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Supreme Court No. _____
(COA No. 64008-9-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GREGORIO ORTEGA,

Petitioner.

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SECRETARY OF THE SUPREME COURT
STATE OF WASHINGTON

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Gregorio Ortega, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Ortega seeks review of the published Court of Appeals decision entered on February 7, 2011, a copy of which is attached hereto as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

A police officer arrested, handcuffed, and searched Gregorio Ortega without a warrant and without witnessing him commit any offense. The Washington Constitution jealously protects a person's privacy and does not permit a police officer to arrest someone without authority of law. The law authorizes an arrest for a misdemeanor only when the arresting officer observed the misdemeanor occur, and explicitly dictates when an officer may make a warrantless arrest at the request of another officer. When arresting Ortega for a misdemeanor without having seen Ortega commit any offense, does Ortega's arrest comport with the

constitution? Is the published Court of Appeals decision likely to lead to substantial confusion?

D. STATEMENT OF THE CASE.

At noon on a Wednesday in March, Officer Chad McLaughlin sat inside the second floor of a building and watched the street below. RP 16-17.¹ He did not have binoculars. RP 67-68; Pretrial Exhibit 1 (video). He was looking for any criminal activity, including potential drug traffic and car prowls. RP 49-50.

McLaughlin saw two men he did not know walking down the street, later identified as Gregorio Ortega and Daniel Cuevas. RP 50. Ortega briefly paused on the street, huddling and possibly touching hands with three different people. RP 26, 62-64; Pretrial Ex. 1.

McLaughlin did not see any item that looked like money or any item that looked like drugs, but he suspected that these meetings were drug-related. RP 26, 77-78. McLaughlin believed he had probable cause to arrest Ortega and Cuevas for "drug traffic loitering," a gross misdemeanor. RP 27; SMC 12A.20.050(E).

¹ The verbatim report of proceedings (RP) is comprised of four consecutively paginated volumes of transcripts. The sole issue on appeal involves the suppression hearing held on July 1, 2006, contained in Volume 1.

McLaughlin contacted two other officers who were patrolling the neighborhood in separate cars and told them to arrest Ortega and Cuevas. Officers David Hockett and Anthony Gaedcke arrested Ortega and Cuevas. RP 96-98. The officers seized, handcuffed, arrested and searched both men incident to their arrests. RP 98. Ortega had small rocks of cocaine in his coat pocket and \$780 in cash in his pants pockets. Id. Later, either at the police precinct or at the scene of the arrest, McLaughlin “advised” the police that they “had the correct individuals.” RP 28, 100. McLaughlin did not take part in the arrest. RP 96-100.

The trial court found that McLaughlin had probable cause to arrest McLaughlin but did not enter any findings acknowledging that McLaughlin did not personally arrest anyone. The Court of Appeals agreed that McLaughlin was not present when Ortega was arrested. It also agreed that the officers arrested Ortega for a misdemeanor offense that they did not witness. The governing law authorizes most misdemeanor arrests only when the officer saw the misdemeanor occur, with certain exceptions explicit in the statute that do not apply here. RCW 10.31.100. The Court of Appeals affirmed Hockett’s arrest of Ortega when he did not see Ortega commit a misdemeanor because the arrest was directed by

a fellow officer from afar, notwithstanding the law indicating that the “fellow officer rule” does not apply to misdemeanors committed outside the arresting officer’s presence.

The facts are further set forth in the Court of Appeals opinion, pages 1-2, Appellant’s Opening Brief, pages 3-6; Appellant’s Reply Brief, pages 1-4, and in the relevant portions of the argument sections. The facts as outlined in each of these pleadings are incorporated by reference herein.

E. ARGUMENT.

THE CONSTITUTION, STATUTES, AND COMMON
LAW PROHIBIT POLICE FROM ARRESTING A
PERSON FOR A MISDEMEANOR LOITERING
CRIME WHEN THE OFFICER DOES NOT HAVE A
WARRANT AND DID NOT SEE ANY ILLEGAL
CONDUCT OCCUR

1. The Court of Appeals correctly concluded that a police offer lacks authority of law to arrest someone for a misdemeanor that did not occur in the officer’s presence. Under Article I, section 7, an arrest must be predicated on a valid warrant or upon authority of law, which is not established simply by an officer’s possession of probable cause. State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010) (when arrest occurs without a warrant, “[u]nless it can be shown that the search in question fell within one of the carefully

drawn exceptions to the warrant requirement, we must conclude that it was made without authority of law”); State v. O’Neill, 148 Wn.2d 564, 585, 62 P.2d 489 (2003) (“authority of law” mandatory prerequisite for arrest under Washington Constitution); State v. Barker, 143 Wn.2d 915, 921, 25 P.3d 423 (2001) (“probable cause alone does not establish the authority of law for an officer outside his jurisdiction to effect a warrantless arrest.”).

For misdemeanor offenses, a police officer lacks authority to arrest a person for committing a misdemeanor² offense unless the offense occurred in the officer’s presence or a statutory exception applies. RCW 10.31.100; State v. Walker, 157 Wn.2d 307, 322, 138 P.3d 113 (2006) (“legislature may provide exceptions to the common law ‘in the presence’ rule”).³ The fellow officer rule applies to felonies, allowing an officer to arrest a person based on a felony that the officer did not witness. But the fellow officer rule “has not been extended to the misdemeanor context.” Slip op. at 9. A police officer does not have authority of law to arrest a person for a misdemeanor offense when that offense did not occur in the

² For purposes of simplicity, references to misdemeanors include gross misdemeanors.

³ Exceptions include crimes involving physical harm or threats of harm; the use or possession of cannabis; illegal firearm possession at an elementary or secondary school; and certain traffic offenses. RCW 10.31.100(1),(3),(4),(10).

officer's presence, unless the offense falls within a specifically enumerated exception. Id.

RCW 10.73.100 sets forth when an officer may rely on the another officer's request as the sole basis for a misdemeanor arrest. See RCW 10.31.100(6). This exception does not apply to unlawful loitering.

2. The Court of Appeals rendered its statement of the law meaningless by creating an exception anytime an officer acts at the request of a co-worker. Ortega was arrested for a misdemeanor. The arresting officer David Hockett did not have a warrant and had not seen Ortega commit any criminal offense. RP 96-97. He arrested Ortega and immediately handcuffed him. RP 98. After handcuffing him, he searched his pockets, finding cocaine and money in a pocket. Id. Hockett arrested Ortega immediately, without preliminary detention. O'Neill, 148 Wn.2d at 585.

Hockett's basis for arresting Ortega was that his fellow officer Chad McLaughlin told him to do so. RP 96. McLaughlin had not seen Ortega commit a felony. He wanted Hockett to arrest Ortega for the misdemeanor of "drug traffic loitering." RP 27, 57.

McLaughlin was in another building when Ortega was arrested. He did not confirm that Ortega was the correct person

until after Ortega was handcuffed and searched, and placed under arrest. RP 100.

Hockett lacked authority of law to arrest Ortega. Hockett had not seen Ortega commit a felony or misdemeanor offense. Hockett did not detain Ortega. He handcuffed him, searched him, and arrested him. RCW 10.31.100 and Article I, section 7 prohibit the officer from arresting Ortega for a misdemeanor offense.

The Court of Appeals explained its reasoning based on the following analogy:

If Officer A was driving a squad car with Officer B and Officer A witnessed a suspect commit a misdemeanor while Officer B did not, we would not construe the in the presence rule to require that Officer A could arrest the suspect but Officer B would need a warrant. Such a view of an arrest by a witnessing officer would be artificially narrow. The same is true here.

Slip op. at 10. This analogy does not describe the factual situation underlying Ortega's arrest, because Hockett and McLaughlin were not in the same car. In any event, if Officer B did not witness a misdemeanor occur, the lawful practice would be to detain the suspect for Officer A to confirm that this was the person who committed the misdemeanor in Officer A's presence. Hockett did not do that here. He immediately arrested, searched, and handcuffed Ortega. RP 96-98. McLaughlin did not participate in

the arrest and Hockett could not recall whether McLaughlin confirmed that Ortega was the suspect at the police precinct or at the scene.⁴ RP 100.

Ortega was arrested for suspicion of a gross misdemeanor even though the arresting officer did not see him commit any suspected criminal offense. RCW 10.31.100 lists the misdemeanor offenses for which an officer may arrest an individual without a warrant and without personally observing the criminal activity constituting probable cause. RCW 10.31.100 codifies a long-standing common law rule that an officer may not arrest a person for a misdemeanor offense that has not happened in the officer's presence, absent a warrant. Cerney v. Smith, 84 Wn.2d 59, 62, 524 P.2d 230 (1974). The requirement of an officer's presence may be relaxed by statute, but the statute is strictly construed. Walker, 157 Wn.2d at 315.

RCW 10.31.100 does not authorize an officer to arrest a person without a warrant for drug traffic loitering or any equivalent misdemeanor offense. Because the offense for which Ortega was

⁴ To the extent there is confusion about when McLaughlin confirmed Ortega was the person he suspected of unlawful loitering, that was an issue that should have been resolved by the trial court, not the reviewing court which does not weigh evidence or resolve factual conflicts State v. Kier, 164 Wn.2d 798, 811, 194 P.3d 212 (2008); State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280

arrested is not an enumerated exception to the common law and statutory rule requiring it be committed in the officer's presence, the arresting officer lacked legal authority to arrest Ortega.

When a statute specifically lists certain situations, a reviewing court must assume that no further situations or exemptions apply. State v. Delgado, 148 Wn.2d 723, 728, 63 P.3d 792 (2003). "Plain language does not require construction." Id. (quoting State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)). Courts must interpret criminal law statutes literally and strictly. Id. This Court's inquiry, "thus, ends with the plain language before us." Id.

RCW 10.31.100 contains precise exemptions authorizing arrests for offenses committed outside the officer's presence. For example, it provides: "[a]n officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest" a suspect. RCW 10.31.100(6). The Legislature did not extend authority to officers to act upon the request of another officer in other circumstances not listed in the statute, and thus the inquiry ends.

(1997).

The Court of Appeals decision is contrary to established law and the requirements of Article I, section 7. Even when a police officer has probable cause to arrest a person, probable cause is not a recognized exception to the warrant requirement. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). Hockett lacked authority of law to arrest Ortega and the Court of Appeals failed to apply the law by correctly acknowledging that the fellow officer rule does not apply but then relying on a version of the fellow officer rule to uphold the arrest.

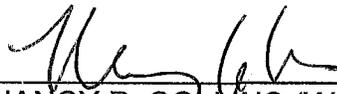
The published Court of Appeals decision is likely to lead to confusion when trial courts try to apply it. This Court should accept review because the decision below is contrary to this Court's interpretations of Article I, section 7, does not accurately construe the controlling statute, and there substantial public interest in clarifying the confusion resulting from the Court of Appeals decision. RAP 13.4(b).

F. CONCLUSION.

Petitioner Gregorio Ortega respectfully requests that review be granted because the published decision of the Court of Appeals authorizes the police to arrest someone for a misdemeanor when the officer did not see the offending behavior and our constitution as well as statutes require a police officer to witness the offense.

DATED this 9th day of March 2011.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|-------------------------|---|-------------------------|
| STATE OF WASHINGTON, |) | |
| |) | No. 64008-9-1 |
| Respondent, |) | |
| |) | DIVISION ONE |
| v. |) | |
| |) | PUBLISHED OPINION |
| GREGORIO BRAVO ORTEGA |) | |
| a.k.a. MARTIN DOMINGUEZ |) | |
| HERNANDEZ, |) | |
| |) | |
| Appellant. |) | FILED: February 7, 2011 |
| |) | |

APPELWICK, J. — Ortega appeals his conviction for possession of cocaine with intent to deliver. Ortega argues the arresting officer did not have the authority to arrest him without a warrant because Ortega did not commit a misdemeanor in his presence as required by RCW 10.31.100. Therefore, the search incident to that arrest was illegal, and the evidence should have been suppressed. The State responds that the arresting officer had probable cause to arrest Ortega for a felony and that the fellow officer rule provided the arresting officer with probable cause to arrest Ortega for a misdemeanor. We hold that the presence requirement of RCW 10.31.100 was satisfied and affirm.

FACTS

After receiving complaints from local business owners, several officers from the Seattle Police Department's Community Police Team organized an investigation into suspicious drug activity in the Belltown neighborhood of Seattle. Officer Chad McLaughlin positioned himself to surveil the street from the second floor of a local business. Officers David Hockett and Anthony Gaedcke, the arrest team, positioned themselves nearby in patrol cars.

From his surveillance location, McLaughlin observed Gregorio Ortega walking aimlessly with co-defendant Alfonso Cuevas. As McLaughlin watched, Ortega and Cuevas attempted to contact passersby through eye contact and head nods. They nodded at two passersby, who then walked with Ortega and Cuevas a short distance until the four of them stopped, and another passerby joined them. Ortega huddled by a payphone with two of the individuals, appearing to make exchanges of small items, while Cuevas paced the sidewalk, looking around. After each exchange, the other individuals quickly left the area. After completing the second suspected transaction, Ortega and Cuevas began walking away together. As they walked away, Ortega and Cuevas were approached by a female, who then walked with them for a few yards. A short time later, Ortega and the female stopped and stepped off the sidewalk to make a quick hand-to-hand transaction while Cuevas again appeared to act as a lookout. Ortega and Cuevas quickly walked away, as did the female. McLaughlin believed he was observing narcotics transactions, but he could not confirm that any of the items exchanged actually constituted a drug sale.

After the third suspected narcotics transaction, McLaughlin believed he had probable cause to arrest Ortega for drug traffic loitering, a gross misdemeanor. McLaughlin radioed Hockett and Gaedcke, informing them that probable cause existed to arrest Ortega and Cuevas and giving specific instructions on the location and appearance of the suspects. Responding immediately by patrol car, Hockett arrested and searched Ortega, locating small rocks of cocaine and \$780 in cash on his person. McLaughlin maintained visual contact with the suspects up to the time of the arrest, which occurred approximately 30 seconds after he radioed the arrest team. McLaughlin packed up his surveillance gear and met with Hockett and Gaedcke, immediately confirming that the suspects were the individuals he had observed.

The State charged Ortega with possession of cocaine with intent to deliver. In a pretrial hearing under CrR 3.6, the trial court heard evidence relating to Ortega's motion to suppress the evidence located during the search incident to arrest. The trial court then concluded that the officers were justified in arresting Ortega and denied the motion to suppress.

The case proceeded to trial. The jury found Ortega guilty as charged. The trial court sentenced Ortega to a standard sentence of 12 months plus one day. Ortega appeals.

DISCUSSION

An officer may conduct a warrantless search of the defendant's person only incident to a valid arrest. State v. Craig, 115 Wn. App. 191, 194-95, 61 P.3d 340 (2002). Ortega contends that he was arrested without authority, because the

arresting officer lacked probable cause for a warrantless arrest for a misdemeanor. Therefore, he argues the trial court erred in denying his motion to suppress. We review conclusions of law in an order pertaining to suppression of evidence de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Probable cause is the objective standard by which to measure the reasonableness of an arrest. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996). Probable cause for a warrantless arrest for misdemeanors is limited by RCW 10.31.100, which states in part, "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 certain listed exceptions.

The presence requirement originated in common law. William A. Schroeder, Warrantless Misdemeanor Arrests and the Fourth Amendment, 58 MO. L. REV. 771, 788-89 (1993); see also City of Tacoma v. Harris, 73 Wn.2d 123, 126, 436 P.2d 770 (1968). The purpose for the common law rule was to allow an officer to prevent a breach of the peace:

"The common law did not authorize the arrest of persons guilty or suspected of misdemeanors, except in cases of an actual breach of the peace either by an affray or by violence to an individual. In such cases the arrest had to be made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission."

People v. Phillips, 284 N.Y. 235, 237, 30 N.E.2d 488 (1940) (quoting 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883));

also Schroeder, *supra*, at 788-89. The “in the presence” rule was a balance of “accommodating the public need for the most certain and immediate arrest of criminal suspects with the requirement of magisterial oversight to protect against mistaken insults to privacy’ with the result that ‘only in the most serious of cases could the warrant be dispensed with.’” State v. Walker, 157 Wn.2d 307, 316, 138 P.3d 113 (2006) (quoting United States v. Watson, 423 U.S. 411, 442, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976) (Marshall, J., dissenting)); see also Carroll v. United States, 267 U.S. 132, 157, 45 S. Ct. 280, 69 L. Ed. 543 (1925) (stating, “[T]he reason for arrest without warrant on a reliable report of a felony [at common law] was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant.”).

The legislature codified the presence requirement in 1979. Former RCW 10.31.100 (Laws of 1979, 1st Ex. Sess., ch. 128, § 1). RCW 10.31.100, though in derogation of the common law, accords with the purpose of the common law in the presence rule. Walker, 157 Wn.2d at 316. RCW 10.31.100 favors arrests made pursuant to a warrant but allows for exceptions in limited situations. Id. When originally enacted, the statute contained three exceptions to the warrant requirement. Former RCW 10.31.100 (Laws of 1969, 1st Ex. Sess., ch. 198, § 1); Walker, 157 Wn.2d at 318. The statute has been amended at least 20 times since then and has been expanded to include 24 exceptions. Walker, 157 Wn.2d at 318; RCW 10.31.100. For example, the legislature removed the in the presence requirement for crimes involving physical harm to persons or property,

violations of court orders, unlawful use of drugs and firearms, and specified traffic offenses. RCW 10.31.100. These exceptions reflect the legislature's determination that the need for immediate arrest outweighs the possibility of a mistaken arrest. Walker, 157 Wn.2d at 316. The Supreme Court noted in Walker that the exceptions listed in RCW 10.31.100 address social problems either not recognized or not present during common law, such as domestic violence, driving under the influence, and the individual and social costs of marijuana abuse. Id. at 316-17.

Ortega does not dispute that McLaughlin, as the observing officer, had probable cause to arrest him for the misdemeanor of drug traffic loitering under Seattle Municipal Code (SMC) 12A.20.050(B).¹ But, McLaughlin did not make the arrest. Ortega contends that Hockett, the arresting officer, did not have authority to arrest Ortega, because Ortega did not commit the misdemeanor in Hockett's presence as required by RCW 10.31.100.

The State responds that probable cause transferred from McLaughlin to Hockett under the fellow officer rule, also known as the collective knowledge doctrine or the police team rule. The fellow officer rule is not a creation of English common law. Rather, it was developed as part of a general liberalizing of the common law presence requirement in response to the challenges of policing in modern times with modern technology. See J. Terry Roach,

¹ Under SMC 12A.20.050(B), "A person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to engage in unlawful conduct contrary to Chapter 69.50, Chapter 69.41, or Chapter 69.52, Revised Code of Washington."

Comment, The Presence Requirement and the "Police-Team" Rule in Arrest for Misdemeanors, 26 WASH. & LEE L. REV. 119, 119-21 (1969). Washington has adopted the fellow officer rule in the felony context. See, e.g., State v. White, 76 Wn. App. 801, 805, 888 P.2d 169 (1995), aff'd, 129 Wn.2d 105, 915 P.2d 1099 (1996); State v. Alvarado, 56 Wn. App. 454, 457-58, 783 P.2d 1106 (1989). Under this rule, in those circumstances where police officers are acting together as a unit, the cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect. State v. Maesse, 29 Wn. App. 642, 647, 629 P.2d 1349 (1981) (holding that information obtained by several officers investigating an arson was sufficient to form probable cause for a nonwitnessing officer to arrest the suspect without a warrant); see also State v. Wagner-Bennett, 148 Wn. App. 538, 542-43, 200 P.3d 739 (2009) (information not known by the arresting officer at the time but known by other officers at the time of the arrest was sufficient to form probable cause); State v. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996) (police department "hot sheet" bulletin may justify an arrest if the police agency issuing the bulletin has sufficient information to provide probable cause); White, 76 Wn. App. at 804-05 (information obtained by officer performing surveillance and radioed to arrest team was sufficient to form probable cause for felony); Alvarado, 56 Wn. App. at 455, 457-58 (same); State v. Sinclair, 11 Wn. App. 523, 531, 523 P.2d 1209 (1974) (radio confirmation from police headquarters that the suspect had an outstanding warrant was sufficient to form probable cause). Cf. State v. Gaddy, 152 Wn.2d 64, 71, 93 P.3d 872 (2004)

(holding that information obtained from the Department of Licensing may not be subject to the fellow officer rule).

No published misdemeanor prosecution case has explicitly held that the fellow officer rule applies. The State asserts that this court extended the fellow officer rule to misdemeanors in Torrey v. City of Tukwila, 76 Wn. App. 32, 882 P.2d 799 (1994). In Torrey, undercover police officers were investigating violations of standards of conduct at an adult entertainment club. Id. at 34. During the investigation, the undercover police officers observed a violation of the Tacoma Municipal Code that established probable cause for a misdemeanor. Id. at 37. Later that day, another officer arrested the dancers. Id. at 35. In a civil suit against Tukwila claiming violations of several constitutional rights, the dancers claimed that their arrest violated RCW 10.31.100, because the arresting officer was not the officer who observed the misdemeanor. Id. at 39. In response to the dancer's RCW 10.31.100 claim, this court stated, "We have no difficulty applying the fellow officer rule to the facts of this case." Torrey, 76 Wn. App. at 39 (citing Maesse, 29 Wn. App. at 647, and Alvarado, 56 Wn. App. at 456-57, as examples of Washington's adoption of the fellow officer rule). Both Maesse and Alvarado, however, involved arrests based on probable cause for a felony. Maesse, 29 Wn. App. at 648; Alvarado, 56 Wn. App. at 455.

The court in Torrey applied the federal fellow officer rule to a misdemeanor arrest. 76 Wn. App. at 39. The claim was civil rather than criminal and was based on violation of federal rights. Id. at 39-40. But, a claim of violation of RCW 10.31.100 is not grounded in the federal constitution. Id. The

court was not squarely faced with the question before us. We are not constrained by it.

The State contends that Gaddy compels the application of the fellow officer rule here. Gaddy involved an arrest based on information obtained from the Department of Licensing. 152 Wn.2d at 70. The Supreme Court determined that the fellow officer rule did not apply to information obtained outside of law enforcement activities. Id. at 71. It noted that reliance on the fellow officer rule was not warranted. Id. It did not indicate that, the fellow officer rule would apply to arrests under RCW 10.31.100. Gaddy does not address the issue raised here.

The fellow officer rule was not available at common law. It has not been extended to the misdemeanor context under RCW 10.31.100 exceptions to the presence requirement. Neither has the Supreme Court applied the rule to a misdemeanor prosecution. Without these factors, it is for the legislature to extend the arrest authority of law enforcement officers. State v. Whatcom Cnty. Dist. Court, 92 Wn.2d 35, 38, 593 P.2d 546 (1979). We decline to adopt or extend that rule to the misdemeanor context.

Although we decline to adopt the fellow officer rule in the misdemeanor context, we hold that RCW 10.31.100 is not violated under these facts. The observing officer viewed the conduct, directed the arrest, kept the suspects and officers in view, and proceeded immediately to the location of the arrest to confirm that the arresting officers had stopped the correct suspects. McLaughlin's continuous contact rendered him a participant in the arrest. Although McLaughlin was not the officer who actually put his hands on Ortega,

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McLaughlin was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team.

If Officer A was driving a squad car with Officer B and Officer A witnessed a suspect commit a misdemeanor while Officer B did not, we would not construe the in the presence rule to require that Officer A could arrest the suspect but Officer B would need a warrant. Such a view of an arrest by a witnessing officer would be artificially narrow. The same is true here.

We hold the arrest of Ortega without a warrant did not violate RCW 10.31.100. Because the arrest was lawful, the search incident to the arrest was valid. Suppression of the evidence obtained during the search was not required. Because we hold that probable cause existed for the misdemeanor, we need not consider the State's argument that it also had probable cause to arrest Ortega for the commission of a felony.

We affirm.

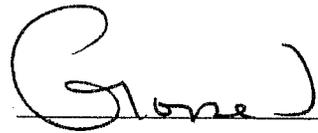
WE CONCUR:

Appelmark, J.

Dyer, C.T.

No. 64008-9-I, State v. Gregorio Ortega

GROSSE, J. (concurring) – I concur in the result for the reasons stated. However, the discussion of the fellow officer rule in the context of RCW 10.31.100 is unnecessary to the decision and could be read as foretelling further judicial evisceration of the statute, something I do not think the majority intends.



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 64008-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Michael John Pellicciotti , King County Prosecuting Attorney-Appellate Unit
- petitioner
- Attorney for other party


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 9, 2011

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