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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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STATE OF WASHINGTON
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No. _____

Division III Cause No. 25735-5,
~~consolidated therein as Case No. 25734-7~~

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

GILBERTO IBARRA-CISNEROS, Petitioner

PETITION FOR REVIEW

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A. INTRODUCTION

This case involves petitioner's conviction on a drug charge because of police use of an illegally obtained cellphone. In the Fall of 2006, petitioner Gilberto Ibarra-Cisneros was convicted in the Walla Walla County Superior Court for possession of cocaine. Petitioner came to the attention of the police because he had called a cellphone that officers had confiscated from his brother. Officers ultimately used that phone to find, observe, and convict petitioner.

However, the search that yielded that cellphone was an illegal search. That search was of his brother's home; the Court of Appeals determined on July 1, 2008 that that search was an illegal search. That opinion is set forth in its entirety at Appendix A.

What yields this petition for review is that the Court of Appeals made an additional conclusion. That court concluded that attenuation had purged the taint of illegality from the phone sufficiently for petitioner's conviction to stand.

Believing this to be in error, petitioner respectfully requests review and relief from this Court.

B. IDENTITY OF PETITIONER

Petitioner Gilberto Ibarra-Cisneros asks this Court to accept review of the Court of Appeals decision which affirmed his conviction, as designated in Part C of this Petition. He is represented in this matter by Janelle M. Carman.

C. COURT OF APPEALS DECISION

The opinion at issue was filed on July 1, 2008. A copy of the published decision is attached hereto at Appendix A.

Reconsideration was requested. The ruling on that motion is attached hereto as Appendix B. This Petition for Review is timely brought.

D. ISSUES PRESENTED FOR REVIEW

1. With regard to petitioner's case, does the Court of Appeals' decision conflict with State and Federal constitutional protections as well as decades of interpretive case law regarding the collection of evidence (here, the cellphone call) in the same time period as the illegal conduct, by substantially the same persons, without Miranda Warnings or intervening circumstances,

in the course of egregious police conduct against petitioner and his brother?

2. Does Article I, Section VII and its interpretive case law permit a police officer to seize a cellular telephone without legal authority?

3. Does Article I, Section VII and its interpretive case law permit a police officer to use an illegally seized cellphone to obtain evidence against callers?

4. Did the Court of Appeals fail to tailor the application of the four-pronged attenuation analysis to the relatively new technology of cellphone use?

E. STATEMENT OF THE CASE

Petitioner and his brother (Adrian Ibarra-Raya) faced parallel criminal trials in Walla Walla in the Fall of 2006. Although the trials occurred back-to-back, petitioner's charges were less serious. Indeed, local police scrutinized petitioner only when he called his brother's cell phone after that phone had been illegally confiscated by law enforcement officers in the midst of investigating and interrogating his brother.

Division III ruled that all of the evidence from the search of the brother's home had to be suppressed. App. A. That included the cellphone on which the subject call took place.

Nonetheless, Division III further ruled that the phone could be used to lure this petitioner to meeting with police, where he was arrested.

At the trial court level, Petitioner brought several motions to suppress the tainted evidence and its fruits. One of those fruits, the cellphone, was the only thing that led officers to petitioner. At the hearings on those motions, the State admitted that if suppression were required in the brother's case, then it was likely that dismissal would be mandated in petitioner's case.

The trial court found that the evidence was admissible against both brothers. The lower court admitted that a reviewing court may disagree with its ruling and that the matter was "razor thin."

At the Court of Appeals, two things happened. Division III rejected the trial court's analysis as to the brother: evidence obtained as a result of the illegal search was properly suppressible. However, the Court of Appeals ruled that use of the same evidence, the cellphone, was admissible against petitioner.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner requests review of this matter to clarify whether a cellphone confiscated during an illegal search or the fruits thereof may properly provide evidence/lead to admissible evidence when it is used to interrogate, and then arrange to meet, the caller via the otherwise tainted phone.

1. Review Is Proper Because The Decision By The Court Of Appeals Conflicts With Both State And Federal Constitutions As Well As Interpretive Case Law

The decision of the Court of Appeals directly conflicts with decades of jurisprudence. This Court has consistently mandated the application of the exclusionary remedy to a violation of Article I, Section VII of the State's Constitution.¹ Evidence seized during an illegal search must be suppressed as "fruit of the poisonous tree." *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986));

¹ Article I, Section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). This is because "[u]nlike in the Fourth Amendment, the word 'reasonable' does not appear in any form in the text of article I, section 7 of the Washington Constitution." *State v. Morse*, 156 Wn. 2d 1, 9, 123 P.3d 832 (2005). Understanding this significant difference between the Fourth Amendment and Article I, Section 7 is vital to properly analyze the legality of any search in Washington.

Even safety concerns of officers leave unchanged the constitutional protections against an illegal search. *State v. Duncan*, 146 Wn. 2d 166, 176, 43 P.3d 513 (2002). “The policy concerns for police safety are in tension with the constitutional guarantees of personal privacy. The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.” *Id.*

The mandatory exclusion rule is not a “meaningless promise.” *State v. Ladson* 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999). “Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence.” *Id.*

This theme continues in more recent decisions. *State v. Houvener*, 145 Wn. App.408, ___ 186 P.3d 370 (2008). In *Houvener*, the Court of Appeals affirmed the lower court’s decision to suppress evidence. “All evidence obtained thereafter should be considered fruit of the poisonous tree.” *Id.* Indeed, “[h]ad the Defendant not been ordered to open his door, he would not have agreed to exit his room, be interviewed by the police, give incriminating statements and thereafter, turn over to the police the stolen guitar and computer.” *Id.*

In another recent case, this court ruled that the private search doctrine does not apply to illegal searches. *State v. Eisfeldt*, 163 Wn.2d. 628, 640, 185 P.3d 580, 585 (2008). “We hold the private search doctrine is contrary to article I, section 7 and is inapplicable to warrantless searches in Washington.” *Id.*

The result would be the same even under the less strenuous analysis of the Fourth Amendment. A privacy violation would bar from trial “physical, tangible materials obtained either during or as a direct result of an unlawful invasion” under the exclusionary rule. *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (finding subsequent confession admissible because it followed intervening, purging events of lawful arraignment, release, and voluntary return of Wong Sun, but that other fruits must be suppressed).

The exclusionary rule is not a mere “but-for” test. *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that

illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Wong Sun, 271 U.S. 487-488 (internal citations omitted).

To decide if the taint has been sufficiently purged from the disputed evidence, courts review four factors: (1) the temporal proximity of the wrongful state action and the disputed evidence; (2) the presence of intervening circumstances; (3) the purpose and flagrancy of the official misconduct; and (4) the giving of *Miranda* warnings. *Brown v. Illinois*, 422 U.S. 590, 603-604, 95 S.Ct. 2254 (1975); *State v. Soto-Garcia*, 68 Wn. App. 20, 27, 841 P.2d 1271 (1992);² *State v. Avila-Avina*, 99 Wn. App. 9, 15, 991 P.2d 720 (2000).³

The burden is on the State to prove sufficient attenuation from the illegal search to dissipate its taint. *State v. Childress*, 35 Wn. App. 314, 316, 666 P.2d 941 (1983). When these factors are applied to petitioner's case, the need for a remedy is clear.

(1) Temporal proximity: First, the timing of events was contemporaneous. The cell phone was seized by the officers along

² Citing *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S.Ct. 2664, 2667, 73 L.Ed.2d 314 (1982).

³ See also *State v. Gonzales*, 46 Wn. App. 388, 398, 731 P.2d 1101 (1986); *State v. Armenta*, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997); *State v. Jensen*, 44 Wn. App. 485, 723 P.2d 443 (1986).

with the person of the brother. Both were taken to the police station. While the brother was being questioned and held, petitioner was attempting to call his brother on the very cell phone answered by Agent Palascios. The illegally obtained cell phone was used to lure petitioner to the parking lot of a local supermarket. That was where an officer spotted petitioner. From that parking lot to the mall, Walla Walla Police Department Officers followed him. The same officers approached and arrested him. The cell phone was the vital link between the activities. Accordingly, the poisoned cell phone poisoned the evidence against Petitioner.

(2) Intervening Circumstances: Admittedly, some time did pass between the brothers' arrests. However, the arrests were by the same players investigating the same course of criminal conduct. Thus, as to any significant factors, there were no intervening circumstances to purge the taint.

(3) Flagrancy of the Misconduct: It is hard for the writer to adequately describe the flagrancy of officer misconduct. The actions were more than offensive, illegal, and excessive. In the words of Division III, the officers were "intruders". (App. A.)

Some of the most striking facts bear repeating: On approach to the brother's house, officers parked their police

vehicles down the road and snuck up to the home – the home they believed (erroneously) may have intruders in it. Then, they took the time to run a VIN number, only to learn (erroneously), that the truck was stolen. Next, at about 2:30 in the morning, they surrounded the home by opening gates to the backyard and crawling near windows at tactical positions. One officer crept to the back door and peered through the window into the kitchen. All the while, the officers pressed close to the walls and windows and doors to eavesdrop for information. When two boys opened the backdoor to respond to the knocking, the officer posted there intentionally used his flashlight to subdue them and force his way into the home. He then ordered them to open the front door for other officers. Then, the four officers conducted an entire search (sweep) of the home before a warrant was even mentioned. And, of course, while the warrant was being obtained, the officers waited inside the home.

(4) Miranda Warnings: There were no Miranda warnings given before luring petitioner to the meeting location, and no Miranda warnings before questioning petitioner about a baggie nearby on the ground. Indeed, there would have been no reason at

all for the officers to approach petitioner but for the communications issuing through the cell phone.

The intruders' misconduct was clear.

2. Review Is Proper Because Of The Potential For Widespread Privacy Violations

Review and correction of this decision is important for direction of both law enforcement and lower courts as to the use of illegally obtained cellphones. As things stand now under the Court of Appeals ruling, police officers in Washington are free to confiscate the telephones of any suspect and then use those cellphones without limitation.

This directly impacts Article I, Section VII. It certainly cannot be that police may take suspects' cell phones through any means necessary and then to interrogate and charge any person listed in the phone's calling history or anyone who may call that cell phone⁴. Such a ruling threatens to make Article I Section VII a meaningless promise. "Under article I, section 7, suppression is constitutionally required. We affirm this rule today, noting our constitutionally mandated exclusionary rule 'saves article 1, section

⁴ With technological advances, more and more information is stored on cellphones making the various uses of an illegally obtained cellphone increasingly more of an issue as time goes by.

7 from becoming a meaningless promise.” *State v. Ladson* 138 Wn.2d at 359, citing to Sanford E. Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L.Rev. 459, 508 (1986).

3. This Issue Is Timely and of Vital Public Importance.

While cell phones may be relatively new, analogous situations give insight on how material contained within their storage should be handled. *State v. Nordlund*, 113 Wn. App. 171, 53 P.3d 520 (2002), *rev. denied*, 149 Wn.2d 1005 (2003).

In *Nordlund*, the police arrested defendant for multiple sex offenses. Later that same day, the police obtained a search warrant for defendant's home. The affidavit contained "generalized statements about the habits of sex offenders" in support of the request to search defendant's computer. During the search, defendant's computer was seized. Incriminating evidence was located on the computer. Defendant appealed and the Court of Appeals reversed.

The search of the computer raised First Amendment concerns as Fourth Amendment ones. *Id.*

The trial court aptly described a personal computer as "the modern day repository of a man's records, reflections, and conversations." Thus, the search of that computer has First Amendment implications that may collide with Fourth Amendment concerns. When this occurs, we closely scrutinize compliance with the particularity and probable cause requirements.

Under this "scrupulous" scrutiny, the King and Pierce County affidavits do not demonstrate probable cause for the seizure and search of Nordlund's personal computer. The affidavits supporting the King County warrant describe Nordlund's noncriminal computer use and conclude that the "computer or similar electronic storage device will provide data that will assist in establishing dates and times in which [Nordlund] was at his residence which given the number of assaults and the locations, this will provide necessary information that may serve to establish [Nordlund's] location at critical times relevant to the alleged crimes." ("As stated in [the] attached affidavit [Nordlund] used a computer at this residence to access pornography and communicate with others via E-mail. Therefore, the computer and any electronic storage media could likely provide important evidence in this case regarding intent, dates and locations.").

Although the affidavits establish the presence of a computer in Nordlund's home and his noncriminal use of that computer, they do not contain particularized information demonstrating the required nexus between the computer and the possible evidence of the crimes under investigation.

The affidavits supporting the King County warrant contain no factual support for the conclusory statement that the computer contained data that would establish Nordlund's "location at critical times relevant to the alleged crimes." Although an examination of the computer could show the times that Nordlund was using his computer and, thus, support an inference that

he was home at those times, there is no factual nexus between this information and any alleged criminal activity. At most, this information could establish that Nordlund *did not* commit the charged crimes.

Nordlund, 113 Wn. App. at 181-83 (citations omitted); *see also* *State v. Perrone*, 119 Wn. 2d 538, 545, 834 P.2d 611 (1992).

Moreover, modern cellular telephones are more than vessels of verbal communication. These phones have lengthy histories of calls made and received. The phones are capable of storing vast amounts of data about callers, including their names and detailed contact information. Indeed, these “phones” take photographs, record movies, hold e-mail communication, provide internet access (including recording the history of sites reviewed), and provide records of the owner’s calendar.

Left alone, the Court of Appeals decision on our case would allow police to “use” the cellphone to obtain massive amounts of the owner’s personal business. Under the analysis used in the decision at issue, officers at the Walla Walla Police Department not only would have been forgiven for answering petitioner’s phone call, they also would have been able to review the movies, emails, and photographs with impunity.

Of course, a warrant may have changed things but there was no warrant. This is just the sort of information that is protected by the warrant requirement.⁵ All this data – including the number from which petitioner was calling – may have been retrievable and protected under a properly requested warrant.

As such, a reversal of the Court of Appeals' decision will only affect illegally obtained phones. However, where officers in the midst of an interview (which was ruled to be inadmissible) answered a tainted cell phone (which was ruled to be wrongfully obtained), and lured the caller to a meeting point, attenuation did not occur.

4. The Attenuation Analysis Should Accommodate Changes In Technology

To protect our State's constitutional privacy protections, the four-prong attenuation analysis may require need updating where this kind technology is concerned. This is because the use of cell phones is tremendously widespread and, on each of those phones, an intricate database is created: lists of those we call, names and

⁵ It may be worth noting that there would be nothing "inevitable" about the information that could conceivably be obtained from the cell phone without a warrant. Without evidence that the camera was the instrument of a crime or loot from a crime, an impartial magistrate would not necessarily find a need to go poking around inside it.

nicknames of acquaintances, phone numbers, addresses, text messages, times of calls, lengths of calls, even recordings or movies. In the wrong hands, that information could be manipulated to defame, to defraud, or to deceive into conviction. The information listed on that phone remains until the phone is destroyed or the information erased.

As such, the old four-prong test may be outdated. Review is therefore proper where the Court of Appeals failed to discern that the application of the four-pronged attenuation analysis must be updated to apply to new technology.

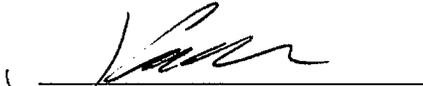
After all, verbal evidence which derives immediately from unlawful entry and unauthorized arrest is no less the “fruit” of official illegality than more common tangible fruits of unwarranted intrusion. The Fourth Amendment may protect against overhearing of verbal statement as well as against more traditional seizure of papers and effects. *Wong Sun*, 371 U.S. at 490.

Accordingly, the issues raised in this Petition for Review involve issues of substantial public interest that should be determined by the Supreme Court.

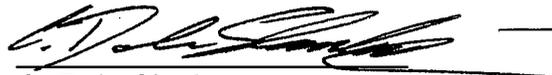
G. CONCLUSION

As a result of the foregoing, the undersigned, on behalf of petitioner, respectfully requests that this Court grant review and reverse the lower courts' decision to admit this evidence against petitioner.⁶

Respectfully submitted,



Janelle M. Carman
Attorney for Petitioner/Appellant
WSBA # 31537



C. Dale Slack
Attorney for Petitioner/Appellant
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⁶ Petitioner is additionally entitled to an award of attorney's fees and costs. This issue will be addressed separately in the event that review is granted.

DESIGNATION OF APPENDICES

APPENDIX A – Copy of Decision of Court of Appeals, Division III

APPENDIX B – Copy of Denial of Reconsideration

APPENDIX A

FILED

JUL - 1 2008

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 25734-7-III
)	(consolidated with)
Respondent,)	No. 25735-5-III
)	
v.)	Division Three
)	
ADRIAN IBARRA-RAYA,)	
)	
Appellant.)	
)	
<hr/> STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	PUBLISHED OPINION
)	
GILBERTO IBARRA-CISNEROS,)	
)	
Appellant.)	

BROWN, J. — First, Adrian Ibarra-Raya appeals his controlled substance convictions flowing from an early morning protective search of his residence after a neighbor in a Walla Walla neighborhood complained of noise coming from a house that was vacant during the day. We reverse Mr. Ibarra-Raya's convictions because officers entered his residence without a warrant or warrant exception; thus, the trial court erred by denying Mr. Ibarra-Raya's CrR 3.6 evidence suppression motion. Second, in a consolidated appeal, Gilberto Ibarra-Cisneros challenges the evidence sufficiency of his

throw-down cocaine possession conviction that developed in a parking lot as officers approached him when investigating a call received on Mr. Ibarra-Raya's cell phone after he was arrested. Because the intervening circumstances attenuated any taint from the cell phone use, and the evidence is otherwise sufficient, we affirm Mr. Ibarra-Cisneros' conviction.

FACTS

At about 2:27 AM on July 14, 2006, a neighbor called 911, regarding noise coming from a nearby house in Walla Walla that looked vacant during the day. Officers took the call as "noise coming from a vacant house." Report of Proceedings (RP) (Adrian Ibarra-Raya) at 86. When officers arrived at the house, they saw lights on and heard party noise, but reported nothing exceptional. A truck without a license plate, but with a temporary permit, was in the driveway. The vehicle identification number (VIN) check came back "stolen out of California." RP (Adrian Ibarra-Raya) at 87.

Two officers then knocked on the front door; immediately the lights in the living room went off. Walla Walla Police Officer Tim Morford was on the side of the house and saw two men, one later identified as Mr. Ibarra-Raya, go into a room off the hallway and then come out of the room and open the back door. Officer Morford ordered the men to remain in the house. Officer Morford then followed the two men into the house and conducted a protective sweep, seeing marijuana and a bundle of cash. At this point, the officers learned that solely the truck's license plates had been stolen and that Mr. Ibarra-Raya was subleasing the house. Based on Officer Morford's observations,

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State v. Ibarra-Raya cons. w/ *State v. Ibarra-Cisneros*

officers obtained a search warrant that led to the discovery of cocaine, over \$400,000 sealed in plastic bags, and marijuana. Officers arrested Mr. Ibarra-Raya.

While at the police station, Mr. Ibarra-Raya's cell phone rang repeatedly. A drug enforcement administration agent eventually answered. A person later identified as Mr. Ibarra-Cisneros asked for his brother. Mr. Ibarra-Cisneros became agitated and threatening when the agent would not put Mr. Ibarra-Raya on the phone. The two agreed to meet in a parking lot where undercover officers saw a pickup pull in with Mr. Ibarra-Cisneros as the passenger. The officers followed the pickup to a mall parking lot where Mr. Ibarra-Cisneros got out of the vehicle and stood beside it.

At trial, the officers testified they approached Mr. Ibarra-Cisneros and found a bindle on the ground where he was standing that contained cocaine. It was fresh looking without dust on it. After he was arrested, Mr. Ibarra-Cisneros volunteered, "If you saw me drop it, then I'll admit it's mine But if you didn't see me drop it then you can't charge me with it." RP (Gilberto Ibarra-Cisneros) at 210-11.

The State charged Mr. Ibarra-Raya with possession of a controlled substance - marijuana - with intent to deliver, and possession of a controlled substance - cocaine. The State charged Mr. Ibarra-Cisneros with possession of a controlled substance - cocaine. The court denied their evidence suppression motions based on an illegal house search for the evidence seized at the house. The brothers separately appealed.

ANALYSIS

A. Evidence Suppression Motions

The issue is whether the trial court erred in ruling the initial entry into Mr. Ibarra-Raya's house was a lawful protective sweep and denying the brothers' evidence suppression motion.

"In reviewing a trial court's denial of a suppression motion, we review challenged findings of fact for substantial supporting evidence." *State v. Lawson*, 135 Wn. App. 430, 434, 144 P.3d 377 (2006). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review the trial court's conclusions of law de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

Warrantless searches of constitutionally protected areas are presumed unreasonable absent proof of a well-established exception. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The State bears the burden of establishing such an exception. *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

Relevant here, the police may enter a building without a warrant when facing exigent circumstances (emergency exception). The exception recognizes the "community caretaking function of police officers, and exists so officers can assist citizens and protect property." *State v. Schlieker*, 115 Wn. App. 264, 270, 62 P.3d 520 (2003) (quoting *State v. Menz*, 75 Wn. App. 351, 353, 880 P.2d 48 (1994)). The

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emergency exception justifies a warrantless entry when: (1) the officer subjectively believes that there is an immediate risk to health or safety; (2) a reasonable person in the same situation would come to the same conclusion; and (3) there is a reasonable basis to associate the emergency situation with the place searched. *State v. Gocken*, 71 Wn. App. 267, 276-77, 857 P.2d 1074 (1993). A court examining these factors must consider "whether the officer's acts were consistent with his or her claimed motivation." *State v. Downey*, 53 Wn. App. 543, 545, 768 P.2d 502 (1989).

We evaluate whether the officer's acts in the face of a perceived emergency were objectively reasonable. *State v. Lynd*, 54 Wn. App. 18, 22, 771 P.2d 770 (1989). The Ninth Circuit has similarly defined "exigent circumstances" as "those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers and other persons, the destruction of relevant evidence, the escape of the suspects or some other consequence improperly frustrating legitimate law enforcement efforts." *United States v. Echegoyen*, 799 F.2d 1271, 1278 (9th Cir. 1986) (quoting *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984)). Thus, a substantial risk to persons or property, including property with evidentiary value, is required for an emergency exception application.

Here, the intruding officers believed they were investigating noises that were coming from a vacant house, but the record shows the report was simply for noises coming from a house that appeared to be vacant during the day. No immediate risk to health or safety is shown. The officers arrived at the house, heard noises and

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State v. Ibarra-Raya cons. w/ *State v. Ibarra-Cisneros*

investigated the vehicle parked in an ungated driveway to check whether a new occupant resided in the house; arguably their activities were legitimate police business. See *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981) ("It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open."). They found what they believed was a stolen truck, although it turned out that just the license plate was stolen. While the police suspected criminal activity, the facts would not lead a reasonable person to suspect a substantial risk to the persons or property within the house or a reasonable basis for an emergency search. Thus, the exigent circumstance exception to the general warrant requirement is not applicable to our facts.

After knocking and preventing the departure of the two occupants, rather than stopping, identifying, and questioning the occupants as intended, Officer Morford, without exigent circumstances to support a community caretaking purpose, entered the home and impermissibly collected the evidence used to obtain a search warrant. Therefore, the trial court erred in not denying the brothers' suppression motion. Having so found, we need not analyze Mr. Ibarra-Raya's cumulative error contention. However, we do need to examine Mr. Ibarra-Cisneros' evidence insufficiency contention because any connection between Mr. Ibarra-Raya's cell phone and the bundle found at Mr. Ibarra-Cisneros's feet is too attenuated to affect his cocaine possession conviction, when considering the intervening circumstances, temporal factors, and lack of flagrant police conduct. *State v. Tan Le*, 103 Wn. App. 354, 360-62, 12 P.3d 653 (2000).

B. Evidence Supporting Mr. Ibarra-Cisneros' Conviction

Was the evidence sufficient to support Mr. Ibarra-Cisneros' possession of cocaine conviction, considering the evidence of constructive possession?

When a defendant challenges evidence sufficiency in a criminal case, we review the evidence most favorably for the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Evidence is sufficient to support a conviction when it permits a rational trier of fact to find that the State established the essential elements of the crime beyond a reasonable doubt. *Id.* A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence, requiring us to draw all possible inferences for the State. *Id.* We defer to the finder of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *Id.* at 874-75.

Under RCW 69.50.4013(1), it is unlawful to possess a controlled substance. Possession can be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession requires that the controlled substance be in the personal, physical custody of the person charged with the crime. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Because nothing in our record shows Mr. Ibarra-Cisneros was in physical custody of cocaine, the evidence presented at trial must support a finding of constructive possession.

Constructive possession involves "dominion and control" over the drugs in question or the premises in which they are discovered. *Callahan*, 77 Wn.2d at 29. Mere proximity to a controlled substance alone is insufficient to show dominion and

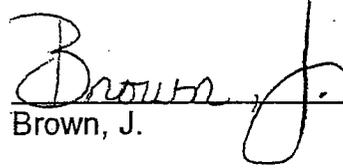
No. 25734-7-III cons. w/ No. 25735-5-III
State v. Ibarra-Raya cons. w/ *State v. Ibarra-Cisneros*

control. *State v. Bradford*, 60 Wn. App. 857, 862, 808 P.2d 174 (1991). Various factors determine dominion and control, and the cumulative effect of a number of factors is a strong indication of constructive possession. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). We must look at all the evidence tending to establish circumstances from which the jury could reasonably infer the defendant had dominion and control of the drugs to establish constructive possession. *Id.*

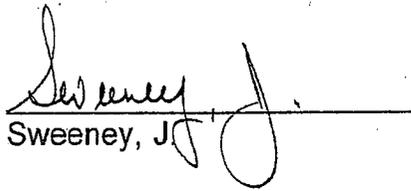
Here, Mr. Ibarra-Cisneros called and inquired about his brother who was at that time in custody and being investigated for delivering a controlled substance. The officers suspected Mr. Ibarra-Cisneros was connected to drug trafficking because of the tone and content of his conversation and arranged a meeting. When the undercover officers eventually approached Mr. Ibarra-Cisneros, he was standing near the side of a truck and had been under observation. Officers found a bundle on the ground next to where Mr. Ibarra-Cisneros was standing that contained cocaine and testified it was fresh looking without dust on it. After he was arrested, Mr. Ibarra-Cisneros stated, "If you saw me drop it, then I'll admit it's mine But if you didn't see me drop it then you can't charge me with it." RP (Gilberto Ibarra-Cisneros) at 210-11. Mr. Ibarra-Cisneros did not challenge the admissibility of his statement. This evidence would permit a reasonable jury to infer that Mr. Ibarra-Cisneros had dominion and control of the cocaine. Accordingly, sufficient evidence supports his possession conviction.

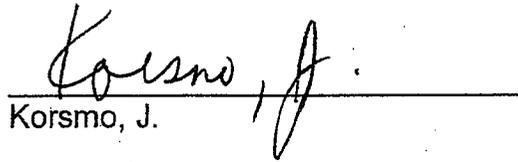
No. 25734-7-III cons. w/ No. 25735-5-III
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Mr. Ibarra-Raya's conviction is reversed. Mr. Ibarra-Cisneros' conviction is affirmed.


Brown, J.

WE CONCUR:


Sweeney, J.


Korsmo, J.

APPENDIX B



FILED

SEP -2 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 ADRIAN IBARRA-RAYA,)
)
 Appellant.)
)
 _____)
 STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 GILERTO IBARRA-CISNEROS,)
)
 Appellant.)

No. 25734-7-III
(consolidated with)
No. 25735-5-III

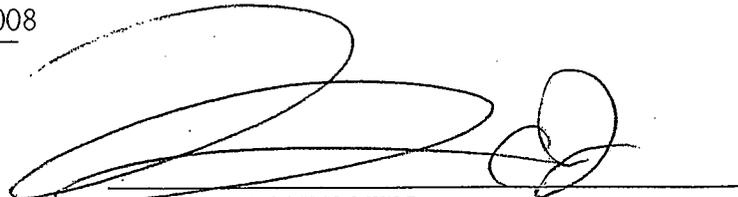
**ORDER DENYING MOTION
FOR RECONSIDERATION**

THE COURT has considered respondent's motion for reconsideration of this Court's opinion under date of July 1, 2008, reversing Adrian Ibarra-Raya's controlled substance convictions, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, respondent's motion for reconsideration is hereby denied.

DATED: September 2, 2008

FOR THE COURT:



**JOHN A. SCHULTEIS
CHIEF JUDGE**