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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

85791-1

No. 28403-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,
Respondent,
v.
DOUGLAS ROSE,
Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE PROSECUTION MISUNDERSTANDS
THE ELEMENTS OF POSSESSION OF A
STOLEN "ACCESS DEVICE"

As set forth in substantial detail in Appellant's Opening Brief, the "card" the police found in Rose's bag was not a working, or potentially usable, credit card. Instead, it was junk mail, sent to a person in hopes she would pay money to activate a new credit case. Because the person to whom the card was sent neither used the card nor desired to pay the onerous activation fee, and purposefully threw the card away, the card was not a stolen access device under the statute.

Unlike State v. Clay, 144 Wn.App. 894, 184 P.3d 674 (2008), rev. denied, 165 Wn.2d 1014 (2009), the card could not have been used by the owner to obtain anything of value. The rightful and intended owner of the card testified in Clay, that she had a valid, on-going credit account at Mervyns and that she expected to receive a new credit card for that account but she had not received that card in the mail. 144 Wn.App. at 896, 899. Furthermore, the Clay Court relied on the fact that "there was 'no testimony that any additional steps needed to be taken to activate that card.'" Id. at 899. Rose could not have used the card for a

number of reasons, including the fact that it was junk mail unless the owner paid \$30 to activate it.

In State v. Askham, 120 Wn.App. 872, 86 P.3d 1224, rev. denied, 152 Wn.2d 1032 (2004), the defendant took a credit card account number from the trash and used the credit card. Id. at 885. Mr. Ashkam took a working, valid credit card account number from the complainant's trash and he used it. Rose had an unactivated account that could not be used in its present form, even by the card's owner, and he never used it or tried to use it. Thus, Ashkam does not explain how Rose exerted unauthorized control over credit card account information.

The controlling statutory definition requires both that the card "can be used" and the person wrongfully possessing the card is withholding such lawful use from the card's owner. RCW 9A.56.010(1); RCW 9A.56.140(1). In the case at bar, the person to whom the card was sent could not have used the card when she last possessed it, she never intended to use the card, and Rose's possession of the card did not affect her ability to use it. Rose did not use the card or try to use it. Therefore, the court impermissibly convicted Rose of possession of stolen property in the second degree.

2. ROSE DID NOT KNOWINGLY AND VALIDLY
WAIVE HIS RIGHT TO A TRIAL BY JURY

The prosecution correctly remarks that Rose expressed an interest, albeit equivocal, in waiving his right to a trial by jury.¹ Yet CrR 6.1 demands a defendant file a written document demonstrating a valid waiver of a jury trial.² CrR 6.1(a) implements the constitutional requirement that a jury trial must occur unless a defendant knowingly, intelligently and voluntarily waives that right. State v. Wicke, 91 Wn.2d 638, 644, 591 P.2d 452 (1979). In the case at bar, Rose never filed a written waiver of a jury trial.

The trial court preliminarily discussed Rose's interest in waiving a jury trial, but deferred entering any finding. The judge said it "would want" a written waiver from Rose establishing his intent to waive his right to a jury trial. 5/28/09RP 5. Rose never filed a written waiver of his right to trial by unanimous jury.

The court's preliminary discussions were lacking. The court vaguely discussed the underlying charges but did not explain that to Rose he would be waiving his constitutional right to a unanimous

¹ See Appellant's Opening Brief, p. 23-27, for detailed discussions about the "colloquy" that occurred in court.

jury verdict. 5/28/09RP 3-5. This discussion does not meet the necessary showing of a knowing, intelligent, and voluntary waiver of the right to a trial by a unanimous jury, and does not defeat the presumption that Rose did not waive his right to a jury trial. State v. Hos, 154 Wn.App. 238, 251-52, 225 P.3d 389 (2009).

3. THE STATE OFFERS NO LEGAL
AUTHORITY SUPPORTING THE COURT'S
FINDING OF PROBABLE CAUSE TO
ARREST FOR DRUG PARAPHERNALIA

Presumably in recognition of the well-established lack of authority to arrest a person for possession of drug paraphernalia based on the possession of a tube "consistent with" an implement used to ingest drugs, the prosecution offers a new theory for the first time on appeal.³ On appeal, the prosecution contends that the probable cause arose from Rose's fidgety behavior after his detention, trying to draw a parallel with State v. Lowrimore, 67 Wn.App. 949, 959, 841 P.2d 779 (1992).

In Lowrimore, the police responded to a call from a mother that her daughter was suicidal and had knives. 67 Wn.App. at 951.

² CrR 6.1(a) provides: "Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court."

³ See Appellant's Opening Brief, p. 32, for a discussion of the legal requirements of possession of drug paraphernalia.

The girl was “very excitable, very upset” with obvious mood swings as she spoke to the responding police officer. Id. The officers civilly detained the girl and searched her purse and a zipped pouch inside the purse. Id. at 956.

The Lowrimore Court pointedly emphasized that the civil and emergency purpose of the detention required a different analysis than would apply in a criminal investigation. Id. at 956-57. The police justifiably searched the girl’s purse based on the civil, emergency purpose of the police intervention.

In the girl’s purse, the officer found three knives, drug paraphernalia, marijuana pipes, and scales. This search was a lawful exercise of police authority. Id.

The court reasoned that the police had authority to search the purse, including the pouch inside, based on the suicide threat presented. Id. at 958. However, because the State did not make that argument, the court also found that the police had probable cause to arrest the girl based on the drug paraphernalia they found in the purse, and could search the pouch incident to her arrest for that offense. Id. at 959.

Significantly, Lowrimore rests on the officer’s authority to arrest a person for ingesting marijuana, which is a different legal

standard than for other controlled substances. Lowrimore cites RCW 10.31.100(1), which provides authority to an officer to arrest a person for a misdemeanor offense not committed in his presence if it involves “the use or possession of cannabis.” Id. at 959 n.10. The court reasoned that the girl’s bizarre behavior coupled with her possession of paraphernalia, which included marijuana pipes, could give an officer probable cause to arrest.

Lowrimore’s behavior was so bizarre that the police felt she needed to be civilly detained. On the other hand, Rose was cooperative although “fidgety.” CP 53. Rose was not accused of possessing or ingesting marijuana, nor was his behavior so bizarre that extreme drug toxicity could be reasonably inferred. The rationale of Lowrimore has no application here.

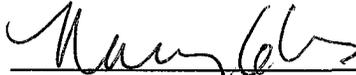
The trial court’s conclusion of law that the police had probable cause to arrest Rose based on the offense of possession of drug paraphernalia must be rejected as it is legally erroneous. CP 53. The court made no findings that Rose had used a controlled substance in the officer’s presence. A legal error is reviewed de novo on appeal. As even the Lowrimore Court agreed, possession of drug paraphernalia alone is not a crime. 67 Wn.App. at 959.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Rose respectfully requests this Court remand his case for further proceedings.

DATED this 1st day of June 2010.

Respectfully submitted,



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STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28403-4-III
v.)	
)	
DOUGLAS ROSE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MEGAN BREDEWEG, DPA	(X)	U.S. MAIL
BENTON COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
7122 W OKANOGAN AVE BLDG A	()	_____
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SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF JUNE, 2010.

X _____ 

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