’s argument that misdemeanor marijuana possession is such a grave offense that it justifies invading the automobile privacy so vigilantly

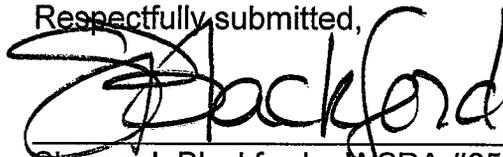
protected by this Court. This Court should hold that the odor of marijuana in an automobile does not by itself provide exigent circumstances to perform a warrantless, prearrest search of that automobile or its occupants.

E. CONCLUSION

Because the search preceded the arrest in this case, O'Neill compels reversal. To the extent Hammond conflicts with O'Neill, Hammond should be overruled. The nature of the crime must be given primary consideration in an assessment of exigent circumstances. In this case, the Court should hold that society's need to pursue suspicion of misdemeanor marijuana possession is not urgent enough to outweigh the protections article 1 § 7 has traditionally extended to nonarrested vehicle occupants during a traffic stop.

DATED this 27<sup>th</sup> day of June, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Blackford", written over a horizontal line.

Sharon J. Blackford – WSBA #25331  
Attorney for Petitioner Micah Tibbles

# APPENDIX A

ISLAND COUNTY DISTRICT COURT  
OAK HARBOR MUNICIPAL COURT  
COUPEVILLE MUNICIPAL COURT  
LANGLEY MUNICIPAL COURT  
800 SE 8<sup>TH</sup> AVENUE  
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*P. H. STROW*  
JUDGE

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*LINDA B. KIPLING*  
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March 31, 2005

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Memorandum Decision  
C560932

Counsel:

The defense moved to suppress the items seized by Trooper Larsen during his search of the vehicle on October 28, 2004, as the products of an illegal, warrantless search. The defense specifically objected to the search because it could not be justified as a search incident to arrest (no arrest having been made) or as the result of inevitable discovery. The State replied asserting that the officer's observation (smell of marijuana) justified an immediate warrantless search of the vehicle.

On February 14, 2005, Trooper Larsen testified at a hearing held pursuant to CrRLJ 3.6, and I denied the motion to suppress finding that the otherwise unexplained smell of marijuana emanating from a vehicle driven by a sole occupant could provide probable cause for a search of the vehicle under the exigent circumstances exception to the general rule prohibiting warrantless searches. I will set out my findings of fact and conclusions of law below.

Findings of Fact

- 1) On October 28, 2004 at 2355 Trooper Norman Larsen stopped a vehicle driven by the defendant for a defective left taillight.
- 2) During the encounter Trooper Larson noticed the strong odor of marijuana coming from the vehicle.
- 3) The driver provided a license identifying himself as Micah N. Tibbles, but could not find the registration.
- 4) Trooper Larsen asked Mr. Tibbles to step out of the vehicle, and Mr. Tibbles complied
- 5) Trooper Larsen advised Mr. Tibbles that he could smell the odor of marijuana coming from the vehicle, and Mr. Tibbles stated that he did not have any marijuana
- 6) Trooper Larsen searched Mr. Tibbles and did not find any marijuana or paraphernalia on his person
- 7) Trooper Larsen asked Mr. Tibbles if he had smoked any marijuana that day, and Mr. Tibbles said that he had not.
- 8) Trooper Larsen then searched the interior of the vehicle and found a glass pipe, a glass container with suspected marijuana inside, a knife, and two lighters in a brown paper bag under the front passenger seat.
- 9) Trooper Larsen asked defendant about the marijuana, and Mr. Tibbles denied that it was his.
- 10) Defendant was not arrested but was cited and released at the scene, and the evidence was transported to the Oak Harbor Washington State Patrol evidence locker and assigned agency case number 04-13446.
- 11) The evidence was analyzed by Scott Legler, a leaf technician for the Washington State Patrol and found to contain 6.6 grams of marijuana.

Conclusions of LawPreface

This was a warrantless search and not incident to arrest. As a general rule warrantless arrests are prohibited unless they fall within seven carefully defined exceptions:

- 1) Consent
- 2) Stop and frisk
- 3) Search incident to lawful arrest
- 4) Probable cause/exigent circumstances
- 5) Hot pursuit
- 6) Plain view
- 7) Inventory

The only exception that could apply in this case is (4) Probable cause/exigent circumstances.

Washington courts have long held that probable cause to arrest and search the occupants of a car for possession of a controlled substance exists when a trained, experienced officer detects the odor of a controlled substance emanating from an automobile: *State v Hammond*, 24 Wn. App. 596, 600 (1979); irrespective of whether the smell comes from the person or the car. If a car is readily mobile and probable cause exists to believe that it contains contraband, it may be searched without a separate exigency requirement, *Pennsylvania v. Labson*, 15 L.Ed. 2<sup>nd</sup> 1031 (1996).

*State v. O'Neill*, 148 Wn. 2<sup>nd</sup> 564, 62 P.2d 489 (2003) has recently addressed searches of automobiles in similar circumstances holding that the search incident to arrest exception may not be used to justify a warrantless search of a motor vehicle when the custodial arrest follows the search. As *O'Neill* correctly points out, it is the fact of custodial arrest that provides the legal basis for the search, and consequently the actual fact of arrest must precede the search. *O'Neill* also holds that inevitable discovery cannot validate the arrest even where the search and arrest are close in time.

What *O'Neill* does not address is the probable cause/exigent circumstances exception to the warrant requirements. In *O'Neill*, the officer approached a vehicle, asked the occupant to step out to pat him down for identification, saw a suspected coke spoon on the floor, seized the spoon and then searched the entire vehicle finding controlled substances that were not otherwise in plain view. The court said that seizing the spoon without a warrant was justified by the plain view exception to the warrant requirement but held that the other items were seized during an illegal warrantless search. In *O'Neill*, the state had argued that under the existing case law that the search incident to arrest could precede the custodial arrest so long as the two were close in time. The state, in *O'Neill*, did not urge probable cause/exigent circumstances as an alternate basis for admitting the evidence, and were probably correct in not doing so, since there was no probable cause to believe any other evidence of controlled substance would be found as there was no indication by smell or other sense that such substance were present.

In our present case, the officer smelled marijuana, and could not find any on the defendant. Moreover the defendant denied consuming any that day. The officer then had probable cause to believe that marijuana either was in or had recently been in the defendant's automobile. His smell of the marijuana was essentially an equivalent to the *O'Neill* officer's visual observation of the coke spoon justifying the quick entry and seizure of any small amount of marijuana or paraphernalia the might be found. In *O'Neill*, once the spoon was found there was no probable cause to believe that other items were present. In our case, probable cause to search existed until something capable of producing the smell was found.

As I indicated at the suppression hearing, however, admission of the items seized would require prior proof that the officer was properly qualified to identify the smell of marijuana, as well as proof of exigent circumstances justifying forgoing the normal warrant requirement.

Probable cause/exigent circumstances is a separate legal justification for a warrantless search. That exception requires proof of probable cause to believe that a crime has been committed; that items of evidentiary value relating to that crime will be found in the premises to be searched; and that exigent circumstances exist which do not permit a reasonable time and delay for a judicial officer to evaluate and act upon probable cause applications for warrants by police officers.

The facts used to determine the reasonableness of the search under the exigent circumstances rule include:

- 1) The degree of urgency and the amount of time necessary to obtain a warrant;
- 2) A reasonable belief that contraband was about to be removed;
- 3) The possibility of danger to police officers guarding the area while the warrant was obtained;
- 4) Indications that the possessor of contraband was aware of police activity directed at them;
- 5) The ready destructibility of the contraband, and the officer's knowledge that disposal efforts are characteristic behavior of persons engaged in a particular line of criminal activity.

The facts presented to the court during the evidentiary hearing suggested that the prosecutor might be able to establish that the warrantless search was reasonable in this instance under the probable cause/exigent circumstances exception. Accordingly the defense motion to suppress for lack of justification for the search under the search incident to arrest or inevitable discovery exceptions to the warrant requirement was denied, and the question of the admissibility of the marijuana and paraphernalia was reserved for trial.

The court notes that some of the evidence that might provide the foundation for proving the existence of exigent circumstances include:

#### Removal of Contraband

Trooper Larsen believed that evidence relating to the use or possession of marijuana was present in a vehicle which was under the control of a defendant he intended to cite and release;

#### Awareness of its Presence

Trooper Larsen had informed the defendant of his suspicions concerning the marijuana, and had physically searched the defendant;

Destruction of Evidence

Evidence of controlled substances crime is readily destroyed.

The evidentiary foundation for admitting the questioned evidence must be established before the evidence is received at trial.



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P.H. Strow  
Judge, Island County District Court

## APPENDIX B

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IN THE DISTRICT COURT FOR THE STATE OF WASHINGTON ISLAND COUNTY

STATE OF WASHINGTON,	)	Case No. C560932
Plaintiff,	)	
	)	TRIAL ON STIPULATED FACTS; ENTRY OF
	)	JUDGEMENT
vs.	)	
	)	
MICAH TIBBLES,	)	
Defendant	)	
	)	

INTRODUCTION

This case involves a routine traffic stop for an equipment defect. During initial contact with the driver and sole occupant the officer detected the odor of marijuana emanating from the vehicle. After the defendant denied recent use or possession the officer searched his person without results and the vehicle where he found marijuana and paraphernalia. Those items were seized and the defendant was cited and released.

This matter came on for a trial on stipulated facts on March 17, 2005, following a motion to suppress pursuant to CrRLJ 3.6 heard on February 14, 2005. The general nature of the motion was to suppress the results of the search which discovered marijuana and paraphernalia in an auto under defendant's dominion and control. The motion specifically alleged that the search could not be justified as a search incident to arrest as no custodial arrest was effected and it could not be justified under the inevitable discovery doctrine, citing *State v. O'Neill*, 148 Wn. 2d 564, 585, 591, 62 P.2d 489 (2003) which rejected the inevitable discovery doctrine in the

1 context of searches incident to arrest in these cases where the search  
2 preceded the custodial arrest.

3 At the conclusion of the hearing on the motion to suppress the court  
4 denied the motion to suppress on the grounds that the state could gain  
5 admission of the evidence under the probable cause/exigent circumstances  
6 exception to the warrantless search prohibition, but conditioned the  
7 admissibility of the evidence on the showing at trial that the officer had  
8 the training and experience to identify the smell of marijuana sufficient to  
9 establish probable cause to search and on a further adequate showing of  
10 sufficient exigent circumstance to justify dispensing with a judicially  
11 approved warrant.

#### 12 Stipulated Facts

13 On March 17, 2005, the following facts were stipulated to the court for  
14 trial:

- 15 1) On October 28, 2004, at 2355 Trooper Norman Larsen stopped a vehicle  
16 driven by the defendant for a defective left taillight.
- 17 2) During the encounter Trooper Larsen noticed the strong odor of  
18 marijuana coming from the vehicle.
- 19 3) The driver provided a license identifying himself as Micah N. Tibbles,  
20 but could not find the registration.
- 21 4) Trooper Larsen asked Mr. Tibbles to step out of the vehicle, and Mr.  
22 Tibbles complied.
- 23 5) Trooper Larsen advised Mr. Tibbles that he could smell the odor of  
24 marijuana coming from the vehicle, and Mr. Tibbles stated that he did  
25 not have any marijuana.
- 6) Trooper Larsen searched Mr. Tibbles and did not find any marijuana or  
paraphernalia on his person.
- 7) Trooper Larsen asked Mr. Tibbles if he had smoked any marijuana that  
day, and Mr. Tibbles said that he had not.

ORDER DENYING MOTION TO SUPPRESS - 2

Island County District Court  
800 SE 8<sup>th</sup> Ave  
Oak Harbor WA 98277

1 8) Trooper Larsen then searched the interior of the vehicle and found a  
2 glass pipe, a glass container with suspected marijuana inside, a knife,  
3 and two lighters in a brown paper bag under the front passenger seat.

4 9) Trooper Larsen asked defendant about the marijuana, and Mr. Tibbles  
5 denied that it was his.

6 10) Defendant was not arrested but was cited and released at the scene, and  
7 the evidence was transported to the Oak Harbor Washington State Patrol  
8 evidence locker and assigned agency case number 04-13446.

9 11) The evidence was analyzed by Scott Legler, a leaf technician for the  
10 Washington State Patrol and found to contain 6.6 grams of marijuana.

11 After considering the evidence and argument of counsel the court found:

12 Findings

13 1) That the defendant was the driver and sole occupant of the auto stopped  
14 by Trooper Larsen on October 28, 2004;

15 2) That the defendant exercised dominion and control over the vehicle;

16 3) That less than 40 grams of marijuana and paraphernalia were found  
17 during the search of the vehicle;

18 4) That the affirmative defense of unwitting possession was not raised by  
19 the evidence submitted;

20 5) That defendant had unlawful constructive possession of the marijuana  
21 and paraphernalia.

22 Accordingly a judgement finding the defendant guilty and deferring imposition  
23 of sentence was entered.

24 Dated this 31 day of March, 2005.



25 F H Strow, Judge

Island County District Court

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Further Observations

I would note parenthetically that no evidence was presented during the trial on stipulated facts as to Trooper Larsen's training or background in marijuana smell identification nor was any evidence offered as to the exigent circumstances justifying a warrantless search. There was also no evidence presented concerning ownership of the vehicle nor the period that vehicle was under the defendant's control. Those are matters which would have been important relating to probable cause to search; exigent circumstances relating to the search; or dominion and control as substantive evidence. At a bench or jury trial on the same evidence offered here I might well have suppressed the evidence or granted a motion to dismiss for insufficiency of the proof of guilt.

However, at a trial on stipulated facts for possession of marijuana and paraphernalia, all the court need find is the identity of the defendant, his dominion and control over the seized items; and proof that those items were actually marijuana and paraphernalia. That proof is present in the stipulated facts. The remaining issue, unwitting possession, is an affirmative defense. Since no evidence was offered by the defense on that issue during trial the prosecution had no obligation to negate the defense.

Dated this 31 day of March, 2005.



P.H. Strow, Judge  
Island County District Court

**CERTIFICATION OF SERVICE**

I, Sharon J. Blackford, certify that on this 27<sup>th</sup> day of June, 2008, I caused a true and correct copy of SUPPLEMENTAL BRIEF OF PETITIONER to be served on:

ISLAND COUNTY PROSECUTING ATTORNEY  
P.O. Box 5000  
Coupeville, WA 98239

VIA FIRST CLASS MAIL, POSTAGE PREPAID

SIGNED in Seattle, Washington, this 27<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
Sharon J. Blackford

FILED  
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STATE OF WASHINGTON  
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