

81068-1

NO. 59848-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JEREMY GRANDE,
Petitioner.

ON MOTION FOR DISCRETIONARY REVIEW FROM THE
SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

**STATE'S ANSWER TO
MOTION FOR DISCRETIONARY REVIEW**

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: TONI G. MONTGOMERY, WSBA#36927
Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

ORIGINAL

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2007 JUN 11 AM 10:37

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ANSWER.....	1
II. ISSUES	2
III. STATEMENT OF THE CASE	2
1. STATEMENT OF PROCEDURAL HISTORY	2
2. STATEMENT OF FACTS	3
IV. ARGUMENT.....	5
V. CONCLUSION	15

TABLE OF AUTHORITIES

Page

WASHINGTON SUPREME COURT CASES

<i>State v. Patterson</i> , 83 Wn.2d 49, 515 P.2d 496 (1973).....	13
<i>State v. Smith</i> , 93 Wn.2d 329, 610 P.2d 869, <i>cert. denied</i> , 449 U.S. 873, 101 S.Ct. 213 (1980).....	13
<i>State v. Walker</i> , 157 Wn.2d 307, 138 P.3d 1133 (2006).....	7

WASHINGTON COURT OF APPEALS CASES

<i>State v. Cole</i> , 128 Wn.2d 262, 906 P.2d 925 (1995).....	12
<i>State v. Compton</i> , 13 Wn. App. 863, 538 P.2d 861 (1975).....	7, 8, 10
<i>State v. Greene</i> , 97 Wn. App. 473, 983 P.2d 1190 (1999).....	10
<i>State v. Hammond</i> , 24 Wn. App. 596, 603 P.2d 377 (1979)....	7, 9, 10
<i>State v. Huff</i> , 64 Wn. App. 641, 826 P.2d 698 (1992) <i>review denied</i> , <i>State v. Huff</i> , 119 Wn.2d 1007, 833 P.2d 387 (1992)...	7, 10, 11, 12
<i>State v. Olson</i> , 73 Wn. App. 348, 869 P.2d 110 (1994)	12
<i>State v. Ramirez</i> , 49 Wn. App 814, 746 P.2d 344 (1987)	9

UNITED STATES SUPREME COURT CASES

<i>Maryland v. Pringle</i> , 540 U.S. 366, 124 S. Ct 795 (2003)	13, 14
<i>United States v. Di Re</i> , 332 U.S. 581, 68 S. Ct. 222 (1948).....	14
<i>Wyoming v. Houghton</i> , 526 U.S. 295, 119 S. Ct. 1297 (1999).....	14
<i>Ybarra v. Illinois</i> , 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).....	13, 14

OTHER JURISDICTIONS

Dixon v. State, 343 So.2d 1345 (Fla.App.1977) 7
People v. Chestnut, 43 A.D.2d 260, 351 N.Y.S.2d 26 (1974) 7
People v. Erb, 128 Ill. App. 2d 126, 261 N.E.2d 431 (1970)..... 7
People v. Laird, 11 Ill. App. 3d 414, 296 N.E.2d 864 (1973) 7
People v. Olson, 175 Colo. 140, 485 P.2d 891 (1971)..... 7
People v. Wolf, 15 Ill. App. 3d 374, 304 N.E.2d 512 (1973)..... 7

WASHINGTON STATUTES

RCW 10.31.100 6, 8, 15

WASHINGTON COURT RULES

CrRLJ 3.6..... 1
RALJ 2.2..... 3
RAP 2.3(d)..... 1, 2
RAP 17.4(e)..... 1

I. IDENTITY OF ANSWERING PARTY

COMES NOW the Respondent, State of Washington, by and through Toni G. Montgomery, Deputy Prosecuting Attorney for Skagit County and pursuant to RAP 17.4(e) provides the following answer to the motion for discretionary review.

II. SUMMARY OF ANSWER

The petitioner, Grande, has not established that under RAP 2.3(d) that the Superior Court decision is:

- 1) in conflict with a decision of the Court of Appeals or the Supreme Court; or
- 2) a significant question of law under the Washington State Constitution or the United State's Constitution; or
- 3) one that involves an issue of public issue that must be determined by an appellate court; or
- 4) that the Superior Court departed from the accepted and usual course of judicial proceedings.

RAP 2.3(d).

The Superior Court reviewed a decision of the District Court regarding whether an officer had probable cause to arrest. These decisions are subject to a de novo standard of review. The Superior

Court correctly found that the officer had probable cause to arrest Grande based on the odor of marijuana emanating from the vehicle in which Grande was a passenger.

III. ISSUES

1. Does this case fit within any of the four categories outlined in RAP 2.3(d)?
2. Does an officer have probable cause to arrest the passenger in a vehicle when such officer is trained in detecting the odor of marijuana, detects the odor of marijuana emanating from the vehicle, and the officer is unable to pinpoint the odor?

IV. STATEMENT OF THE CASE

1. Statement of Procedural History

The defendant was charged with Possession of Marijuana and Possession / Use of Drug Paraphernalia for events that took place on or about April 6, 2006. On June 19, 2006, the Honorable Judge David Svaren presided over a pretrial motion hearing pursuant to CrRLJ 3.6 in order to determine whether probable cause existed to arrest the defendant on the date in question for possession of marijuana.

On July 12, 2006, Judge Svaren issued a written ruling on the issue presented to the Court. In his ruling, Judge Svaren found that the facts present in the instant case, including the odor of marijuana coming from the vehicle, did "not justify a finding of probable cause specific to the Defendant." Judge Svaren then granted the defense motion to suppress. Appendix A. An order dismissing Grande's case was signed and filed on July 17, 2006. Appendix B.

Pursuant to RALJ 2.2, the State appealed Judge Svaren's decision on August 11, 2006. The Honorable Judge David R. Needy heard oral arguments regarding this appeal on January 29, 2007. Judge Needy reversed Judge Svaren's ruling and found that probable cause did exist to arrest Grande. An order for remand was filed on March 20, 2007, and particularized facts and conclusions were signed and filed on April 26, 2007. Appendix C. Grande filed a notice of discretionary review on April 12, 2007, after filing the motion for discretionary review on March 23, 2007.

2. Statement of Facts

Trooper Hanger came into contact with Jeremy Grande, on April 6, 2006, while he was on duty as a Washington State Patrolman. 6/19/06 RP 2 3.6. Trooper Hanger stopped a vehicle for

having "illegal window tint" and Grande was a passenger in the vehicle with one other occupant, the driver. 6/19/06 RP 3 3.6.

Upon contacting the vehicle, Trooper Hanger observed "the odor of marijuana coming from the vehicle." 6/19/06 RP 3 3.6. Grande stated "oh, it's you again" and that the driver of the vehicle "got very agitated." 6/19/06 RP 3 3.6. Trooper Hanger identified the odor as moderate and could not determine where in the vehicle it was coming from. 6/19/06 RP 4 3.6. Trooper Hanger then placed both the driver and the passenger under arrest. 6/19/06 RP 4 3.6. During a search incident to arrest, Trooper Hanger discovered a glass marijuana smoking pipe with marijuana contained in it. 6/19/06 RP 4 3.6. Trooper Hanger NIK tested the marijuana to be sure, and it tested "positive for marijuana." 6/19/06 RP 4 3.6.

Trooper Hanger was trained at the Washington State Patrol Academy and elsewhere in regard to traffic enforcement and one of his duties is to enforce the traffic laws in the State of Washington. 6/19/06 RP 1,2 3.6.

In addition to basic training, Trooper Hanger has also received training to detect controlled substances. 6/19/06 RP 2 3.6. Specifically, Trooper Hanger has been able to observe marijuana that has been presented during training, and has also been able to smell

burnt marijuana when a "small amount is lit" during training. 6/19/06
RP 2 3.6.

Trooper Hanger has practical field experience in detecting marijuana, including "several marijuana arrests, ranging from a small little amount you can hold in your hand up to as much as over 1,800 pounds." 6/19/06 RP 2 3.6. In addition, Trooper Hanger has had over one hundred arrests or stops that involved the odor of marijuana. 6/19/06 RP 2 3.6. Whenever Trooper Hanger has field tested marijuana detected during an arrest, "100% have always come back positive being tested as marijuana." 6/19/06 RP 6 3.6.

V. ARGUMENT

1. No basis for Discretionary Review

The decision of the Superior Court is not in conflict with decisions of the Court of Appeals or the Supreme Court. As will be fully outlined below, Judge Needy's ruling that Trooper Hanger had probable cause to arrest Grande based on odor of marijuana emanating from a vehicle in which Grande was a passenger is consistent with longstanding Washington case law. As such, Judge Needy did not depart from the accepted and usual course of judicial proceedings. In addition, although issues regarding arrest involve

public interest and implicate the Washington State Constitution and the United States Constitution, the particular issues presented here have already been decided by Washington Courts.

2. Individualized probable cause to arrest a passenger exists for possession of marijuana and / or use of paraphernalia when he is confined as an occupant in a vehicle in which the odor of marijuana is detected by a trained officer.

RCW 10.31.100 provides statutory authority for warrantless arrests in certain situations. The relevant portion of the statute provides:

...A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving...the use or possession of cannabis...shall have the authority to arrest the person.

This particular portion of the statute was enacted by the Washington State Legislature to enable law enforcement to arrest in broader situations regarding particular misdemeanor and gross misdemeanor offenses, including possession of marijuana and use of drug

paraphernalia. It should further be noted that this particular statute has recently been found to be constitutional by the Washington State Supreme Court. *State v. Walker*, 157 Wn.2d 307, 138 P.3d 1133 (2006).

Washington State Courts, along with courts from numerous other jurisdictions, have held that the odor of marijuana coming from a vehicle is enough to provide probable cause to believe some or all of the individuals within the vehicle are in possession of marijuana or are using marijuana. See *State v. Compton*, 13 Wn. App. 863, 538 P.2d 861 (1975); *State v. Hammond*, 24 Wn. App. 596, 603 P.2d 377 (1979); *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992) review denied, *State v. Huff*, 119 Wn.2d 1007, 833 P.2d 387 (1992); *People v. Olson*, 175 Colo. 140, 485 P.2d 891 (1971); *Dixon v. State*, 343 So.2d 1345 (Fla.App.1977); *People v. Wolf*, 15 Ill. App. 3d 374, 304 N.E.2d 512 (1973); *People v. Laird*, 11 Ill. App. 3d 414, 296 N.E.2d 864 (1973); *People v. Erb*, 128 Ill. App. 2d 126, 261 N.E.2d 431 (1970); see also *People v. Chestnut*, 43 A.D.2d 260, 351 N.Y.S.2d 26 (1974) (Search of passengers based on odor of contraband found to be lawful as the odor constituted probable cause and a warrantless search was justified by the exigent circumstances of a vehicle

stopped along the highway whose occupants are alerted to the officer's suspicions).

In 1975, Division Two of the Washington State Court of Appeals addressed the issue of whether the odor of marijuana alone provides sufficient evidence to provide probable cause to believe the crime of unlawful possession of marijuana is being committed. *State v. Compton*, 13 Wn. App. 863, 538 P.2d 861 (1975). The *Compton* court held that a warrantless search of the defendant was lawful when an officer trained in the detection of marijuana smelled the odor coming from the defendant's vehicle. *Id.* at 865. Although the court was examining a contested search of the defendant, rather than an arrest, the court's holding was that "*the odor of marijuana gave [Trooper Owen] sufficient information to form a reasonable belief that the crime of unlawful possession of a controlled substance was being committed in his presence.*" *Id.* at 864-65 (Emphasis Added). Such a holding would also have allowed a lawful arrest of the defendant pursuant to RCW 10.31.100.

This question was revisited by Division Two of the Washington State Court of Appeals again in 1979, with the court holding that a warrantless arrest based on the odor of marijuana alone is valid.

State v. Hammond, 24 Wn. App. 596, 603 P.2d 377 (1979). The court in *Hammond* provided that,

“[w]hen officers trained and experienced in marijuana identification detect its odor in a vehicle stopped along the highway, they do not have to ignore the odor, and have sufficient information to believe that the crime of marijuana possession is being committed in their presence.”

Hammond, 24 Wn. App. at 598 (citing *Compton*, 13 Wn. App. 863).

The *Hammond* court indicated that this holds true not only for the driver of a vehicle, but for the passengers as well (as defendant Hammond was alone in the back seat). The court concluded its holding by providing that the “marijuana odor established probable cause to arrest [the defendant] for marijuana possession.” *Id.* at 600; See also *State v. Ramirez*, 49 Wn. App. 814, 819, 821, 746 P.2d 344 (1987) (Officers possess probable cause to either search or arrest for marijuana possession or use upon smelling the odor of burning marijuana).

Defense Counsel attempts to obfuscate the aforementioned line of case law by arguing that *Compton* and *Hammond*, and the line of case law following it, is not consistent with the notion that individualized suspicion is required to establish probable cause. The

holding in *Compton* and *Hammond* is not, however, inconsistent with the long-standing requirement that probable cause be individualized.

In finding individualized probable cause for all individuals within a vehicle, the court in *Hammond* based its decision upon the fact that the odor of marijuana was found within a confined vehicle in which passengers are present. As such, the finding was simply that the odor of marijuana in such a small and confined area creates individualized suspicion to all passengers when the odor cannot be pinpointed, and when no particular individual can be singled out as the guilty party. Such a holding is consistent with the probable cause standard requiring that facts and circumstances exist that are “sufficient to cause a person of reasonable caution to believe that a crime has been committed.” *State v. Greene*, 97 Wn. App. 473, 478, 983 P.2d 1190 (1999).

Post *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979), the Court of Appeals continued to follow the precedent set above in finding that an odor of controlled substances is enough to arrest vehicle occupants in 1992. *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992) *review denied*, *State v. Huff*, 119 Wn.2d 1007, 833 P.2d 387 (1992). In *Huff*, the court examined whether the

passenger in a vehicle was properly arrested due to the presence of the odor of methamphetamine coming from inside the car. *Id.* at 644. The court specifically held that “*probable cause to arrest the occupants of a car for possession of a controlled substance exists when a trained officer detects that the odor of a controlled substance is emanating from a vehicle.*” *Id.* at 647 (Emphasis Added).

Such a holding is not inconsistent with the requirement of individualized probable cause, as defense counsel argues. The fact that an odor of a controlled substance is coming from a confined area with only a few individuals gives rise to a reasonable suspicion that those individuals are in possession of that same controlled substance or have used paraphernalia in association with that controlled substance due to their proximity to the odor and the confined area.

The court in *Huff* specifically addressed the position taken by Grande that there needs to be something more pinpointing the odor of contraband to a particular individual. In footnote two of the opinion, the court states that:

A few courts have distinguished between whether the smell emanates from the suspect’s person or from the car, holding that probable cause to arrest exists only when the defendant herself smells of narcotics...However, **this is not the rule in Washington.**

Huff, 64 Wn. App. at 647, Footnote 2 (Emphasis Added). The court cites to *Compton* and its progeny, as discussed above, for this prospect. If the court in *Huff* erred, the Washington State Supreme Court would seemingly have granted the defense petition for review to overturn the Court's reasoning. This did not happen, however, and the Washington Supreme Court instead denied the petition, and left *Huff* as it was decided by the Court of Appeals.

The position taken by Washington courts indicates that the odor of a controlled substance provides individualized suspicion to those who are in direct proximity to the odor, indicating use of paraphernalia or possession of marijuana.

In keeping with the rulings of the aforementioned case law, the Washington State Supreme Court addressed the issue with regard to search warrants, and provided that "a statement that an officer with training and experience actually detected the odor of marijuana provides sufficient evidence, by itself, constituting probable cause to justify a search." *State v. Cole*, 128 Wn.2d 262, 289, 906 P.2d 925 (1995) (Citing *State v. Olson*, 73 Wn. App. 348, 869 P.2d 110 (1994)). This is applicable to the instant case as the standards in determining probable cause as to a search are relatively similar to

those justifying an arrest, requiring a showing of facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869, cert. denied, 449 U.S. 873, 101 S.Ct. 213 (1980); *State v. Patterson*, 83 Wn.2d 49, 58, 515 P.2d 496 (1973).

The United States Supreme Court has also provided an opinion that is helpful in this case as it distinguishes the case of *Ybarra*, which Grande relies heavily upon. *Maryland v. Pringle*, 540 U.S. 366, 124 S.Ct 795 (2003). In *Pringle*, an officer discovered five baggies of cocaine and a large amount of money behind the back-seat armrest. *Id.* at 372. There were three occupants in the vehicle, and when none of the occupants would admit to knowledge of the drugs, all three were arrested for possession of the cocaine. *Id.* at 368-69. The Supreme Court in *Pringle* found that “there was probable cause to believe [the defendant passenger] committed the crime of possession of cocaine, either solely or jointly.” *Id.* at 372.

The Supreme Court in *Pringle* discussed the requirement of individualized probable cause with respect to the passengers, and stated that “a car passenger - unlike the unwitting tavern patron in

Ybarra - will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.” *Pringle*, 540 U.S. at 373 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 304-05, 119 S.Ct. 1297 (1999) (Emphasis added)). In further addressing this issue, the Court provided that “any inference that everyone on the scene of a crime is a party to it must disappear if the Government...singles out the guilty person.” *Pringle*, 540 U.S. at 374 (quoting *United States v. Di Re*, 332 U.S. 581, 594, 68 S.Ct. 222 (1948)). Similar to *Pringle*, the government here was unable to single out the guilty person upon observing the odor of marijuana emanating from the vehicle, and probable cause existed to believe that both parties in the vehicle were in possession of marijuana due to the odor emanating from the vehicle until the investigation provided otherwise.

Grande attempts to distinguish *Pringle* from the case at hand by pointing out that the legislature has assigned stiffer penalties to cocaine than it has to marijuana. This argument is without merit. The fact that the legislature chose to punish those who possess cocaine more harshly than those who possess small amounts of marijuana has no bearing on a determination of whether or not an officer has probable cause to arrest an individual when an odor of controlled

substances is detected. Marijuana is no less illegal than cocaine and the reasoning from *Pringle* attaches with equal weight to cases involving marijuana.

VI. CONCLUSION

Washington State Courts have *repeatedly* held that if the odor of marijuana is coming from a vehicle, probable cause exists to arrest the occupants of the vehicle on suspicion of possession or use of marijuana. In the instant case, Trooper Hanger detected the odor of marijuana coming from a vehicle in which the defendant was a passenger, and suspected both individual occupants of possession of marijuana. Based upon his observations, Trooper Hanger initiated a warrantless arrest of both occupants under the authority of RCW 10.31.100(1). During a search incident to arrest, drug paraphernalia with marijuana was discovered upon the defendant's person. Pursuant to long standing precedent in Washington State Courts, beginning in 1975, such an arrest and search was lawful under the circumstances. As such, the State respectfully requests this Court deny review or if review is granted that this Court affirm the Superior Court's ruling.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2007 JUN 11 AM 10:37

DATED this 8th day of June, 2007.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: Toni G. Montgomery
TONI G. MONTGOMERY, WSBA#36927
Deputy Prosecuting Attorney

DECLARATION OF DELIVERY

I, Karen Wallace, declare as follows:

I sent for delivery by; United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Zuckerman, addressed as 1300 Hoge Building, 705 2nd Avenue, Seattle, WA 98104. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 8th day of June, 2007.

Karen Wallace
KAREN WALLACE, DECLARANT

Appendix A

SKAGIT COUNTY DISTRICT & MUNICIPAL COURTS

State

Plaintiff

vs

Jeremy Grande

Defendant

CASE NO. C626563

ORDER ON

- CIVIL MOTION(S)
- CRIMINAL MOTION(S)

THIS matter having come on for hearing this date on motion of the Plaintiff Defendant for certain relief, and the court having considered the records and files herein, the evidence offered, stipulations made, contents of memorandums or briefs furnished, and argument of counsel, and being advised, now finds, adjudges and decrees as follows:

RCW 10.31.100(1) allows an arrest in the absence of a warrant by a "police officer having probable cause to believe that a person has committed or is committing a misdemeanor... involving the use or possession of cannabis." The defendant was a passenger in a car from which the odor of burnt marijuana emanated. Defendant was arrested when the officer smelled pot. There was no evidence other than the odor, prior to the arrest, that would lead the officer to his probable cause conclusion. The officer conducted no investigation and made no particular observations of defendant that would confirm or dispell the conclusion of probable cause. Instead, the officer ~~was~~ made an arrest and proceeded to search defendant. While the officer may have been justified in concluding that someone had smoked some marijuana, this does not justify a finding of probable cause specific to defendant. Motion to suppress is granted.

Dated this _____ day of _____, 2006

cc: PA ✓
DA ✓


JUDGE/COMMISSIONER

Appendix B

FILED

JUL 17 2006

Skagit Co. Dist Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN SKAGIT COUNTY DISTRICT COURT
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

JEREMY GRANDE,

Respondent

) Case No.: C 626563

) AGREED
) ORDER OF DISMISSAL

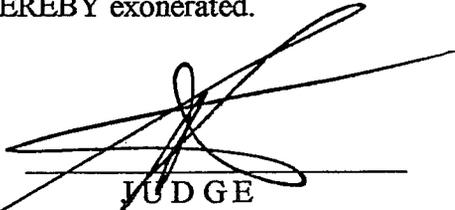
This matter having come on regularly before the undersigned judge of the above entitled court upon the motion of the defense for an order suppressing evidence pursuant to CrR 3.6 and the court having determined that the evidence must be suppressed, and having entered an order of suppression on July 12, 2006, and having further determined that such order has the practical affect of terminating the cause as contemplated by RAP 2.2 (b)(2) as indicated by the prosecutor's signature below,

NOW THEREFORE, the court makes and enters the following:

ORDER

It is hereby ORDERED, AJUDGED, AND DECREED, that the above entitled cause be and hereby is DISMISSED, and any posted bail HEREBY exonerated.

Done this 17th day of July 2006.



JUDGE

Presented by,

AGREED ORDER Copy received, notice of presentation waived



Roy Howson, WSBA #3058
Attorney for Defendant



WSBA # 30927
Deputy Prosecuting Attorney

ORDER DISMISSING

- 1

HOWSON LAW OFFICE
Jenifer & Roy Howson & Jonathan Rands
415 Pine Street
Mount Vernon, WA 98273

CC: Pal Deputy ✓
01 00 00 00 7/10 ✓

Appendix C

2007 APR 26 AM 9:48

SUPERIOR COURT OF WASHINGTON
COUNTY OF SKAGIT

STATE OF WASHINGTON, Appellant,

vs.

JEREMY GRANDE, Respondent.

NO: 06-1-00654-1

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

THE COURT, having read the briefs and having heard the argument of counsel for the Appellant and for the Respondent, now makes and enters the following:

FINDINGS OF FACT

The Court accepts the facts from the District Court hearing.

And having accepted those factual findings, the court also now enters the following:

CONCLUSIONS OF LAW

1. This case deals with probable cause and not guilt or innocence;
2. Washington case law has consistently held that Hammond is the law of Washington;
3. The Court of Appeals and the Supreme Court have had many opportunities to overrule Hammond and they have declined to do so;
4. There are many freedoms that the citizens of Washington enjoy such as driving down the street and when an individual gets in a car where a person has been smoking marijuana, that individual is subjecting him or herself to probable cause;

ORIGINAL

5. Unless the odor of marijuana can be clearly associated with one person in a vehicle, thus alleviating suspicion of the other occupants of the car, the officer may proceed on probable cause;
6. Odor of marijuana emitting from a vehicle, which is a tightly confined space, gives an officer individualized probable cause to arrest all occupants of the vehicle without conducting further investigation;
7. Hammond and subsequent cases are restricted to automobiles;
8. The law that the Court is bound by is that there is Probable Cause even for the passenger in a vehicle where the odor of marijuana is present;
9. The cases that deal with the issue of probable cause as to individuals in situations involving the odor of marijuana in a vehicle, have either addressed the issue of individualized probable cause or have chosen to overlook it, in that such cases discuss specifically confined spaces, i.e. automobiles;
10. Judge Needy declined to overlook the cases as they exist.

/

/

/

/

/

/

/

/

/

/

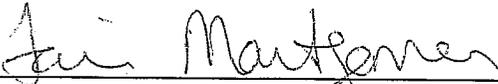
THIS COURT HEREBY ORDERS, ADJUDGES AND DECREES that the District Court decision is REVERSED and this case is REMANDED to District Court for further proceedings pursuant to this order.

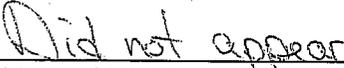
Judgment should be entered in accordance with this Order.

Done this 28th day of April, 2007.


HONORABLE JUDGE DAVE NEEDY

Presented by:


TONI G. MONTGOMERY, WSBA# 36926
Prosecuting Attorney, Appellant


ROY HOWSON, WSBA# 03058
Attorney for Defendant, Respondent

SUPERIOR COURT OF WASHINGTON
COUNTY OF SKAGIT

STATE OF WASHINGTON, Plaintiff

vs.

JEREMY GRANDE, Defendant.

NO: 06-1-00654-1

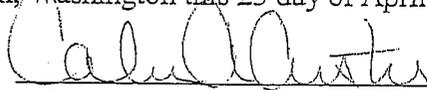
DECLARATION OF SERVICE

I, Calina A. Armstrong, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein. That I, as a legal assistant in the office of the Skagit County Prosecuting Attorney, did personally listen to the taped record of the RALJ hearing held January 29, 2007. That I typed the record of this hearing, a copy of which is attached hereto, and hereby certify that the transcription is accurate and correct to the best of my ability.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Mount Vernon, Washington this 23 day of April, 2007.


Calina A. Armstrong, DECLARANT

STATE V. GRANDE
06-1-00654-1

1/29/07

The Honorable Judge Needy
Roy Howson, Attorney for Defendant
Toni G. Montgomery, Attorney for State

Judge Needy: Mr. Howson is it Grand or Grande

Roy Howson: Grande your honor

Judge Needy: Grande

Toni Montgomery: This also is the States appeal and I don't have much more to add beyond what Mr. Holmes has outlined in his brief and response brief other than to emphasis that there appears to be a very long line of case that recognize that the odor of marijuana is sufficient probable cause to arrest every occupant of a vehicle including passenger where there are ??? inside the vehicle. Hum if the court has a question for me I would be more than willing to answer those but I don't.

Judge Needy: Most of my

Toni Montomery: ___ whether Mr. Holmes brief...cut off by judge

Judge Needy: Most of my questions are for Mr. Howson, so for better for worse for putting our cards on the table.

Roy Howson: Mumble

Judge Needy: Well I just believe that you are asking this court to overturn some existing case law if I am reading your briefing correctly.

Roy Howson: Partly

Judge Needy: and to restore protection, (interrupted by Howson) go ahead I will let you state it.

Roy Howson: The question before the court is whether an officer who smells the odor burnt marijuana coming from a car, which could, at least arguably, give him probable cause to arrest the driver. I say that because they do it on a constructive possession theory to the extend that the Court has said that the odor of alcohol um excuse me, marijuana smelled by the officer indicates that there is or has been marijuana present in the car and suggests that somebody is in possession of marijuana.

You can look at the driver and say "well the driver has the main control over the vehicle and the driver is deemed to be in constructive possession. The question here is does he have the right to arrest the passengers without any indication whatsoever that the passenger or passengers have done anything wrong themselves? That is, do all the passengers lose their freedom based upon the conduct of someone else such as the driver to someone else who isn't even there because he left the car. Conduct that they can control.

Now divide the argument into two parts because there really are two parts. One of which the State has authority on, that the State v. Hammond which I am ---- the court simply decided wrong but there is a separate argument, an argument that is they do not have the authority to make such an arrest based upon the statute that grants authority that is RCW 10.31.100 so ----- If I may I will begin with the first part of the ----- I am sorry if I take a little time..

Judge Needy: That's fine.

Howson: But this I believe is an important decision because I believe that reading as it does the concept of individual freedom, individual freedom has literally stake at this hearing. I believe that everyone here at the conclusion of this hearing will either walk away with the same freedoms that we all enjoy at this moment or we will all be just less free than we are at this time that what the State gives.

Now I have always felt a kind of a special privilege in my profession or occupation, whatever you will, is dictated by the Constitution of this United States and the Constitution of the State of Washington. Because the Constitution says you must have I go to a bail hearing because the Constitution speaks of bail. I attend pretrial motions because the first, fourth, fifth, and sixth Amendments rights have been potentially violated for someone. Mumble.. proceed to jury trial because due process of the Constitution mumble.. dictated to some extent in the Constitution under the eighth amendment.

So the idea of us doing here what we have all sworn to do, that is, to protect and defend the Constitution is a supremely important mumble is at stake at this moment. I find it people use the word freedom these days pretty loosely and often and I also find they seem to realize less and less where it is that our freedoms come from and who it is that they protect us from. If the freedoms that we have and enjoy are (really?) in place in the Bill of Rights and they protect us from zealous people that always seem to find their way into government.

Our Constitution guarantees our freedom but most importantly it guarantees our individual freedom. I am not just a free man so long as I'm with a group of judges. I am not just a free man so long as I am with a group of white people or with a group of people who have no prior arrest record. I am not a free man based upon who I happen to be with or where I happen to be when the space I happen to occupy at the moment. I am a free man and subject to losing my freedom faced only upon my own personal conduct. That which I may control.

Other people who I am near may be doing something wrong which justifies the Government in taking away their freedoms but that does not and should not affect me. I am to be judged at all times upon what I am doing, I the individual, that's what makes me personally free and without that I am not personally free.

Quite frankly, you are not personally free, the prosecutor is not personally free nor anyone else for that matter. At least, that is what we have always said in the Constitution and our case law. The Constitution embodies the idea, if you will, of a line of freedom. That line is probable cause. I am a free man unless the Government has probable cause to believe that I am committing a crime, that I personally am doing something wrong. I can only control my own behavior.

That means that my freedom can be denied only based upon my conduct and not that of someone else that I just happens to be with or near and that means or at least has always meant in the past, individualized probable cause, individualized freedoms. If I can be instantly seized not based upon what I have done but the fact that I am with someone else or near someone else or sharing a space with someone else who happens to be doing something wrong then I am not really free.

Now I have cited to the Court a lot of cases in my brief and still the case on the first issue is as you have seen which have clearly declared our belief in individual freedom and individualized probable cause. Not only individualized probable cause but actually individualized suspicion is required. Even for the suspicion it has to be individualized.

I think that is the Broadnax decision which is cited in my brief. That and the laws state time immemorial at least up until the Hammond decision and those that have chosen to follow and that decision is wrong. It is wrongly decided, your forced to turn the most basic concept of our Constitutional freedoms that they are applied to every individual completely on its....

To redefine the meaning of freedom in this county without even mentioning, without even mentioning the Constitutional concept. You know they never held with it in that case. They never dealt with the idea individualized probable cause they never dealt with one era, they never dealt with that whole line of cases and without discussing the requirements be there.

Now I may maintain, and I make no boast but I maintain that right now we should say no on this basis alone on the constitutional argument. I realize that there is case law there that the Hammond Court says exist etc.. But whether or not you agree with that position, and not everyone I guess shares the passion that I do for the individual rights, whether my view is shared or not there is yet another reason that we must declare that the arrest of a passenger based upon the showing of probable cause as to someone else that is the driver or a showing simply that someone at sometime in that car has possessed or used marijuana at some point in time. Based, in other words, upon my placement or simply where I happen to be at the moment. That is clearly wrong.

Now the reason that it was relied upon by Judge Svaren is not that argument. Quite frankly he never reached that argument _____. The reason relied upon by Judge Svaren, and which, in fact, the reasons appealed is that he insists that the legislature of this State has denied the authority to arrest in this type of situation regardless of that declaration.

You remember that the law for the State _____ has been for years and years up until the mid 70s that an officer can only arrest for a misdemeanor committed in his presence. 10.31.100 changed that for the first time you can arrest a person based upon probable cause for a misdemeanor if the misdemeanor fell into one of those certain categories. When it was first enacted the only category there was the one for cannabis and that is the one we are still talking about now.

So they granted a new authority. _____ now has the authority to arrest but when they granted that authority they granted as a limited authority. They granted as authority to arrest only upon individualized probable cause. Now, hears what the legislature says, "that a police officer having probable cause to believe that a person has committed or is committing a felony shall have authority to arrest the person without a warrant". The police officer may arrest the person without a warrant for committing a misdemeanor etc. in sections 1-10.

Section 1 says as to probable cause "any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor involving use or possession of cannabis may arrest the person so believed". The statute speaks only and completely to individualize probable cause. In other words, when the legislature granted this new authority to police to make arrests, where they could not make arrests before, they granted that limited authority recognizing individual liberty at the time they did it and regardless of whether or not you accept my view of the constitutional argument and the threat that I see raised by the Hammond case, this case must nevertheless be decided on the basis of the statutory authority granted and not granted by RCW 10.31.100.

Individualize probable cause is required in the statute, specifically set out in the statute, and that is the situation because Judge Svaren found here that the statute requires individualize probable cause. there was not a finding and he makes the specific finding that there was not such individualized probable cause as to Mr. Grande.

He was simply a passenger in the car and he was arrested because he was a passenger in the car and for no other reason. Guilt by association, if you will, and Judge Svaren's ruling must be upheld. One thing I wanted to point out before I end and I think this is on page nine in my brief so I will try to make this quick. But in my estimation or when we are in this situation because so often courts confuse probable cause to search with probable cause to arrest.

When you are talking about probable cause to a search, and I think this is in the Seafirst case itself, they make it very clear. You're talking about reasonable grounds that a crime

has been committed. Period. ___ you can look for evidence of that crime. But when you are talking about probable cause for arrest, you are talking about two things, reasonable grounds to believe that a crime has been committed by a particular person or particular persons that's what probable cause to arrest means and I think it gets confused sometimes by the Court because you just find that they drop off that last sentence, that little bit about by the person is dropped off occasionally and usually that doesn't matter if its probable cause to search that is in consideration or if there is only one individual involved but it matters extremely when there are two individuals involved or more and the line of case that I've cited ___ alike.

Like clearly cases that suggest Hammond was decided wrongly ___ court and ah ___ that have wiped that out and, as I say, primarily however, even regardless of that, we still have to look at the authority they have to arrest _____ and that's what Judge Svaren said and that this _____.

Judge Needy: Did you wish to say anything more?

Toni Montgomery: Just to mention, as the court is aware, State v. Walker which was decided July 13 of just this pass year, we affirm the constitutionality of 10.31.100 and misdemeanors involving cannabis occurring outside the officers presence beyond that I believe that the line of cases upholding arrest of all occupants of a vehicle on the odor of marijuana should be upheld.

Judge Needy: Mr. Howson, you argue very eloquently and very passionately for freedom. I certainly hope that we all share your desire to live in a free land and have our rights protected. You do make a couple of statements that I disagree with however.

One is your term "guilt by association" we are not talking about a conviction here. We are talking about an establishment of probable cause to look further. Yes, possible, temporarily or longer restrict someone's freedom but at the same time we are not making a finding that if you are in a car with marijuana you are guilty of consuming marijuana.

I have read and understand the struggles on both sides and I think there are cases from States in this Country that fall on each side of the argument so it is not as if the entire Country finds it one way or the other. But Washington and Washington case law has, in my mind, consistently, since 1979 with Hammond, found that case was and is still the law of the State of Washington and there have been many opportunities for the Court of Appeals and the Supreme Court to over rule that case and they have not done so.

There are freedoms on all sides, freedoms to driving down the road and being safe in your own vehicle. Freedoms to share privileges with other people who abide by the law and when you or I get a car where someone is smoking marijuana we are basically on notice in the State of Washington that we are subjecting our self to probable cause.

Rightfully or wrongfully I believe this is what this case stands for. Unless it can clearly be associated with one person in that vehicle, which would then alleviate any probable

cause from the others. But when an officer comes across a situation and there is strictly the odor and nothing at that point in time determining which of the passengers in a very tightly confined spaced automobile is the one responsible for that odor.

Our Washington case law says the officers may proceed with probable cause. Our hope, and always is, in terms of freedom is that once the system gears up and does everything the system does that no one would be unjustly convicted or found guilty of that crime. If, as you argue so well, they were simply there by association doing nothing wrong. But I do believe the law that I am bound to follow and interpret in Washington says that that is probable cause even for the passenger and the Court will overrule the District Court dismissal.

Roy Howson: Mumble

Judge Needy: Yes, go ahead.

Roy Howson: It is of extreme concern to me that you've said, talked about probable cause to um of um conviction of probable cause to arrest _____ is of extreme concern to me that have a statute that speaks directly to the individual and we have case law that doesn't speak to this action _____ incites it _____ nothing to the statute or what is said. None of those cases that talked about RCW 10.31.100 and what that means to this situation.

Here's where we are at right now as I see it. Police officers trained to smell marijuana walks into this room and should for some reason smell the obvious odor of marijuana brought into _____

Judge Needy: I disagree you right there because I think these cases are restricted to automobiles and much smaller space or a tavern or a courtroom.. but go ahead..

Roy Howson: It may be much smaller but.....

Judge Needy: It was smaller before this you know. This is the expanded version.

Roy Howson: This is the version of a room you know. Is there anyone subject to arrest I maintain that there is not (cough) and not simply because there's this long line of prosecutorial authority that says here mumbling but also because in this state there's a statute that says you have the power to arrest says to the individual, speaks to the individual not one case has talk _____ and that was the one case _____ to Washington.

Judge Needy: And I do find that to be a compelling argument but I also believe that in the cases that have addressed this issue by the language that they talk about they are aware of that argument even if they didn't specifically address it and they've chosen to overlook it and I'm not choosing to overturn the cases as they exists.

They talk about the confined space of an automobile. That, in more often than not, you and I being in a car together are more likely to share common interests, goals and activities than if we are simply in a room like a courtroom where we are not all, in fact, very much not sharing the same interests or roles.

We're each playing a different part here and we are not necessarily associated other than professionally. So, I believe that the way that they've looked at it and analyzed I am certainly finding your argument to be strong and I understand it but I simply respectfully disagree with it and I'm not in a position to feel that I haven't been given sufficient guidance from the higher courts on this particular issue and I'm not going to overturn that. If I can make any other findings that would be helpful I would try to do so.

Toni Montgomery: Do I need to prepare findings of fact and conclusions.

Judge Needy: Normally that would be the case and then Mr. Howson will have a chance to look at those and if they are agreed you can both sign and I can sign in chambers but if there are issues on those then we would have a presentment hearing and I will rule accordingly.

Appendix D

State v. Jeremy Grande
06-1-00654-1 / C626563
June 19, 2006

Participants:

Judge David Svaren
Roy Howson, Attorney for Defendant
Toni Guzzo, Attorney for the State
Trooper Brent Hanger, Witness

Judge David Svaren: (gavel) – on for two different motions. One is State's motion to correct what is said to be a scrivener's error and second is for a motion under Rule 3.6. Is there any objection to the State's motion, first of all, Mr. Howson?

Roy Howson: No, Your Honor.

Judge Svaren: Okay, that'll be granted, then. The State may call its first witness as to the 3.6 motion.

Toni Guzzo: Thank you, Your Honor. The State at this time calls Trooper Brent Hanger.

Judge Svaren: Okay, Trooper Hanger, would you raise your right hand? Do you solemnly swear or affirm any testimony you give in connection with today's proceeding will be the truth?

Trooper Brent Hanger: Yes, sir, I do.

Judge Svaren: Okay, thanks. Please have a seat. Make yourself comfortable. Thank you. Your witness, Ms. Guzzo.

Ms. Guzzo: Thank you, Your Honor. For the record, please state your name, spelling the last.

Trooper Hanger: It's Brent Hanger, H-A-N-G-E-R.

Ms. Guzzo: And with whom are you employed?

Trooper Hanger: I am a trooper with the Washington State Patrol.

Ms. Guzzo: For how long?

Trooper Hanger: Since July of 1998.

COPY

Ms. Guzzo: And do you enforce traffic laws in the State of Washington?

Trooper Hanger: Yes, I do.

Ms. Guzzo: And, Trooper Hanger, what training have you had with the Washington State Patrol in law enforcement in general?

Trooper Hanger: Well, it's very extensive: the State Patrol Academy is twenty-six weeks long (inaudible). The training is anywhere from first aid, ground fighting, weapons, (inaudible), collision investigations, (inaudible). It's very extensive.

Ms. Guzzo: Okay, and have you had any training specifically related to the detection of drugs – how to determine if a substance is a controlled substance?

Trooper Hanger: Yes, I have.

Ms. Guzzo: And what is that training?

Trooper Hanger: I have training as various types of illegal, controlled substances are presented to us for display as well as for — marijuana is — a small amount is lit and (inaudible) burn.

Ms. Guzzo: Okay. And have you had any practical experience or work-related experience in detecting marijuana or whether or not an odor is burnt marijuana?

Trooper Hanger: Yes, I have. I've been involved in several marijuana arrests, ranging from a small little amount you can hold in your hand up to as much as over 1800 pounds.

Ms. Guzzo: Okay, and how many stops, would you say, or arrests have you conducted based on the odor of marijuana?

Trooper Hanger: Oh, I'd hazard a guess – probably in the low hundreds.

Ms. Guzzo: Okay, and, Trooper Hanger, were you working on April 6, 2006?

Trooper Hanger: Yes, I was.

Ms. Guzzo: And on that date, did you come into contact with a person now known to you as Jeremy Grande or Grande?

Trooper Hanger: Yes, I did.

Ms. Guzzo: And what was the nature of that contact? What drew you to Mr. Grande?

Trooper Hanger: He was a passenger in a vehicle I stopped for illegal window tint.

Ms. Guzzo: Okay, and what training have you had to recognize whether or not windows are tinted illegally?

Trooper Hanger: It's mostly practical experience, as well as repeated tests with a tint meter.

Ms. Guzzo: Okay, and what is a tint meter?

Trooper Hanger: A tint meter is a tool that I have that transmits light through one side of the glass and it has another side that picks up how much light goes through that glass.

Ms. Guzzo: Okay, and have you ever checked your observations of a window's tint with the tint meter to check for accuracy?

Trooper Hanger: Numerous times.

Ms. Guzzo: And have they been accurate?

Trooper Hanger: Yes.

Ms. Guzzo: Okay. So when you say that you – that Mr. Grande was a passenger in a vehicle that you stopped – the basis of the stop was the tinted windows?

Trooper Hanger: Yes.

Ms. Guzzo: And was that based on your observations?

Trooper Hanger: Yes, it was.

Ms. Guzzo: Okay, and what happened upon stopping the vehicle?

Trooper Hanger: Well, upon contact (inaudible) Mr. Grande said oh, it's you again, and then the driver, Ms. Hurley, she got very agitated. We had had contact before.

Ms. Guzzo: Okay, and what happened after that?

Trooper Hanger: Well, actually, Mr. Grande calmed her down although she probably would have calmed down on her own. I observed the odor of marijuana coming from the vehicle.

Ms. Guzzo: Okay, and how strong would you say this odor was?

Trooper Hanger: Kind of moderately.

Ms. Guzzo: And was it just coming from – did you determine where in the vehicle it was coming from?

Trooper Hanger: No.

Ms. Guzzo: Okay, and what did you do once you detected the odor of marijuana in the vehicle?

Trooper Hanger: I advised them they were both under arrest and they were both arrested.

Ms. Guzzo: Okay, and did you at any time check the window tint by using your tint meter?

Trooper Hanger: Yes, I did.

Ms. Guzzo: And what did it come up with?

Trooper Hanger: It came up to 5(?)%.

Ms. Guzzo: And what did you do after Mr. Grande was arrested?

Trooper Hanger: Trooper ___ actually handcuffed Mr. Grande and pointed out there was something in his pocket, which happened to be a glass marijuana smoking pipe with marijuana (inaudible) it, and fresh marijuana in it.

Ms. Guzzo: And did you at any time ___-test or do any other kind of test, to determine what the substance was?

Trooper Hanger: Yes, I did, and it did back positive for marijuana.

Ms. Guzzo: Your Honor, I have no further questions at this time.

Judge Svaren: Okay. Mr. Howson?

Mr. Howson: Trooper, the training that you mentioned – this was training that you received at the academy?

Trooper Hanger: Yes.

Mr. Howson: When was that?

Trooper Hanger: July of 1998.

Mr. Howson: And was there any subsequent training along those same lines?

Trooper Hanger: There's – yes, every trimester we have refresher training as well as every year we return to the academy for three days of training.

Mr. Howson: When was the last time that you had any refresher training with respect to the recognition of marijuana?

Trooper Hanger: I don't believe there's been any refresher training as to the odor of marijuana.

Mr. Howson: So your original training that you received in terms of the odor of marijuana and how to detect it was in 1998.

Trooper Hanger: The training – yes.

Mr. Howson: And no refresher courses since that time.

Trooper Hanger: No.

Mr. Howson: And may I assume that what was done in order for training was that you were told what the substance was, it was – some amount of it was burned, you smelled it, and that's pretty much how it was?

Trooper Hanger: That's the training – yes.

Mr. Howson: Is there anything else?

Trooper Hanger: Experience.

Mr. Howson: Anything else as part of the training?

Trooper Hanger: Not in regards to marijuana.

Mr. Howson: All right. How long did you follow the car that Mr. Grande was in?

Trooper Hanger: Before I decided I was going to stop them, about a block.

Mr. Howson: Okay, so you – was the car traveling in the same direction you were at the time you first saw it?

Trooper Hanger: No.

Mr. Howson: Traveling in a different direction?

Trooper Hanger: Correct.

Mr. Howson: And you turned around and a block later stopped it?

Trooper Hanger: Correct.

Mr. Howson: All right. And I take it you don't know how long Mr. Grande had been in the car?

Trooper Hanger: I have no idea how long he had been in the car.

Mr. Howson: You didn't see him get into the car?

Trooper Hanger: No.

Mr. Howson: You don't know where he got into the car?

Trooper Hanger: No, I don't.

Mr. Howson: And you don't know, of course, how long he had been in the car?

Trooper Hanger: No, I don't.

Mr. Howson: All right, thank you. That's all.

Judge Svaren: Thank you. Ms. Guzzo, do you have any further questions?

Ms. Guzzo: Yes, Your Honor. Trooper Hanger, with the experience that you had on duty as a Washington State Patrolman, have you ever in the arrests that you've made involving marijuana – have you ever checked your observation with the substance marijuana with any test results?

Trooper Hanger: Yes, I have.

Ms. Guzzo: And what were those results?

Trooper Hanger: 100% have always come back positive being tested as marijuana.

Ms. Guzzo: Thank you. No further questions, Your Honor.

Mr. Howson: No questions, Your Honor.

Judge Svaren: _____, please excuse the witness. Does the State have any additional witnesses?

Ms. Guzzo: Your Honor, the State does not.

Mr. Howson: We have no witnesses, Your Honor.

Judge Svaren: Thank you. Your motion will be heard.

Mr. Howson: Thank you. Your Honor, we have filed in this case a rather lengthy brief and the Prosecutor has, I believe, filed two responses. One was primarily because I had filed a brief which I believed was late and asked if they would like to have some time to respond. They indicated they would. We put it off for two weeks. But, unfortunately, I received their response last Friday and have not really had the opportunity to go through that particularly.

I mention that only because as to the second issue that I will argue, if the Court has some concerns that arise from the filing of the State's response brief, I would ask for opportunity to respond to that before any ruling, because I have not had that opportunity yet.

But let me begin with the first portion which we have briefed on both sides of this matter. We're discussing probable cause, Your Honor, and probable cause has for over two hundred years now been the line of freedom. It's been the line drawn in the sand between individuals and their government that allows them to call themselves free men. It's the very point at which we tell our government that I'm a free man and you cannot infringe upon my personal freedom until you have a good reason, grounded not in hunch or speculation, but in fact.

That line in our sand and our willingness to defend it is all that allows us to continue to call ourselves free people, but it's a line that's consistently under attack. The word "probable," as has been used by the courts, sounds every day more and more like the word "possible." Freedom defined by possible cause is not freedom. Anything is possible. Probable is much different, and it was probable that was used by the founders of this country to draw that line in the sand, that line that says this is where freedom begins and ends.

I think we can honestly say that all of us today are less free than we were forty years ago, based solely upon how the word "probable cause" has been used. And today, here in Mount Vernon, in this county, in this very case, at this moment we face the question of the erosion of our personal freedom. This case has the simplest of facts, as the court has just heard. The officer stopped the car, he smelled the odor of marijuana coming from the car – no particular location, just from the car. He arrested both the driver and the passenger immediately upon the detection of that odor simply coming from the car. He had no information whatsoever as to the passenger except that he was present in a car in which there was an odor of marijuana which had arrived there at some point in time which he did not know. It got there in some way that he did not know and had no

relation to the time in which Mr. Grande arrived, as far as his knowledge was concerned.

These facts present before this court a conflict between a decision and a body of law. There's a long body of law rising from the Fourth Amendment, but more importantly, rising independently also from Article 1, Section 7, of the Washington State Constitution, which has required individualized probable cause year after year after year after decade after decade. And there exists now another extremely small body of law in Washington appearing from Division 2 in the case of *Hammond* which would serve, if allowed, to overrule that humungous body of law that exists and has existed now for decades.

Both constitutions have required as a part of their history of the probable cause standard, I should say, for arrest that it be individualized – that no man should be required as a part – excuse me – no man should be arrested unless there exist facts that suggest then and there that he individually – that he personally has done something wrong. That's been the line in the sand and I have cited case after case after case and example after example contained within the briefs as to that body of law.

This is what we mean when we use the word "individual freedom." When you take the first word out of "individual freedom," you don't have freedom as we have traditionally thought of it in this country. It becomes meaningless.

I've mentioned that I've set forth a large body of cases. I picked up this morning and noticed another case on my desk – *State v. Penfield*, 2001, 106 Washington App. 157 – not directly on point, but, again, it comes up with the same exact thing: individualized probable cause. Whenever that issue's been put before the court in terms of an arrest, they have spoken of individualized probable cause. The only place that it does not appear and the place that *Hammond* seized upon it is when they talk generally in terms of probable cause and it gets confused between probable cause to arrest and probable cause to search.

We think that the beginning point of the analysis should be as that in *Seacrist*, which is cited on Page 7 of our brief. And the beginning point is this: under an analysis of probable cause to search – and that's where the confusion has arose for *Hammond* – the relevant inquiry is whether evidence of a crime will be found. For instance, in this particular case, the officer, upon smelling the odor of marijuana, had probable cause to search. He also, under traditional theory of constructive possession, could be said to have probable cause to arrest the driver because probable cause to search simply depends upon the indication that there exists somewhere within that car the contraband that he can, quite frankly, smell. But the *Seacrist* decision went on to say – and correctly so, in light of all the other cases – under an analysis of probable cause to arrest, the inquiry is whether the person to be arrested has committed a crime.

So what evidence is there that that individual has committed a crime at that point in time – at the point in time of arrest? This is one of those cases where you can very easily see that, had things gone a different way and the arrest – which we maintain is an illegal arrest – not been made, it could have very easily ended up at the same point. But the problem was the arrest was made. We believe that the principle stated in *Ybarra* remain the law of the land. That is, that the 4th and 14th Amendment protect persons – that's what it says – that a seizure of a person must be supported by probable cause particularized to that person. Now those are the words of the United States Supreme Court – “particularized to that person.”

The *Hammond* case – the case that said oh, if you smell the odor of marijuana you can arrest everyone in the car; that's actually what the *Hammond* case has said. The *Hammond* case and those that follow it cannot stand in the face of the settled law. The *Hammond* court didn't cite or discuss the area of particularized probable cause – individualized probable cause. They didn't distinguish it in any fashion from what they were doing and they did not overrule it or purport to overrule it. Quite frankly, they didn't see it. They never talked about it. They didn't discuss it, and yet there is this immense body of law directly contrary to that decision out of Division 2. It cannot stand. It cannot stand against that body of law.

So the question here now is shall we now change the line drawn in the sand? Shall we vote here for less freedom or for no freedom at all? Mr. Grande cannot leave here this morning having more freedom than he had when he walked through the door. We're asking for no expansion of any rule or any existing rule; we're asking that the rule that exists from the U.S. Supreme Court, from the State Supreme Court – throughout that body of law – simply be applied. A ruling for the State will leave us all in this room and throughout the county less freedom than we had this morning.

This is important. We ask the court in our decision to reaffirm the freedom of every person in this courtroom, because when you take away individualized freedom, you take away the meaning of freedom in this country.

There's a second reason we have moved for suppression – that is, that the arrest statute itself, 10.31.100, conflicts with Article 1, Section 7 – and there's a large portion of our brief devoted to that. I don't intend to reiterate the argument set forth in the brief this morning. Our Supreme Court has accepted review of this issue, though, and I think that's extremely important. This is a legitimate issue that the Supreme Court in *Walker* has before it right as we speak now. Essentially, 10.31.100 provides for arrest of misdemeanors not committed in the officer's presence. And this is a dramatic change from the common law applied in Washington from the beginning. And we might say, at first blush, but, ah, nothing's ever been said to the contrary and this statute has existed for a long time. But our Supreme Court has never had the opportunity to rule directly on

that point, but they have never at any point in any other cases said that the legislature has the authority to do what they did in this particular instance.

In *Ladson*, the court expressly stated the opposite – that it is the court's responsibility, not the legislature, to determine the constitutionality of such procedures. Remember, it is the courts that set forth the rules as to a great many things, including search and seizure. That's a procedural matter. How people are brought to court is a procedural matter. Arrest is something that falls directly within the framework of the judiciary, directly to the courts as a matter of rule-making. And that was made abundantly clear when the court rules took over from statute the area of search and seizure.

This is a statement of separation of powers. This is an argument that the court has already heard. It's reiterated here in this brief. The court has heard it because it came up in a DUI situation. And the issue of separation of powers, as I say, is a crucial issue in today's law. That is for certain. It is now before the Supreme Court in this particular instance and we will ultimately have a decision regarding 10.31.100. As it stands now, given what was said in *Ladson*, given the body of law that exists, we must say that this statute is unconstitutional.

Thank you very much.

Judge Svaren: Thank you. Ms. Guzzo?

Ms. Guzzo: Thank you, Your Honor. Regarding the stop of the vehicle in which Mr. Grande was a passenger, the State will rely on Mr. ___'s brief that was filed with the court – it looks like – on June 1st regarding the stop and the window tinting, the statute referenced, and also Trooper Hanger's testimony today regarding his training in recognizing a window tint that is too dark and checking that in the past with a tint meter.

Going on further, in regards to individualized PC, as the State points out in the response motion, the United States Supreme Court case of *Maryland v. Pringle*, the State feels is directly on point in that there are numerous individuals in a vehicle that's stopped where drugs are found, no one fesses up to ownership of the drugs. The court there found that there was enough probable cause to arrest every single person in the car. And in that case – if we're talking about individualized PC, the court would be saying that there was individualized PC for every single person in the car when there is – when there are drugs located within the car.

Pringle, in that case, was the front seat passenger. The drugs were found in kind of the back seat, shoved between the arm rest and the back seat. Pringle was probably the furthest person away from the drugs, and so not only did they find that the driver – possibly under constructive possession theory; I don't know – had – there was probable cause to arrest the driver for possession of those

drugs. The back seat passenger – there was probable cause to arrest that person, but there was also probable cause to arrest Pringle in that case. The officer in *Pringle* did ask all three occupants who the drugs belonged to. No one fessed up to it. They arrested all three and the arrest of Pringle was found valid.

It's the State's argument that this case is analogous to that Supreme Court case in that there are two occupants in the vehicle, an odor of marijuana is found – where the court has found the odor of marijuana within a vehicle is enough to arrest all occupants of the vehicle. There is a thought by Trooper Hanger that there is marijuana present within the vehicle, although he doesn't know which person – the driver or the passenger – off hand, in smelling the odor of marijuana, has that marijuana on his or her person or where it's located in the car. The court has ruled that there's authority to arrest all occupants of the vehicle.

Now if Trooper Hanger had asked the occupants of the vehicle whether or not there was marijuana present in the vehicle and those occupants say no or no, we don't have the marijuana, is he left to not arrest either one at that point because no one has fessed us to ownership of the marijuana? And the argument would be no, or the court in *Pringle* would have said that no, that the officer didn't have probable cause for all three occupants in the vehicle if that was the case, if someone had to fess up and say that they were the ones that owned the marijuana in the vehicle.

It's the State's argument that there – not only was there individualized probable cause to arrest Mr. Grande in the first place, but that the crime was also committed in his presence and that he smelled the odor of marijuana at that time. And so the thought is that the crime is being committed that instant when the odor of marijuana – that someone is having – has possession of the marijuana at that time.

Beyond that and going into the constitutional issue of the statute, the State isn't going to again reiterate what is in the brief. The State would just direct the court's attention to the argument that the State makes in their brief as to the constitutionality of the RCW. And the State would ask that the defense motion be denied and that this case be permitted to proceed to trial.

Judge Svaren: Thank you. Mr. Howson:

Mr. Howson: Thank you, Your Honor. Extremely briefly – I think the State's reliance on *Pringle* is not appropriate in this case. There's a vast difference in facts in the matters between what we had there and what we have here. There you had the drugs that were known to be in the car in a particular location, and the question becomes as to whose possession those drugs were in.

In this particular situation, we don't even have that. What we have is an odor – simply that, nothing more – an odor. An odor means that at some point in time – and we know not when – if the officer is correct, some marijuana was burnt either in the car or smoke from marijuana entered the car or was blown into the car or something of that sort. That's all that is known – simply that there has at some point in time been some drugs – which may or may not still be present, may have been completely consumed – all of that is unknown fact. The unknowns are gigantic in this particular case. There is simply one known and nothing more, and that is that there has been some burned marijuana at some point in time.

We don't know when the passenger got into the car, how long he's been in the car, what his knowledge of it is, and no questions were asked whatsoever. The officer simply smelled that and now we want to jump and say from that basis he has a reasonable basis to believe that the passenger of this vehicle has committed or is committing a crime. He simply has nothing of that sort. What he wants to do is say the passenger is present where a crime has been committed at some point in time. He's present there now. I could do something about the driver. I could arrest the driver. I can do some investigation. I can search the car. But I'm not going to do that. I'm going to arrest anybody who's present, anybody who's in that car, based solely – and nothing more – on the fact that I have a reason to believe that at sometime in the past that car has contained evidence of a crime.

That is a gigantic, gigantic leap in terms of what we do, in terms of protection of the individual. It says it doesn't matter whether the officer has any reason to believe that he's committed a crime or not. Your freedom is gone. Your freedom is gone the moment you associate with another individual who may have done something of that sort. And this is contrary to everything that we stand for in this country and we cannot allow this to continue to take away from our personal freedom. We must make a stand at some point. I maintain that stand is here today in this courtroom. The line is drawn and we must fight for it and this defendant.

Thank you.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATION

I, Debbie Nicholson, declare as follows:

1. That I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

2. That I am a Staff Assistant II for the Skagit County Prosecuting Attorney.

3. I certify that, to the best of my knowledge, the attached is a true and correct transcription of a recording of a hearing held on June 19, 2006, in Matter C626563, and transcribed by me on September 25 and 26, 2006.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Mount Vernon, Washington, this 26th day of September, 2006.

Debbie Nicholson
Debbie Nicholson, Declarant