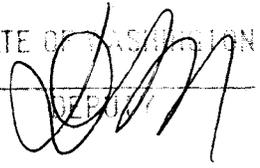


FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

NO. 38472-8-II
Grays Harbor Co. Cause NO. 07-1-000630-7

**COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,

v.

DARRIN L. LOUTHAN,
Appellant.

BRIEF OF RESPONDENT

Edgar M. Korzeniowski, WSBA #35118
Deputy Prosecuting Attorney
Grays Harbor Co. Prosecuting Attorney's Office
102 W. Broadway, Rm. 102
Montesano, WA 98563

Phone: (360) 249-3951
Facsimile: (360) 249-6064
E-mail: ekorzeniowski@co.grays-harbor.wa.us

Attorney for Respondent

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. Whether the Defendant is collaterally estopped from challenging the validity of a municipal ordinance which formed a basis of a search incident to arrest that led to the discovery of methamphetamine, when he plead guilty to violating that very same statute?**
- B. Whether law enforcement had probable cause to arrest the Defendant for other offenses, notwithstanding violation of a municipal ordinance?**

II. STATEMENT OF CASE

A. Procedure

On December 6, 2007, the State filed an information charging appellant Darrin L. Louthan ("Defendant") with one count of Possession of Methamphetamine. CP 1-2. The Defendant was also charged by citations in Montesano Municipal Court for Possession of Drug Paraphernalia under Cause No. C16789 and Driving under the Influence of Drugs under Cause No. C16790. CP 20-21. These crimes all

originated from the same stop which occurred the day before. CP 19-22.
CP 10-14.

The Defendant filed a suppression motion challenging the validity of Montesano Municipal Ordinance 8.22.040 (“drug paraphernalia ordinance”). CP 5-14. The court denied the Defendant’s motion on February 20, 2008. RP 9. Findings of Fact and Conclusions of Law were entered on March 17, 2008. CP 15-17.

A stipulated facts trial was held on June 12, 2008. CP 19-22. The Defendant was found guilty by the court the same day. His sentencing was set over for sentencing on October 13, 2008. RP 20-27. The Defendant plead guilty and was sentenced on the drug paraphernalia ordinance on June 24, 2008. CP 29, 84-89.

B. Facts

The following facts are based on the stipulation to facts and police reports. CP 19-22, CP 10-14.

On December 5, 2007, Officer Dwayne Hayden of the Montesano Police Department was on patrol. He was monitoring the road closure/road block at Highway 107 and Main Street. Highway 107 was closed from Highway 12 to Minkler Road. The Department of

Transportation set up barricades, cones, and road blocks due to high flooding and high water over the roadway.

At approximately 8:30 p.m., Officer Hayden observed a small brown Ford Truck with WA License Plate A34897J. Officer Hayden stopped the driver for failure to obey traffic control devices. The Defendant was the driving the vehicle and there were no passengers. The Defendant is the legal owner of the vehicle. Officer Blundred of the Montesano Police Department came into assist shortly thereafter.

Officer Hayden observed the Defendant and suspected him to be under the influence of a controlled substance based on his training and experience. The Defendant's pupils were constricted and would not expand or contract when light was shined on them. The Defendant's speech was very slurred. There was no odor of alcohol on the Defendant's breath, and the Defendant denied consuming alcohol. When the Defendant was asked for proof of insurance, the Defendant produced his 2006 tax return and insisted that it was proof of his insurance. The Defendant was issued citations for failure to obey traffic control device and driving without proof of insurance under Montesano Municipal Court No. I7525.

Officer Hayden observed an orange juice container, with a tube protruding out of the side, and was held by electrical tape, behind the driver's seat. It also had black tar residue on it. The officer believed in his training and experience, this contrivance was drug paraphernalia.

Officer Hayden instructed the Defendant to exit the vehicle, and placed him into custody. The Defendant was given his Miranda warnings which he acknowledged and understood. Officer Hayden arrested the Defendant for use of drug paraphernalia pursuant to RCW 69.50.412 at approximately at 8:37 p.m. The Defendant was cited with possession of drug paraphernalia in violation of Montesano Municipal Code 8.22.040 under Montesano Municipal Court No. C16789.

Officers Hayden and Blundred conducted a search of the vehicle incident to arrest. Officer Blundred located three bindles containing a white powdery substance. Field test showed it tested positive for methamphetamine. Officer Blundred also located a blade in a clear plastic baggie with black tar like residue on the blade. Field test showed it tested positive for opiates (a category which heroin happens to fall in). Officers located other evidence of drug paraphernalia among other things, two glass pipes, commonly used to smoke methamphetamine, and a digital scale.

Trooper Charlie Stewart, a Drug Recognition Expert, of the Washington State Patrol conducted the DUI investigation. The Defendant was taken to the Grays Harbor Co. Jail to conduct the DRE interview portion of the investigation. The interview began at approximately 9:39 p.m. During the interview, the Defendant admitted to Trooper Stewart that he smoked 1/4 gram of black tar heroin that morning, and a bowl of methamphetamine 2-3 days ago. The Defendant acknowledged using these drugs in his car. The Defendant was cited for Driving Under the Influence of Drugs under Montesano Municipal Court under Cause No. C16790.

III. ARGUMENT

A. The Defendant's conviction must be affirmed because he is collaterally estopped from challenging the validity of the very same municipal ordinance he plead guilty to in a related action.

The Defendant had had a stipulated facts trial on June 12, 2008. CP 19-22. He plead guilty to Possession of Drug Paraphernalia under Montesano Municipal Court Cause No. C16789 on June 24, 2008. CP 29, 84-89. The charge stems from the arrest for use of drug

paraphernalia under RCW 69.50.412. CP 20. The Defendant avers this statute is the subjective reason for his arrest (App. Br. p. 6-7), among other alternative theories.

“[A] guilty plea forecloses appeal except for validity of the statute, sufficiency of the information, jurisdiction of the court, or circumstances surrounding the plea.” *State v. Cross*, 156 Wn.2d 580, 620, 132 P.3d 80 (2006) (citations omitted). “[A] defendant who pleads guilty waives appeal ‘to errors committed prior to arraignment, including an illegal search or seizure.’” *Cross*, 156 Wn.2d at 618 (citations omitted).

The Defendant has not moved to withdraw his municipal court plea under CrRLJ 7.8, RCW 10.73.090 or RCW 10.73.100(2) (unconstitutional statute), nor has indicated any desire to do so in his pleadings in the current case.

The doctrine of collateral estoppel bars relitigation between the same parties on an issue of ultimate fact that has been determined by a valid and final judgment. *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The doctrine applies to criminal and civil litigation. *State v. Cleveland*, 58 Wn. App. 634, 638-40, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990).

Collateral estoppel applies where: (1) the issues presented in both cases are identical; (2) there was a final judgment on the merits in the first action; (3) the party against whom the doctrine is asserted was a party to or in privity with a party to the prior action; and (4) application of the doctrine does not work an injustice against the party to whom it is applied. *State v. Barnes*, 85 Wn. App. 638, 650, 932 P.2d 669, *review denied*, 133 Wn.2d 1021 (1997). The burden of proof is on the party asserting collateral estoppel. *Barnes*, 85 Wn. App. at 650-51.

The issues in Montesano Municipal Court cause number C16789 are identical (i.e. validity of conviction depends on the validity of the statute in question). The question of validity was resolved when the Defendant plead guilty. He was the same Defendant in the municipal matter as in Superior Court. There is no injustice imposed upon the Defendant. He chose to plead guilty to the municipal matter, after having the opportunity for a suppression hearing in superior court, and stipulated facts trial. The Defendant does not claim that his municipal counsel was ineffective in allowing him to plead guilty, or that it wasn't joined with the Superior Court matter.

The Defendant cannot have it both ways and accept the municipal statute as valid for purposes of plea resolution in municipal court, whilst claiming invalidity through a back door collateral attack or appeal.

B. The Defendant's conviction must be affirmed because probable cause to arrest the Defendant existed for other offenses, and any issues with the municipal ordinance are harmless at best in the totality of the circumstances.

An invalidation of a statute does not retroactively invalidate probable cause. *State v. Brockob*, 159 Wn.2d 311, 342, 150 P.3d 59 (2006). The Court reasoned that probable cause is determined at the time of arrest, and that law enforcement may rely on the presumptive validity of the statute at the time. *Id.* The Defendant has not filed a proper collateral attack to the possession of drug paraphernalia charge. The statute still remains valid. Furthermore, even if he had, the statute was still presumptively valid at the time of his arrest.

Local governments have concurrent jurisdiction to enact ordinances that criminalize drug related activity in addition to RCW 69.50. *City of Tacoma v. Luvene*, 118 Wn.2d 826, 833-835, 827 P.2d 1374 (1992). However, local governments are preempted from varying

penalties of violations existing under RCW 69.50. *Id.* RCW 69.50.412(1) does not forbid possession of drug paraphernalia, nor does it expressly or impliedly license such possession either. When no conflict exists with a state statute, a local government is free to criminalize behavior that is not conflict with that state statute. The Court in *State v. Fisher*, 132 Wn. App. 26, 130 P.3d 382 (2006), relying on *Luvene*, came to the very same conclusion, when it upheld Snohomish Co. Code that prohibited possession of drug paraphernalia with intent to use.

Officer Hayden had probable cause to arrest the Defendant, aside from possession of drug paraphernalia. The Court found there was probable cause to arrest for use of drug paraphernalia under RCW 69.50.412(1). RP 8-9. It relied on *State v. Lowermire*, 67 Wn. App. 949, 959-960, 841 P.2d 779 (1993), which held that possession of drug paraphernalia accompanied by unusual behavior is sufficient to establish probable cause for arrest.

Even if Officer Hayden's belief was mistaken as to use or possession of drug paraphernalia as the Defendant would have the Court to believe, it wouldn't matter either. An officer's erroneous subjective belief as to the existence of one crime does not nullify an arrest based on

objective probable cause of another crime. *State v. Walker*, 157 Wn.2d 307, 322-323, 138 P.3d 113 (2006) (concurring opinion) (referencing *State v. Vangen*, 72 Wn.2d 548, 554, 433 P.2d 691 (1967); *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698 (1992)).

Officer Hayden could have arrested the Defendant for possession of a controlled substance based on finding of drug paraphernalia, i.e. smoking apparatus containing black tar. CP 20-21. “There is no minimum amount required to sustain a conviction for possession of controlled substances. *See State v. Malone*, 72 Wn. App. 429, 439, 864 P.2d 990 (1994). Residue alone could have sufficed. *State v. Williams*, 62 Wn. App. 748, 751, 815 P.2d 825 (1991).” *Walker*, 157 Wn.2d at 322-323 (concurring opinion).

The Defendant was cited in Montesano Municipal Court under Cause No. C16790 for Driving under the Influence of Drugs. CP 21. His unusual behavior was observed immediately upon contact with law enforcement. CP 20.

IV. CONCLUSION

The Defendant waived any challenges to appeal the validity of the drug possession ordinance when he plead guilty to the very same

crime in a related matter. The Defendant should not be allowed collaterally attack the same crime on appeal through the back door. Furthermore, any challenges to the municipal ordinance, viewed in most favorable light to the Defendant are still *harmless*. Probable cause for use of drug paraphernalia, possession of controlled substances, and driving under the influence existed at the time of his arrest.

The Court must affirm the Defendant's conviction for the foregoing reasons.

RESPECTFULLY SUBMITTED this 11th day of June, 2009.

H. STEWARD MENEFEE
Prosecuting Attorney
For Grays Harbor County

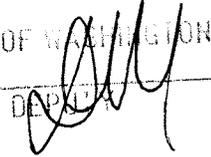
BY:



EDGAR M. KORZENIOWSKI
Deputy Prosecuting Attorney
WSBA #35118

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No. 38472-8-II

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on June 11, 2009 I caused to be served in the manner indicated a true and accurate copy of the foregoing

State's Response Brief on:

Susan F. Wilk
Washington Appellate Project
1511 3rd. Ave., Ste. 701
Seattle, WA 98101-3635

- USPS Mail
- Hand Delivery
- E-mail
- Attorney's Designated Inbox for Pleadings



EDGAR M. KORZENIOWSKI

DECLARATION OF SERVICE

H. STEWARD MENEFFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WA 98563
(360) 249-3951 FAX 249-6064