

FILED
COURT OF APPEALS
DIVISION II

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NO. 38472-8-II

STATE OF WASHINGTON
BY _____

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

STATE OF WASHINGTON,

Respondent,

v.

DARRIN LOUTHAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution, the trial court erred in denying Louthan's motion to suppress evidence obtained from his unlawful arrest.

2. The trial court erred in concluding that the officer had probable cause to arrest Louthan for use of drug paraphernalia.

3. To the extent that this conclusion addresses mixed questions of law and fact, the trial court erred in entering conclusion of law 3.¹

4. The trial court erred in entering conclusion of law 4.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where an ordinance conflicts with state law, the two statutes cannot coexist and the ordinance must be invalidated. An ordinance and a statute conflict where one prohibits what the other expressly authorizes. RCW 69.50.412 expressly authorizes the possession of drug paraphernalia, but under the Montesano Municipal Code, possession of drug paraphernalia is a misdemeanor. Should this Court hold the ordinance conflicts with state law and must be invalidated? (Assignment of Error 1)

¹ The trial court's findings of fact and conclusions of law are attached as an Appendix.

2. Under article I, section 7, a search incident to arrest must follow a valid custodial arrest. Police officers arrested Louthan for possession of drug paraphernalia. Rather than rule on Louthan's challenge to the validity of his arrest for this purported offense, the trial court found the officers could have arrested Louthan for the crime of use of drug paraphernalia. Where this reason was not the real reason for Louthan's arrest, and the trial court's decision is directly contrary to the Washington Supreme Court's decision in State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007), must Louthan's conviction be reversed? (Assignments of Error 1-4)

3. A police officer may only effect a warrantless arrest for a misdemeanor offense where the crime has been committed in the officer's presence. Where Louthan did not use drug paraphernalia in the officers' presence, did the trial court err in concluding that the police had probable cause to arrest him for this offense?

(Assignments of Error 1-4)

C. STATEMENT OF THE CASE

Darrin Louthan was stopped by Montesano police for driving in an area that had been closed due to flooding. CP 11, 13. Although Louthan was cooperative with the officers, their suspicions were aroused because his pupils were contracted and

did not fluctuate in the light of a flashlight. CP 13. Louthan denied drinking and his breath did not smell like alcohol. CP 11. While Officer D. Hayden returned to his car to prepare a traffic citation, Officer D. Blundred stayed by Louthan's car. CP 11, 13.

From the passenger side of the vehicle, Blundred observed a plastic jug with a hose sticking out of it that was secured to the jug by black electrical tape. CP 13. Blundred believed this item to be drug paraphernalia, and informed Hayden of this. CP 11, 13. Hayden arrested Louthan for possession of drug paraphernalia, contrary to Montesano Municipal Code 8.22.040. CP 11-12. A search of Louthan's vehicle incident to his arrest revealed the presence of methamphetamine. CP 12-13.

Based on this incident, the Grays Harbor Prosecuting Attorney charged Louthan with one count of possession of methamphetamine. CP 1-2. Louthan moved to suppress the evidence pursuant to CrR 3.6, contending that MMC 8.22.040 unlawfully prohibited the mere possession of drug paraphernalia, in conflict with RCW 69.50.412 and relevant decisional law holding that the possession of drug paraphernalia is not a crime. CP 6-8.

At a hearing on the motion to suppress evidence, the court refused to reach the merits of Louthan's challenge to the validity of

MMC 8.22.040. RP 7. Even though the State conceded that the police did not have probable cause to arrest Louthan for use of drug paraphernalia, the court disagreed. RP 5-9. The court ruled that the officer's observations of Louthan's behavior as being consistent with someone who was under the influence of a controlled substance, coupled with the alleged drug paraphernalia in the back seat, supplied probable cause to arrest Louthan for using drug paraphernalia, contrary to RCW 69.50.412(1). RP 8-9. The court further ruled, "I don't think it's material that the officer didn't make an actual arrest for that offense. He had probable cause to arrest for that offense." RP 8. The court entered findings of fact and conclusions of law consistent with its oral ruling. CP 15-17.

Louthan proceeded to a stipulated facts trial, and now appeals.

D. ARGUMENT

1. THE TRIAL COURT'S CONCLUSION THAT THE SEARCH COULD BE UPHELD AS A SEARCH INCIDENT TO AN "ARREST" FOR A CRIME FOR WHICH LOUTHAN WAS NOT IN FACT ARRESTED IS CONTRARY TO THE AUTHORITY OF LAW REQUIREMENT OF ARTICLE I, SECTION 7, AND *STATE V. MOORE*.

- a. The "authority of law" requirement of Article I, section 7 necessitates that a valid custodial arrest precede a search incident to arrest. Under Article I, section 7 of the Washington Constitution,² a warrantless search incident to arrest is constitutionally authorized only if the underlying arrest is lawful. State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003); accord State v. Parker, 139 Wn.2d 486, 496-97, 987 P.2d 73 (1999); see also, State v. Johnson, 71 Wn.2d 239, 242, 427 P.2d 705 (1967). The "search incident to arrest exception to the warrant requirement is narrower" under article I, section 7, than it is under the Fourth Amendment. State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). "It is the fact of arrest itself that provides the 'authority of law' to search." O'Neill, 148 Wn.2d at 585 (citing State v. Cyr, 40 Wn.2d 840, 843, 246 P.2d 480 (1952), overruled on other grounds by State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983)).

² Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

However, an arrest made without probable cause, based on pretext, or otherwise without lawful authority may not support a search under the Washington constitution. Moore, 161 Wn.2d at 885-86 (invalidating search incident to “arrest” where actual reason for arrest was not valid, and officer did not rely on hypothetical reason); Johnson, 71 Wn.2d at 242-43 (pretextual arrest unlawful); State v. Michaels, 60 Wn.2d 638, 644-45, 374 P.2d 989 (1962) (same); State v. Barker, 143 Wn.2d 915, 922, 25 P.3d 423 (2001) (probable cause alone does not necessarily establish authority of law for a warrantless arrest).

b. As in Moore, the officer subjectively intended to arrest Louthan for possession of drug paraphernalia, a non-arrestable offense, and not for “use” of drug paraphernalia, thus this post-hoc rationale identified by the trial court cannot cure the invalid arrest. As O’Neill has made very clear, a search incident to arrest is lawful only if it follows a valid custodial arrest. 148 Wn.2d at 585. Some iteration of this rule has consistently shaped article I, section 7 jurisprudence. For example, although a police officer’s probable cause determination may support a search if an arrest is made, an officer’s decision not to arrest ends her authority to search under this exception. Johnson, 71 Wn.2d at 242-43 (where first arrest

was pretextual and unlawful, and valid arrest was not made until two days after searches, searches could not be sustained as incident to this arrest).

The same rule applies when a police officer mistakenly makes an arrest based on her belief that the defendant's conduct violated a particular law. Evidence acquired as a result of that seizure or an ensuing search must be suppressed. Justice Charles W. Johnson, Survey Of Washington Search And Seizure Law: 2005 Update, 28 Seattle U. L. Rev. 467, 515 (2005) (citing State v. Melrose, 2 Wn. App. 824, 828, 470 P.2d 552, 555-56 (1970)). The Melrose court stated that "[a] warrantless arrest based on probable cause of guilt means probable cause of guilt of conduct which violates the law *for which the arrest is made.*" 2 Wn. App. at 828 (emphasis added). In such an instance, the officer "acts under an inexcusable mistake of law." Id.

And of course this analysis guided the Court's opinion in Moore, where although the officer *could have* investigated and arrested Moore for giving a false name in connection with a seatbelt violation, the officer *in fact* arrested Moore for giving a false name in connection with his alleged possession of a dangerous dog, which was not a crime. 161 Wn.2d at 885-86. Under Moore, the

trial court improperly relied on a reason for Louthan's arrest that was not the actual reason cited by the officers. The arrest thus lacked the authority of law required by article I, section 7.

2. THE ACTUAL REASON FOR THE ARREST WAS INVALID BECAUSE THE MONTESANO CITY ORDINANCE PROHIBITING POSSESSION OF DRUG PARAPHERNALIA CONFLICTS WITH RCW 69.50.412.

The actual reason for Louthan's arrest similarly cannot uphold the legality of the search incident to arrest, as MMC 8.22.040, prohibiting possession of drug paraphernalia, conflicts with RCW 69.50.412.

a. Possession of drug paraphernalia is not a crime under the Revised Code of Washington. The Montesano Municipal Code criminalizes possession of drug paraphernalia. MMC 8.22.040.³ However, RCW 69.50.412 excludes possession of drug paraphernalia from its list of misdemeanor offenses related to drug paraphernalia. See RCW 69.50.412 (criminalizing, *inter alia*, use of drug paraphernalia, delivery of drug paraphernalia, and sale of drug

³ MMC 8.22.040 provides:

It shall be unlawful for any person to possess any drug paraphernalia as defined in RCW 69.50.102. Possession of drug paraphernalia is a misdemeanor criminal offense and any person convicted of such offense shall be subject to a jail sentence of not more than ninety days and a fine of not more than one thousand dollars, or both such fine and imprisonment.

paraphernalia).⁴ It is emphatically clear under our criminal code and jurisprudence that possession of drug paraphernalia is not a crime.

Sergeant West could not have lawfully arrested O'Neill for possession of drug paraphernalia ... Possession of drug paraphernalia is not a crime, and West could not have arrested for possession of the "cook spoon."

⁴ RCW 69.50.412 reads:

(1) It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

(2) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

(3) Any person eighteen years of age or over who violates subsection (2) of this section by delivering drug paraphernalia to a person under eighteen years of age who is at least three years his junior is guilty of a gross misdemeanor.

(4) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this subsection is guilty of a misdemeanor.

(5) It is lawful for any person over the age of eighteen to possess sterile hypodermic syringes and needles for the purpose of reducing bloodborne diseases.

O'Neill, 148 Wn.2d 564, 584 n. 8 (citing RCW 69.50.412 and State v McKenna, 91 Wn. App. 554, 563, 968 P.2d 1017 (1998)).

b. MMC 8.22.040 conflicts with RCW 69.50.412, thus Louthan's arrest for a violation of this provision could not have supported the search incident to his arrest. Below, Louthan argued that his arrest was unlawful because although MMC 8.22.040 criminalizes mere possession of drug paraphernalia, this provision conflicts with RCW 69.50.412, which permits possession. CP 6-8. Louthan was correct, and his arrest on this basis was unlawful.

An ordinance may be deemed invalid in two ways: where (1) the ordinance directly conflicts with a criminal statute or (2) the legislature has signaled an intent to preempt the field. State v. Kirwin, __ Wn.2d __, __ P.3d __ (No. 80113-4, March 26, 2009) at 5.⁵ Here, the Montesano municipal ordinance criminalizing possession of drug paraphernalia directly conflicts with RCW 69.50.412, and thus is invalid.

"A local regulation conflicts with state law where it permits what state law forbids or forbids what state law permits." Id. at 5-6

⁵ At the time of this writing, this case had not yet been published on LEXIS, and consequently pin citations are to the slip opinion. The Court's slip opinion is available at <http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=801134MAJ> (last accessed March 30, 2009).

(citing Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health, 151 Wn.2d 428, 433, 90 P.3d 37 (2004); and City of Seattle v. Eze, 111 Wn.2d 22, 33, 759 P.2d 366 (1988)). “A conflict arises when the two provisions are contradictory and cannot coexist.” Kirwin, slip op. at 6. “If an ordinance conflicts with a statute, the ordinance is invalid.” Id.

In Kirwin, the issue on appeal was whether the defendant’s arrest for a violation of the Olympia city ordinance prohibiting littering was invalid where, under state law, littering is merely a civil infraction. Kirwin, slip op. at 2. Although the language of the two provisions are nearly identical, because only a civil sanction may be imposed for a violation of the state provision and violation of the Olympia code is a misdemeanor, Kirwin contended the ordinance conflicted with state law. Id. at 4-5.

The Court disagreed.

[T]he ordinance goes farther in its prohibition – but not counter to the prohibition under the statute. The city does not attempt to authorize by this ordinance what the Legislature has forbidden; nor does it expressly forbid what the Legislature has expressly licensed, authorized, or required.

Id. at 6 (quoting Eze, 111 Wn.2d at 33).

Here, by contrast, the Montesano city code expressly forbids what the Legislature has licensed, authorized, or required. The ordinance therefore conflicts with state law, and is invalid. Kirwin, slip op. at 5-6.

Under state law, possession of drug paraphernalia is not a crime. RCW 69.50.412; O'Neill, 148 Wn.2d at 584 n. 8; McKenna, 91 Wn. App. at 563. But it is a misdemeanor under the Montesano city code. MMC 8.22.040. Thus, a citizen could possess drug paraphernalia in unincorporated Grays Harbor County and commit no crime, but once he entered the city of Montesano, he could be arrested for this same conduct. The two provisions are contradictory, and cannot coexist. Kirwin, slip op. at 6. The ordinance is invalid, and could not support Louthan's custodial arrest.

3. THE TRIAL COURT'S ALTERNATIVE JUSTIFICATION THAT THE OFFICER HAD PROBABLE CAUSE TO ARREST LOUTHAN FOR THE CRIME OF "USE OF DRUG PARAPHERNALIA" CANNOT WITHSTAND SCRUTINY, AS LOUTHAN DID NOT COMMIT THIS MISDEMEANOR IN THE OFFICER'S PRESENCE.

Rather than reach the merits of Louthan's challenge to the Montesano ordinance criminalizing possession of drug

paraphernalia, the trial court elected to uphold the search on an alternative ground: as incident to his “arrest” for use of drug paraphernalia. RP 8-9. As explained in argument 1, this was contrary to Moore. Even assuming that Moore could be distinguished, however, this alternative justification fails, as Louthan did not commit the crime of “use of drug paraphernalia” in the officers’ presence.

Subject to several enumerated statutory exceptions, a police officer may only arrest an individual without a warrant for a misdemeanor committed in the officer’s presence. RCW 10.31.100. “Use of drug paraphernalia,” proscribed by RCW 69.50.412, is not one of the offenses enumerated in RCW 10.31.100. Thus, because Louthan did not use the alleged drug paraphernalia in the officers’ presence, the trial court was incorrect in ruling that his appearance coupled with the suspicious plastic jug in his car provided probable cause to arrest him for use of drug paraphernalia. RCW 10.31.100; O’Neill, 148 Wn.2d at 584 n. 8 (“[T]he officer could not have arrested O’Neill for use of the drug paraphernalia because he could not arrest for this misdemeanor if it was not committed in his presence.”).

Even assuming, therefore, that the trial court could invent a post hoc justification for Louthan's arrest that was not the real reason why he was arrested, the fiction created by the trial court cannot support a valid custodial arrest.

4. THE COURT MUST REVERSE LOUTHAN'S CONVICTION.

Given the absence of a valid reason to support Louthan's custodial arrest, the evidence obtained as a result of the search incident to his arrest should have been suppressed. "The important place of the right to privacy in Const. art. I, § 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow." State v. White, 97 Wn.2d 92, 111-12, 640 P.2d 1061 (1982). This Court should reverse the trial court's decision and remand with the direction that the evidence obtained as a consequence of Louthan's arrest be suppressed.

E. CONCLUSION

For the foregoing reasons, this Court should find that Louthan's search did not follow a valid custodial arrest, and order that the after-acquired evidence must be suppressed.

DATED this 30th day of March, 2009.

Respectfully submitted:


For SUSAN F. WILK (WSBA 28250)
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Attorneys for Appellant

APPENDIX A

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CHESTER J. DUNN
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

DARRIN L. LOUTHAN,

Defendant.

No.: 07-1-630-6

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

THIS MATTER having come on before the undersigned judge of the above-entitled court, the court hereby enters the following:

FINDINGS OF FACT

1.

The court finds that the parties have stipulated that the police reports filed with the defendant's brief are the facts by which the court will decide this issue of law.

2.

On December 5, 2007, at approximately 8:30 p.m., Officer Hayden of the Montesano Police Department stopped a vehicle for violation of a road closure. The driver of the vehicle was the defendant.

3.

The officer made contact with the defendant and "noticed [the defendant's] pupils would not

FINDINGS OF FACT AND
CONCLUSIONS OF LAW -1-

32

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expand or contract.” By the appearance of the defendant, the officer concluded that he was under the influence of a controlled substance.

4.

Officer Blundred of the Montesano Police Department arrived on scene to help with the stop. From a position outside the defendant’s vehicle, on the passenger side, ~~the~~ ^{Officer} Blundred observed what appeared to be drug paraphernalia inside the defendant’s vehicle. This object was an orange juice container with a tube protruding out of the its side.

DLE

5.

The officers arrested the defendant and removed him from the vehicle. The defendant and his vehicle was searched. In the vehicle the officer found a white powder believed to be methamphetamine.

Based upon the forgoing findings of fact, the court enters the following:

CONCLUSIONS OF LAW

1.

The court has jurisdiction over the parties and subject matter herein.

2.

The court declines to address the issue as to whether the Montesano Municipal Code in question violates state law.

3.

Given the defendant’s appearance to the officer and the posscssion of drug paraphernalia the officer had probable cause to arrest the defendant for use of drug paraphernalia pursuant to RCW 69.50.412.

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There was a lawful justification for the defendant's arrest. It is unimportant that this was not the reason expressed by the officer at the time of the arrest.

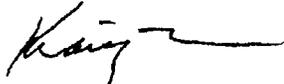
5.

The search of the defendant's vehicle was made as a result of a lawful arrest. Therefore, all evidence obtained after the arrest of the defendant is admissible at trial.

DATED this 17 day of March, 2008.


JUDGE

Presented by:


KRAIG C. NEWMAN
Deputy Prosecuting Attorney
WSBA #33270

Approved (for entry)(as to form):


AMANDA G. KLEESPIE
Attorney for Defendant
WSBA #37114

KCN/jab

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 38472-8-II
)	
DARRIN LOUTHAN,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF MARCH, 2009.

X _____
[Handwritten Signature]

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STATE OF WASHINGTON
BY *[Handwritten Signature]*
COURT OF APPEALS
DIVISION II

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