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No 59468-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY ERICKSON,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 JUL 25 PM 4:44

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable James Allendoerfer

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. The trial court erred following the CrR 3.6 hearing in admitting cocaine evidence that was seized as the product of a seizure supported by a warrant issued without a finding of probable cause.

2. The trial court erred in entering CrR 3.6 conclusion of law 5, stating that the arrest warrant was valid as issued.

3. The trial court erred in entering CrR 3.6 conclusion of law 6, stating that Mr. Erickson's "failure to appear was personally witnessed by the judge."

## **B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Whether, under the Fourth Amendment and under Article 1, § 7 of the State Constitution, a warrant for arrest may issue following the defendant's failure to appear for a probation violation hearing where there is no finding of probable cause to support the underlying violation allegation.

## **C. STATEMENT OF THE CASE**

Anthony Erickson was convicted of possession of a controlled substance in a stipulated bench trial, following a CrR 3.6 hearing in which he unsuccessfully challenged his arrest on a

warrant, and sought suppression of the cocaine found in the subsequent search of his person. CP 4-15, 65-66. He was ordered to serve 90 days confinement. CP 4-15. He appeals. CP 16.

#### **D. ARGUMENT**

##### **THE WARRANT FOR MR. ERICKSON'S ARREST WAS NOT SUPPORTED BY A FINDING OF PROBABLE CAUSE.**

##### **1. Suppression hearing and trial court's ruling.** On

November 16, 2006, Mr. Anthony Erickson was walking near a used car lot by Highway 99 in Lynnwood, Washington.

12/21/06VRP at 7; CP 29-31. According to the testimony at the CrR 3.6 suppression hearing and the trial court's findings of fact, Lynnwood police officer Jason Valentine observed Mr. Erickson waiving animatedly at the officer as he drove by in his marked patrol car. Officer Valentine stopped his vehicle and approached Mr. Erickson on foot, whereupon he and the defendant had a "friendly" conversation. 12/21/06VRP at 10; CP 29-31.

When the officer asked Mr. Erickson his name, the defendant stated his name and also proffered his identification card. 12/21/06VRP at 10; CP 29-31. Valentine wrote down the

information and then terminated the contact, but after running Mr. Erickson's name through a warrant database in his patrol vehicle, he discovered that there was a warrant for the defendant's arrest from case number C38418 LWP, issued by the Lynwood Municipal Court on October 4, 2006. 12/21/06VRP at 12-13; CP 29-31. The officer searched for and located Mr. Erickson, who was still on foot, and arrested him on the warrant, following which an amount of cocaine was located on his person. CP 124, 29-31.

Prior to the CrR 3.6 hearing the parties filed multiple briefs which ultimately raised one contested issue. CP 45-64, 67-73, 74-80, 81-104, 105-06, 107-11, 112-20, Mr. Erickson challenged the validity of the warrant on ground that no documentation evidenced any finding of probable cause relating to the underlying allegations in the case of several probation violations, including a failure to appear for a drug/alcohol evaluation and follow-up treatment, and a failure to pay fines and assessments. CP 67-73; 12/21/06VRP at 62-65. The State asserted that the warrant in question was justified merely by Mr. Erickson's failure to appear in court for the probation violation hearing on these matters, scheduled for October 2, 2006, and asserted that this failure was personally observed by

the judge and that a bench warrant therefore was properly issued without further documentation of probable cause. CP 45-64; 12/21/06VRP at 57.

Following argument, the trial court held that the State's position was correct because CrRLJ 2.5 and State v. Parks, 136 Wn. App. 232, 148 P.3d 1098 (2006) allow a court to issue a bench warrant where a defendant fails to appear for a hearing as to which he has been given notice. CP 65-66. The court held:

The time and place for a due process hearing on probable cause is at the duly scheduled probation violation hearing held in open court. Defendant was sent notice of such hearing, and summonsed to appear. Unfortunately, he had changed his mailing address without notifying the City, and apparently did not receive the notice. He failed to appear. The only remaining remedy for the Municipal Court was to issue a bench warrant. Following Defendant's arrest a full hearing was timely held by the Court on the underlying allegations relating to Defendant's probation violations. He was found guilty and was sanctioned with jail time.

CP 66.

**2. The court rules and the constitution provide that no warrant for arrest may issue except upon probable cause.**

CrRLJ 2.2, which governs the issuance of arrest warrants in district or municipal courts, specifies that arrest warrants must be

supported by a documented finding of probable cause, specifically providing that

a warrant of arrest must be supported by an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The evidence shall be preserved. The court must determine there is probable cause to believe that the defendant committed the crime alleged before issuing a warrant.

CrRLJ 2.2. CrRLJ 2.2(b)(2) specifies that if the complaint charges the commission of a misdemeanor or gross misdemeanor, the court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent bodily harm to the accused or another, in which case it may issue a warrant. Similarly, CrRLJ 2.2(b)(5) permits a warrant to issue if a person fails to respond to a summons. But CrRLJ 2.2(c) provides that when a warrant is issued, it must include certain specific information, including "that the court has found that probable cause exists."

These court rules enforce the dictates of the Washington Constitution, Article I, § 7, which provides that "no person shall be

disturbed in his private affairs, or his home invaded, without authority of law." When served, a warrant of arrest disturbs a person in his private affairs, and thus a warrant shall not issue "without authority of law" regardless of whether it is labeled an administrative warrant, an arrest warrant, a bench warrant, or something else. State v. Walker, 101 Wn. App. 1, 5-6, 999 P.2d 1296 (2000) (citing City of Seattle v. McCready (McCready II), 124 Wn.2d 300, 309-10, 877 P.2d 686 (1994); City of Seattle v. McCready (McCready I), 123 Wn.2d 260, 271-72, 868 P.2d 134 (1994)). In addition, the Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

The Walker case involved a bench warrant for a failure to appear that was signed and issued by a court clerk, contrary to the provisions of CrRLJ 2.2 and otherwise unauthorized by statute or code. State v. Walker, 101 Wn. App. at 3 (quoting the trial court's

finding that "the municipal court computerized records do not reflect that [Walker] appeared in court."). The remedy in Walker was suppression given that there was no probable cause finding by a judge. "To date, the Washington Supreme Court has remedied all violations of Article I, section 7 by applying the exclusionary rule." State v. Walker, 101 Wn. App. at 11-12.

In the present case, the parties placed into evidence the docket from the Lynnwood Municipal Court and all documentation from the issuance of the warrant. Supp. CP \_\_\_\_, Sub # 23 (Exhibits 1-3). The docket in Case # 000038418 from the Lynnwood Municipal Court indicated that on August 8, 2006 a probation violation report was filed with the court arising out of the defendant's prior conviction for fourth degree assault, but with no specific violations noted in the record. On September 7, 2006, the Notice of Probation Violation hearing was returned to the court, with an indication that no forwarding address for the defendant was known. CP 68.

Then, on October 2, 2006, Mr. Erickson failed to appear at the probation violation hearing, and a \$5,000 bench warrant was issued. CP 68. The record of the hearing does not contain a

finding of probable cause for probation violations at the time of the hearing. The docket does not contain a notation of probable cause for probation violations. The warrant, which was issued after the failure to appear at the probation violation hearing, noted "Failure to Appear" and "Violation of a Court Order". Exhibit 1. The "Violation of a Court Order" notation does not specify which order was violated and does not specify the violations.

**3. An issuing court must make a determination of probable cause, finding probable cause to believe that a probation violation has occurred, prior to issuing a warrant for a defendant when a defendant fails to appear for a probation violation hearing.** Settled law indicates that a specific finding of probable cause, made on the record, must support every arrest warrant issued by a court. The finding of probable cause must be sufficiently specific to allow a reviewing court to assess the validity of the warrant. The basis for this position is the 4th and 14th Amendments to the US Constitution and Article 1, § 7 of the Washington State Constitution.

Probable cause is a mutable concept which simply means that there is sufficient evidence that would lead a reasonable and

prudent person to take action. In certain circumstances, probable cause must be established by a court prior to police action, such as an arrest warrant issued by a court or a search warrant issued by a court. To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Supreme Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible. The classic statement of this principle appears in Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. at 13-14.

In State v. Parks, 136 Wn. App. 232, 148 P.3d 1098 (2006), the Court of Appeals found that a judge must find probable cause prior to issuing a warrant when a case is in pretrial status at the Municipal Court level. The Court clearly based its opinion on the Due Process clause. There, the State argued that the warrant was

issued for the defendant's failure to appear, under Rule 2.2.

Critically, the Court states in the opinion that a finding of probable cause for the underlying offense must support a bench warrant issued for failure to appear. State v. Parks, 136 Wn. App. at 237.

When addressing the issue of the alleged conduct of contempt or bail jumping, the Court specifically noted that there was no finding of probable cause for either of those offenses noted in the docket. State v. Parks, at 238-39. Further, the Court noted that the court rules were established to enforce the Constitution, not evade it:

Taken as a whole, the criminal rules for the courts of limited jurisdiction are designed to enforce, not evade, the constitutional command. There should have been a judicial finding of probable cause, made on the record before the court attempted to force Parks to appear in court. We hold that making such a finding is not only a "best practice" but also a constitutional obligation of the issuing court.

State v. Parks, 136 Wn. App. at 239. Based on these authorities, the arrest warrant was required to be, but in this case was not supported by a finding of probable cause, and the defendant's failure to appear does not absolve the trial court of finding probable cause to support the underlying allegations before issuing an arrest warrant for the failure to appear.

Furthermore, an additional issue in the present case is one of an adequate record of a probable cause finding. The Municipal Court has a constitutional duty to the defendant to issue a ruling with a clear record. See Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1974) (finding of probable cause must be memorialized in the record). Without an adequate record, there can be no meaningful review of a probable cause determination. In the case at bar, the record is wholly inadequate to allow a reviewing court to determine whether probable cause was found and whether there was a sufficient basis for such a finding. The warrant cannot be upheld.

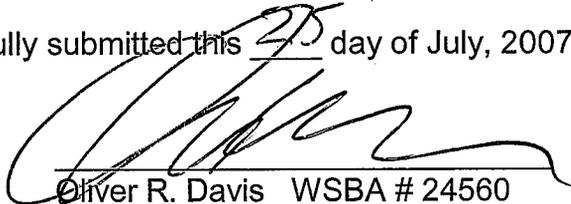
**4. Suppression and reversal are required.** Evidence which is the product of an unlawful search or seizure is not admissible. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Evidence will be excluded as fruit of the illegal seizure unless the illegality is not the “but for” cause of the discovery of the evidence, and suppression is required where the challenged evidence is in some sense the product of illegal governmental activity. Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, 615 (1984) (citing United States v.

Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 537 (1980)). Here, the cocaine found on the defendant's person would not have been discovered but for Officer Valentine's illegal detention of Mr. Erickson. For this reason, and based on the foregoing, Mr. Erickson asks that this Court reverse the trial court's order denying his motion to suppress, and reverse his conviction.

**E. CONCLUSION.**

Based on the foregoing, Mr. Erickson respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 25 day of July, 2007.



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Washington Appellate Project - 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,  
Respondent,  
  
ANTHONY ERICKSON,  
Appellant.

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COA NO. 59468-1-I

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**CERTIFICATE OF SERVICE**

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 25<sup>TH</sup> DAY OF JULY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |   |                   |                                     |
|-----|---|-------------------|-------------------------------------|
| [X] | SETH AARON FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | ANTHONY ERICKSON<br>13508 29 <sup>TH</sup> AVENUE W<br>MILL CREEK, WA 98012                           | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 25<sup>TH</sup> DAY OF JULY, 2007.

X \_\_\_\_\_



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