

62568-3

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COA NO. 62568-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER EUGENE GREGORY,

Appellant.

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

The Honorable Dean Lum, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence found by police as a result of unlawful searches and seizures.

2. Appellant received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Police cannot use arrests as pretexts for evidentiary searches, nor may police circumvent the search warrant requirement by manipulating the time of an arrest to coincide with a suspect's presence in a place that police want to search for evidence of an unrelated crime. In this case, there was a warrant for appellant's arrest based on escape from community custody but police, suspecting appellant was involved in illegal drug activity, waited to execute the warrant until after he entered a car where drugs had been found a few weeks before. Did police violate article I, section 7 by using the search incident to arrest exception to the warrant requirement as a subterfuge for an exploratory search for drugs?

2. The reason for the search incident to arrest exception is to prevent an arrestee from grabbing a weapon or destroying evidence within the passenger compartment of the car. Did police violate the Fourth Amendment where appellant posed no such threat at the time of the search because he did not have immediate access to the passenger compartment

of the vehicle, given that he was 10 feet from the car at the time of arrest, immediately placed on the ground, handcuffed by police, and placed in a police vehicle?

3. Did police violate article I, section 7 by searching the car where appellant did not have immediate access to the passenger compartment at the time of his arrest?

4. Was defense counsel ineffective in failing to move for suppression of evidence found in appellant's residence and cell phone on the basis that search warrants affidavits failed to establish a nexus between the things to be seized and the place to be searched, thus rendering the search warrants invalid for lack of probable cause?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Christopher Gregory with one count of possession with intent to deliver methamphetamine. CP 80. The court denied Gregory's motion to suppress evidence obtained as a result of unlawful searches. 2RP 48.¹ A jury subsequently found Gregory guilty as charged. CP 81. The court imposed a standard range sentence of 80 months confinement. CP 112. This appeal timely follows. CP 119-29.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 9/15/08; 2RP - 9/16/08; 3RP - 9/17/08; 4RP - 9/18/08; 5RP - 9/19/08.

2. CrR 3.6 hearing

On May 29, 2008, a Bellevue police officer stopped a Honda Accord for a traffic violation. Pretrial Exh. 5. He searched the car and found methamphetamine, a digital scale, and packing material. 1RP 31-32; Pretrial Exh. 5. at 4-5. Police arrested the driver, Matthew Logstrom, and the passenger, Tina Bottroff. 1RP 8, 30-32, 50. Logstrom admitted he was a meth dealer. 1RP 32-33; Pretrial Exh. 5 at 6. Appellant Christopher Gregory was not involved with this event. 1RP 32.

However, Detective Jefferson Christiansen spoke with Logstrom during the booking process and learned Gregory lived at a Bellevue address with a woman named Vetter. 1RP 9, 12. Gregory also lived with Bottroff. 1RP 66. The mention of Gregory's name peaked Christiansen's interest because he had dealt with him on previous occasions and arrested him before. 1RP 9, 12, 20. Christiansen knew a Department of Corrections (DOC) arrest warrant had issued in connection with Gregory's escape from community custody. 1RP 9-12; Pretrial Exh. 1. Gregory was on community custody as a result of a controlled substance conviction. Pretrial Exh. 1 at 1-2. A police informant told Christiansen that Gregory was dealing narcotics and involved with stolen cars. 1RP 27, 48-49.

Between May 29 and June 13, police did not go to Gregory's residence, nor did they attempt to find out if Gregory worked anywhere.

1RP 38. Christiansen said they do not always immediately arrest people in Gregory's situation, but rather conduct undercover surveillance when they learn the location of a residence. 1RP 70-71.

On June 13 at 9 a.m., Christiansen, Mark Halsted,² and another officer set up surveillance on unit number 44 at the Bellevue apartment complex where Gregory lived so that they could observe vehicle traffic and anyone entering or leaving. 1RP 12-15, 39, 52-54. Police saw Bottroff arrive at the residence in the morning, driving the same Honda in which police found drugs and drug paraphernalia on May 29. 1RP 15, 30. She parked somewhere in the parking lot complex. 1RP 55.

During the course of the day, Bottroff took two or three trips to the car, where she retrieved a small purse and a bag and brought them into the apartment. 1RP 15-16. Police saw Gregory leave the residence at one point but made no effort to arrest him at that time. 1RP 39, 53-54. Christiansen said they did not like to make an arrest in front of someone's residence for safety reasons. 1RP 16.

Police saw Gregory and Bottroff leave the residence together in the Honda at around 3 p.m. 1RP 15-16. Police made no effort to stop Gregory after he walked out of the apartment. 1RP 54-55. They did not

² Halsted had conducted follow-up investigation relating to the May 29 drug incident. Pretrial Exh. 4 at 3.

stop him in the parking lot before he got into the car. 1RP 55. Bottroff and Gregory left in the Honda with Bottroff driving and Gregory in the front passenger seat. 1RP 15-17, 19, 59.

Christiansen and Halsted, driving separate, unmarked police cars, blocked the Honda in at a nearby gas station parking lot. 1RP 18-20, 40, 55, 57, 59. Christiansen immediately left his vehicle. 1RP 19. At about the same time, Gregory opened the passenger side door and left the Honda. 1RP 19. Gregory closed the car door and walked towards the gas station convenience store, making eye contact with Christiansen. 1RP 19-21, 61. The passenger door to the Honda was not left ajar and the window was rolled up. 1RP 61-62; 2RP 33-34.

The two officers contacted Gregory as he was opening the door to the convenience store. 1RP 61. Christiansen told Gregory to stop and commanded him to get on his knees. 1RP 20; Pretrial Exh. 6. Gregory complied and went to the ground in the doorway to the store. 1RP 41, 60-61. He was cooperative. 1RP 21, 60. Christiansen, with Halsted's assistance, placed him under arrest without incident. 1RP 21. Gregory was handcuffed and placed inside a police vehicle. 1RP 22-23; Pretrial Exh. 4 and 6. Christiansen determined he had authority to search the car upon arresting Gregory. 1RP 42. The distance between the car and the store was eight to ten feet. 1RP 67.

Christiansen searched Gregory following his arrest, recovering only a cell phone from his pants pocket. 1RP 23, 44. Bottroff was sitting in the driver's seat at the time of Gregory's arrest. 1RP 42, 65. Christiansen told Bottroff that police would be searching the car incident to arrest. 1RP 21, 63. Bottroff left the car upon request. 1RP 42. Christiansen told Bottroff she was free to leave. 1RP 63.

Christiansen then searched the entire compartment of the Honda, starting with the driver's side door in which he found a bag containing several Ziploc baggies, one of which held methamphetamine. 1RP 23-24, 63-64, 72. In the center console of the car, Christiansen found a digital scale and documentation with Bottroff's name on it. 1RP 24. Bottroff was about 10 feet from the vehicle at the time of the search.³ 1RP 66-67.

Bottroff was then arrested and searched on the basis of the evidence found in the car. 1RP 24, 43. Two baggies of methamphetamine were found on Bottroff. 1RP 25-26. Bottroff sat about three feet away from the car's bumper after arrest. 1RP 22. Continuing to search the car, police found a number of small baggies inside her purse and bag. 1RP 25. Upon completing their search, police took Gregory to the police station. 1RP 26.

³ At trial, Christiansen testified Officer Halsted was standing by Bottroff at this time. 4RP 28.

Police immediately obtained a search warrant for Gregory's residence and searched it that same day. 1RP 27; Pretrial Exh. 6. Drugs and drug paraphernalia were found in the residence. 1RP 46. On June 26, a search warrant issued to search the cell phone recovered from Gregory during the June 13 search. 1RP 27-29; Pretrial Exh. 4.⁴

At the CrR 3.6 hearing, Gregory's trial counsel joined in co-defendant Bottroff's argument that the search of the car was based on a pretextual arrest. 2RP 14-15. The arrest was pretextual because the totality of circumstances showed police deliberately waited to arrest Gregory in order to search the car incident to arrest. 2RP 18-21. Those circumstances included police knowledge that drugs were previously found in the car and the three officers watching Gregory's apartment made no attempt to arrest him before he got in the car. 2RP 18-20.

Gregory's trial counsel alternatively argued the vehicle search did not otherwise fall within the search incident to arrest exception to the warrant requirement. CP 39-40. The search was illegal because Gregory did not have immediate control or ready access to the passenger compartment at the time of arrest. CP 39; 2RP 16. As a result, evidence derived from the search must be suppressed. CP 39. The subsequent

⁴ At trial, archived text messages in the phone were used as evidence that Gregory planned narcotics transactions. 4RP 56-58, 66-73; Trial Exh. 16.

search of Bottroff's person was tainted by the illegal search of the vehicle incident to arrest. CP 40-41. Counsel also argued the affidavit in support of searching Gregory's cell phone lacked probable cause because it did not establish the veracity of a police informant, the information provided by the informant was stale, and information regarding the earlier illegal search was tainted and needed to be excised. CP 41-42; 2RP 17-18.

The prosecutor claimed the arrest was not pretextual because police did not have an opportunity to arrest Gregory at the apartment. 2RP 4. The prosecutor asserted Christiansen "needed back up" and "waited for the first safe spot to stop them." 2RP 4-5. According to the prosecutor, "[t]here's no evidence anywhere that indicates the detective did anything but arrest the defendant as soon as he possibly could." 2RP 5. The prosecutor accused the defense of questioning police "policies" on the timing of arrests. 2RP 5. Finally, the prosecutor maintained there can be no such thing as a pretextual stop "where we have the objective evidence of a warrant." 2RP 5, 29-30.

Regarding the search incident to arrest, the prosecutor argued the vehicle search was lawful under the "bright line rule" that police can search cars contemporaneous to arrest. 2RP 5, 30. The State further argued the search warrant for Gregory's cell phone was valid because the information obtained from the lawful June 13 search provided probable

cause when considered in combination with information obtained from the informant. Supp CP __ (sub no. 23B, State's Response at 10, 9/15/08). The State conceded if the arrest was pretextual or the search incident to arrest was unlawful, then "all the evidence in this case would then fall and we'd have to dismiss the case." 2RP 4.

The trial court ruled the pretext doctrine did not apply to this case because police had an arrest warrant and thus did not need to manufacture a sham reason to stop Gregory in the car.⁵ 2RP 39-40. The court also rejected the argument that officers should have arrested Gregory before he entered the car, pointing to the detective's testimony that it is not a safe practice to arrest someone as soon as they step outside their door. 2RP 40.

The trial court further ruled the search incident to arrest was otherwise valid. 2RP 47-48. The court found Gregory was arrested eight to ten feet away from the car. 2RP 47. He "was taken and went to the ground approximately eight to ten feet away from the passenger door." 2RP 48. The court characterized the distance between Gregory and the

⁵ The trial court did not enter written findings and conclusions in connection with the CrR 3.6 hearing. Written findings of fact and conclusions of law are required under CrR 3.6, but such error is harmless where, as here, the trial court's oral findings are sufficient to permit appellate review. State v. Riley, 69 Wn. App. 349, 352, 848 P.2d 1288 (1993).

vehicle at the time of arrest as "extremely close proximity." 2RP 48. It treated State v. Adams⁶ as controlling authority. 2RP 48.

The trial court also ruled the search warrant for the cell phone was valid because the supporting affidavit provided probable cause, taking into account the stale information supplied by the informant in combination with the information obtained as a result of the May 29 and June 18 searches. 2RP 41-42.

Evidence recovered from the car, Bottroff, Gregory's residence, and cell phone was admitted at trial and formed the basis for conviction. 4RP 29-43, 47-49, 66-74, 118-19, 133-34, 141-47, 156-58; 5RP 5-17. This appeal timely follows. CP 119-29.

C. ARGUMENT

1. THE SEARCH INCIDENT TO ARREST WAS UNCONSTITUTIONAL BECAUSE POLICE USED THIS EXCEPTION TO THE WARRANT REQUIREMENT AS A PRETEXT TO CONDUCT AN EVIDENTIARY SEARCH FOR DRUGS.

Police abuse their power when they time an arrest so that they may search for and seize evidence on an exploratory basis unrelated to the crime of arrest. This is what happened in Gregory's case. Such arrests are pretextual and violate article I, section 7 of the Washington Constitution.

⁶ State v. Adams, 146 Wn. App. 595, 191 P.3d 93 (2008), review granted, 165 Wn.2d 1036, 205 P.3d 131 (2009).

a. Standard Of Review.

Whether a warrantless search is based on a pretextual stop is a question of law. State v. Montes-Malindas, 144 Wn. App. 254, 260 n.1, 182 P.3d 999 (2008); State v. Myers, 117 Wn. App. 93, 96, 69 P.3d 367 (2003). The trial court's conclusions of law in a suppression hearing are reviewed de novo. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). The trial court's findings must support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

b. Police May Not Use An Exception To The Warrant Requirement As Pretext For An Evidentiary Search.

Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." "Although they protect similar interests, 'the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.'" Eisfeldt, 163 Wn.2d at 634 (quoting State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). "The Fourth Amendment protects only against 'unreasonable searches' by the State, leaving individuals subject to any manner of warrantless, but reasonable searches." Eisfeldt, 163 Wn.2d at 634. "By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a

warrant before any search, reasonable or not." Id. "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." Id. at 635. "The warrant requirement is especially important under article I, section 7, of the Washington Constitution as it is the warrant which provides the 'authority of law' referenced therein." State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

A warrantless search is per se unconstitutional under article I, section 7 unless it falls within an exception to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). Exceptions to the warrant requirement are jealously guarded "lest they swallow what our constitution enshrines." State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007) (citing State v. O'Neill, 148 Wn.2d 564, 548-85, 62 P.3d 489 (2003) (citing Wayne A. Logan, An Exception Swallows a Rule: Police Authority to Search Incident to Arrest, 19 Yale L. & Pol'y Rev. 381 (2001))).

A search incident to arrest is an exception to the warrant requirement. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002). Police, however, may not use an exception to the warrant requirement "as pretext for an evidentiary search." State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009).

A lawful search incident to the arrest of a person in possession of a vehicle permits an officer to "search the passenger compartment of a vehicle for weapons or destructible evidence." State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986). But an "arrest may not be used as a pretext to search for evidence." State v. Michaels, 60 Wn.2d 638, 644, 374 P.2d 989 (1962). More specific to this case, "police cannot use arrest warrants as a guise or pretext to otherwise conduct a speculative criminal investigation or a search." State v. Hatchie, 161 Wn.2d 390, 401, 166 P.3d 698 (2007) (holding an arrest warrant constitutes "authority of law" allowing police to enter a residence for an arrest under certain circumstances; entry must not be pretext for conducting unauthorized searches or investigations).

In Ladson, the Supreme Court held pretextual traffic stops violate article I, section 7. Ladson, 138 Wn.2d at 345, 358. In that case, police on gang patrol suspected the defendant was involved in drugs sales and arrested him for driving with a suspended license. Id. at 345-46. Police then searched the car incident to arrest. Id. at 346. Police motive for searching the car was to look for evidence of illegal drug activity. Id. The stop for a traffic offense was a pretext to search for drugs. Id. at 345, 358.

The Court explained that the essence of a pretext detention is that police justify stopping a citizen by pointing to some unlawful act, but in

reality the motivation for the stop is to investigate suspicions unrelated to that unlawful act. Id. at 349. Police may not use their authority to enforce the law as a pretext to avoid the warrant requirement for an unrelated criminal investigation. Id. at 357.

Ladson cited Michaels as controlling authority. Ladson, 138 Wn.2d at 353. In Michaels, the defendant was stopped and arrested for failing to use a turn signal and was searched incident to the arrest. Michaels, 60 Wn.2d at 639-40. The facts revealed the stop and arrest were pretexts for the officer's desire to conduct a criminal search, which turned up gambling dice for which the defendant was prosecuted. Id. at 640, 642-44. Michaels suppressed the evidence, holding, "[a]n arrest may not be used as a pretext to search for evidence." Id. at 644 (citing United States v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420, 76 L. Ed. 877 (1932); Taglavore v. United States, 291 F.2d 262 (9th Cir.1961)).

Ladson found Michaels controlling because "[j]ust as an arrest may not be used as a pretext to search for evidence, a traffic infraction may not be used as a pretext to stop to investigate for a sufficient reason to search even further." Ladson, 138 Wn.2d at 353. Ladson interpreted Michaels to stand for the proposition that "a warrantless search may not constitutionally follow a facially valid but pretextual arrest." Id. at 354.

In both Michaels and Ladson, "the arrest (or stop) is permissible but for the fact it is a pretext to accomplish an impermissible ulterior motive." Id.

When determining if an arrest is based on pretext, courts consider the totality of circumstances, taking into account both the officer's subjective motives and the objective reasonableness of the officer's behavior. Id. at 358-59. Subjective motivations are not dispositive on appeal, even when found credible by the trial court, because pretext must be assessed based on the totality of the circumstances, which include the objective facts as well as the officer's professed motivation. Montes-Malindas, 144 Wn. App. at 260-61.

c. The Totality Of Circumstances Reveal Gregory's Arrest Was A Pretext To Search The Car For Drugs.

The State always carries the heavy burden of proving a warrantless search is justified. Ladson, 138 Wn.2d at 350; Jones, 146 Wn.2d at 335. The State therefore has the burden of establishing the search incident to Gregory's arrest is justified under article I, section 7 by "clear and convincing evidence." Garvin, 166 Wn.2d at 250. The State has the specific burden of showing police did not use the search incident to arrest exception as a pretext for an evidentiary search based on the totality of circumstances. Montes-Malindas, 144 Wn. App. at 260.

The State cannot do so here. The totality of the circumstances reveals police timed Gregory's arrest on the DOC warrant to enable a search of the car incident to arrest, and that the real reason for Gregory's arrest at that time and place was to search for evidence of drug dealing inside the car. The arrest was merely incident to the search and therefore pretextual.

Detective Christiansen did not explain his motivation for searching the car other than his belief that he had authority to do so based on the fact that he arrested Gregory. 1RP 42. The detective's true reason for wanting to search the car must be assessed from the surrounding circumstances.

One common feature in pretext cases is that officers conducting a warrantless search incident to arrest suspect the arrestee is involved in illegal drug activity and conduct a search based on an arrest that has nothing to do with drugs. See, e.g., Ladson, 138 Wn.2d at 345-46; State v. DeSantiago, 97 Wn. App. 446, 448, 452-53, 938 P.2d 1173 (1999) (officer suspected DeSantiago had just bought or sold drugs but did not have probable cause to stop him for the drug transaction).

That feature is present here. The detective suspected Gregory was a drug dealer based on an informant's tip. Bottroff, with whom Gregory lived, had been arrested for drug possession a few weeks earlier after police found drugs in her car. Police searched that same car after Gregory

and Bottroff left their apartment and drove off. Police had an arrest warrant for Gregory, but that warrant had nothing to do with drugs. Police could not obtain a warrant to search the car because they did not have probable cause to do so. Police used the search incident to arrest exception to the warrant requirement as a subterfuge to search for drugs in the car.

Another fact supporting pretext here is that officers could not hope to find evidence related to Gregory's arrest inside the car. Michaels, 60 Wn.2d at 644. The arrest warrant was for failing to maintain contact with his community custody officer; i.e., escape from community custody.⁷ No evidence of this crime could be found in the car. Police conducted an exploratory search of the car to find evidence of a crime totally unrelated to the crime for which Gregory was arrested. See Richardson v. State, 288 Ark. 407, 412, 706 S.W.2d 363 (Ark. 1986) (murder suspect arrested for public intoxication but real object was search defendant's clothes for blood traces; arrest was pretextual because search had no relation to the nature

⁷ RCW 72.09.310 provides "An inmate in community custody who willfully discontinues making himself or herself available to the department for supervision by making his or her whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer shall be deemed an escapee and fugitive from justice, and upon conviction shall be guilty of a class C felony under chapter 9A.20 RCW."

and purpose of the arrest). Officers engaged in an exploratory search for drugs.

"General or exploratory searches are condemned even when they are incident to a lawful arrest." Amador-Gonzalez v. United States, 391 F.2d 308, 313 (5th Cir. 1968). "The search must have some relation to the nature and purpose of the arrest." Id. Recognized exceptions to the warrant requirement are limited by the reason that called them into existence. Ladson, 138 Wn.2d at 356. Washington courts recognize only one reason for the search incident to arrest exception: the need to prevent an arrestee from grabbing a weapon or destroying evidence. State v. Valdez, 137 Wn. App. 280, 286, 152 P.3d 1048 (2007); Stroud, 106 Wn.2d at 147, 151-52. Arrests made to facilitate general searches for criminal wrongdoing are repugnant to article I, section 7.

Another circumstance useful in determining officer motivation for the search is the police function an officer is serving at the time of the seizure — i.e., is the officer on regular patrol using his authority to enforce general laws or is the officer investigating a specific criminal offense? See Ladson, 138 Wn.2d at 346 (officers part of proactive gang patrol when they instigated a traffic stop); Montes-Malindas, 144 Wn. App. at 261 (factor supporting pretext was officer not on routine traffic patrol but rather conducting surveillance when he pulled defendant over on traffic

stop); Myers, 117 Wn. App. at 97 (whether officer conducting some other business when deciding to stop vehicle is factor supporting pretext); State v. Hoang, 101 Wn. App. 732, 740-11, 6 P.3d 602 (2000) (fact that officer was on routine traffic patrol rather than narcotics duty when he stopped vehicle for traffic violation was factor supporting lack of pretext); cf. DeSantiago, 97 Wn. App. at 452-53 (that officer was assigned to routine patrol was immaterial when officer actually surveilling narcotics hot spot).

It is clear that officers in this case were not on regular patrol looking out for general crimes that happen to pass their way. Three officers set up surveillance on Gregory's house. See Montes-Malindas, 144 Wn. App. at 261 (officer not on routine patrol but rather conducting surveillance). Detective Christiansen was in the patrol division on the Special Enforcement Team investigating auto-related crimes in the city. 1RP 6. When asked to describe any training to aid in these types of investigations, the detective testified he completed specialized training in "narcotics and convictions and other programs that are directly related to my job assignment." 1RP 6. Christiansen's affidavit of probable cause in support of the search warrant for Gregory's residence stated he had advanced training involving narcotics, was familiar with the methods of drug users, dealers and manufactures, had been involved in more than 100 narcotics related investigations, and that more than 100 people had been

arrested for controlled substance violations as a result of his investigations. Pretrial Exh. 6 at 2. His training included techniques for conducting a controlled substance investigation. Pretrial Exh. 6 at 2. Christiansen was interested in Gregory because his informant had told him Gregory was dealing in narcotics and stolen cars. But Christiansen knew the Honda was not stolen, and there was no evidence that part of Christiansen's regular job duties was to arrest people on outstanding DOC warrants. 1RP 48. This factor supports pretext.

The trial court stated he was unaware of "any authority which would have the Court require to have the officers arrest the defendant the moment he stepped out his door." 2RP 40. Setting aside this overblown characterization of the issue, police may not lawfully circumvent the constitutional warrant requirement "by manipulating the time of a suspect's arrest to coincide with his presence in a place which government agents wish to search." United States v. Carriger, 541 F.2d 545, 553 (6th Cir. 1976); accord People v. Scudder, 175 Ill. App. 3d 798, 801, 803, 530 N.E.2d 533 (Ill. App. 1988) (police passed up a convenient opportunity to arrest defendant and then found incriminating evidence at the place in which they effectuated the arrest).⁸ While there is no requirement that an

⁸ The United States Supreme Court in Whren v. United States held pretextual traffic stops do not violate the Fourth Amendment because the

arrest warrant be executed immediately after its issuance, delay in executing the warrant is fatal when government agents purposely delay execution to gain a tactical advantage not otherwise attainable; for example, to search premises "incident to arrest" for which a search warrant was unobtainable due to lack of probable cause. United States v. Drake, 655 F.2d 1025, 1027 (10th Cir. 1981). Specifically, a search incident to arrest is unconstitutional "when police execute an arrest warrant exactly coincident with an individual's presence at a particular place in order to search that place incident to the arrest." State v. Scurry, 636 A.2d 719, 724 (R.I. 1994).

That is what happened in this case. The totality of circumstances show the police executed the arrest warrant on Gregory coincident with his presence in the car in order to search the car for drugs.

The Court in Michaels cited Taglavore in support of its holding that arrests cannot serve as pretexts for unrelated evidentiary searches.

subjective motivation of officers and the real reason for making the stop are irrelevant to its legality. Whren v. United States, 517 U.S. 806, 812-13, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). Washington does not follow the United States Supreme Court on the pretext issue. Ladson, 138 Wn.2d at 354-55, 357-58. Fourth Amendment pretext cases decided before Whren retain vitality under an article I, section 7 analysis because Washington, in accord with case law from other jurisdictions before they ceased inquiry into ulterior motives, retains examination into the true reason for conducting a search incident to arrest as the touchstone of pretextual analysis.

Michaels, 60 Wn.2d at 644. In Taglavore, the defendant was arrested on warrants for traffic offenses that had occurred the previous day. Taglavore, 291 F.2d at 264. The officer did not stop him or issue a traffic citation at the time of these offenses because, according to the officer, he was too busy doing other police work. Id. The officer filled out an arrest warrant later that day and directed other officers to arrest the defendant while informing them there was an excellent chance they would find marijuana on him. Id. The court held the ensuing arrest was a mere sham and suppressed the evidence because police engaged in a deliberate scheme to evade constitutional requirements by using an outstanding warrant for a traffic offense to search the defendant for drugs. Id. at 265, 267.

Police in Gregory's case likewise used an arrest warrant as a pretext to search for drugs. Police knew the car in which Gregory was riding on the day of arrest contained illegal drugs a few weeks earlier when Bottroff was inside. Police knew Bottroff was involved with drugs and that she lived with Gregory. Police knew Gregory was dealing drugs on the basis of an informant's tip. Police did nothing to execute the arrest warrant for weeks. On the day three officers set up surveillance on Gregory's residence, they waited until he was in the car before they executed it. Police knew they could not hope to find any evidence relating to Gregory's escape from community custody inside the car. No officer

testified as to his reason for wanting to search the car or Gregory. Christiansen simply testified he had authority to search the car because he had arrested Gregory. 1RP 42.⁹

Other cases support Gregory's argument that police used the arrest warrant as a subterfuge to search for drugs. In State v. Hoven, a "reliable informant" notified police that the defendant had controlled substances in his truck. State v. Hoven, 269 N.W.2d 849, 851 (Minn. 1978). Police did not apply for a search warrant to search the truck. Id. Instead, they intended to arrest him on warrants stemming from the defendant's failure to appear in response to minor traffic violations. Id. The officer placed the truck under surveillance for two hours. Id. The defendant eventually emerged from a nearby residence, got into the truck, and drove away. Id. After following the truck for a short distance during which time no traffic violations occurred, police pulled the truck over and discovered incriminating drug evidence. Id. The Minnesota Supreme Court ruled the pretextual nature of the arrest made the subsequent search of defendant's vehicle constitutionally impermissible. Id. at 852-53. The officer used the arrest warrants to search the truck incident to arrest. Id. at 853. "Because he waited until defendant entered the truck and drove off before arresting

⁹ The record does not show Gregory was ever charged for his escape from community custody.

him, the inference is inescapable that the arrest was made and timed primarily to facilitate the warrantless search." Id. The court suppressed the evidence because the arrest warrants "were used pretextually to permit the police to search defendant's vehicle in which they expected to find illegal drugs." Id. at 851.

In Carriger, government agents knew Beasley was a drug dealer and suspected Carriger was his source. Carriger, 541 F.2d at 547. Intending to confirm this suspicion, agents arranged a controlled buy through an undercover informant. Id. at 547-48. Agents watched Beasley leave his home with a bag and followed him to Carriger's apartment. Id. at 548. Agents then entered Carriger's apartment building without a warrant and found drugs inside his apartment. Id. at 548. Beasley was arrested outside the building and Carriger was arrested as he returned. Id. A search of the common areas of the apartment building revealed heroin stashed behind a stairwell. Id. Assuming agents had probable cause to arrest Beasley, the warrantless searches were still unlawful because agents could not use probable cause to arrest Beasley as a pretext to search Carriger's apartment. Id. at 553. The court reasoned:

Here officers could easily have effected Beasley's arrest as he left the building, if, at that moment, the agents had facts within their knowledge and of which they had reasonably trustworthy information sufficient to warrant a prudent man in believing that Beasley was in possession of narcotics.

[internal citation omitted] But instead of accomplishing the arrest then, the Government now seeks to justify the entry into the apartment building, the search of Carriger's apartment, and his subsequent arrest in the building as incident to Beasley's arrest. If the purpose of the day's activities had been to arrest Beasley it would have been a simple matter for the officer to arrest Beasley when the officer saw him leaving the apartment building with the shopping bag that now contained "something." But it is clear from the record that the purpose of the day's activities was not to arrest Beasley but instead to discover who his source was.

Id. at 554.

The trial court must consider the totality of the circumstances in assessing whether a stop is pretextual. Hoang, 101 Wn. App. at 734, 743. The trial court, however, focused exclusively on the detective's brief statement that "For safety reasons, we do not like to make arrest in front of someone's resident [sic]." 1RP 16. The trial court stated the detective testified "that would not be a safe practice and a practice that is not condoned by Bellevue Police policy." 2RP 40. In actuality, the detective did not say anything about Bellevue police policy. And police did not perceive Gregory as violent or dangerous. They would not have waited several weeks to execute the warrant if they thought Gregory was a dangerous man that should be removed from the community after failing to comply with DOC supervision requirements.

In any event, the detective's brief reference to safety does not defeat Gregory's pretext claim. The detective did not explain why the three officers conducting surveillance failed to arrest Gregory when he was in the parking lot of the apartment complex, before he entered the car. At that point, there was no realistic danger Gregory would dart back into the apartment and access a weapon they had never known him to carry. The record of the CrR 3.6 hearing does not show whether the location of the parked car was in front of Gregory's residence or the distance between where the car was parked and the door to Gregory's apartment. The absence of these facts must be held against the State because the State has the burden of proving facts to justify warrantless searches under an exception to the warrant requirement. State v. Webb, 147 Wn. App. 264, 270, 274, 195 P.3d 550 (2008). If the State on appeal seeks to rely on the detective's statement that they do not like to make arrests in front of a residence, then the State had the burden at the CrR 3.6 hearing of establishing facts showing police could not have arrested Gregory other than in front of his residence before he entered the car and could not have arrested him before he entered the car without undue danger to officer safety.

The more important point, however, is that the detective did not explain why he wanted to search the car. Thus, even if police had a valid

reason not to arrest Gregory outside the residence, the question of motivation for searching the car remains. The police did not need to search the car incident to arrest. See Thornton v. United States, 541 U.S. 615, 627, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring) (a search incident to arrest need not take place; conducting such a search "is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful."). Police could simply have arrested Gregory for escaping from community custody and that would have been the end of it. But they took the extra step of searching the vehicle for evidence of a crime that had nothing to do with the crime for which Gregory was arrested. The question is why. The State failed to meet its burden of showing lack of pretext.

The trial court wrongly ruled the pretext doctrine could not apply to this case as a matter of law because police had an arrest warrant and thus did not need to create a reason to stop Gregory in the car. 2RP 39-40. The court attempted to distinguish Ladson and subsequent pretext cases on the ground that those cases involved officers "creating a pretext for stopping and arresting individuals in the first place. In other words, there existed no reason to stop the person and the officers came up with a pretext to stop the person to arrest the person, suspecting they could generate additional evidence on the basis of that pretext stop or arrest."

2RP 39. This remark echoes the prosecutor's backward position that "[t]he idea of Ladson is that you are using something as a false pretext for an arrest." 2RP 29. The trial court and the prosecutor misunderstand pretext law. The idea of Ladson, and all pretext cases, is that police are using something, such as an arrest, as a false pretext for an evidentiary search.

The essence of a pretext detention is that police justify stopping a citizen by pointing to some unlawful act, but in reality the motivation for the stop is to investigate suspicions unrelated to that unlawful act. Ladson, 138 Wn.2d at 349. The trial court failed to grasp this essence, which exists regardless of whether police have a lawful basis to arrest due to an outstanding arrest warrant or because they witness an indisputably arrestable offense.

Police may not use an exception to the warrant requirement "as pretext for an evidentiary search." Smith, 165 Wn.2d at 517. Nor can police "use arrest warrants as a guise or pretext to otherwise conduct a speculative criminal investigation or a search." Hatchie, 161 Wn.2d at 401. The trial court's reliance on the pre-existing warrant for Gregory's arrest misses the analytical mark. The dispositive point is whether police searched the car because they hoped to find drugs. If so, then the arrest was a pretext for an evidentiary search.

"Article I, section 7, forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires we look beyond the formal justification for the stop to the actual one." Ladson, 138 Wn.2d at 353. The "ultimate teaching" of our case law under article I, section 7 "is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception." Id. at 357.

Police had an arrest warrant in this case. But they did not have a search warrant. Exceptions to the warrant requirement are not pro forma devices capable of being used to undermine the "authority of law" warrant requirement enshrined in the Washington Constitution. Id. at 356. Pretext is "a triumph of form over substance; a triumph of expediency at the expense of reason." Id. at 351. A warrantless search cannot fall within an exception to the warrant requirement when the search warrant is avoided upon a pretext of form. Id.

Over a half century ago, it was already "settled law that 'when it appears, as it does here, that the search and not the arrest was the real object of the officers in entering upon the premises, and that the arrest was a pretext for or at the most an incident of the search,' the search is not reasonable within the meaning of the Constitution." McKnight v. United

States, 183 F.2d 977, 978 (D.C. Cir. 1950) (quoting Henderson v. United States, 12 F.2d 528, 531 (4th Cir. 1926)). Plainly stated, the search must be incident to the arrest; the arrest cannot be an incident to the search. Taglavore, 291 F.2d at 265; Scurry, 636 A.2d at 723; Henderson, 12 F.2d at 530. "Where the arrest is only a sham or a front being used as an excuse for making a search, the arrest itself and the ensuing search are illegal." Taglavore, 291 F.2d at 265.

In Amador-Gonzalez, the defendant was arrested for a minor traffic offense because he was suspected of concealing narcotics in his automobile. Amador-Gonzalez, 391 F.2d at 314. Although the arrest itself was legitimate, the heroin seized from the car was suppressed because the arrest was a mere pretext to allow the arresting officers to search the defendant and his car for drugs. Id. at 314-15. "While a delayed arrest is not necessarily improper, and at times may be good police practice, 'every time there is a delay in the making of the arrest and there is a search made as incidental to the arrest, the law enforcement officers take the risk that they will be charged with using the arrest as a mere pretext for the search.'" Id. at 314 (quoting Carlo v. United States, 286 F.2d 841, 846 (2d Cir. 1961)). The court reasoned "[t]he lawfulness of an arrest does not always legitimate a search. General or exploratory

searches are condemned even when they are incident to a lawful arrest." Amador-Gonzalez, 391 F.2d at 313 (internal citations omitted).

Washington courts embrace the reasoning set forth in Amador-Gonzalez. Even though Gregory was arrested on an outstanding warrant, the subsequent search of the car, incident to the arrest, was illegal because the totality of circumstances show the arrest was a pretext to conduct an evidentiary search of the car. The trial court therefore erred in denying Gregory's suppression motion.

d. Unlawfully Obtained Evidence Must Be Suppressed And the Charge Dismissed With Prejudice.

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." Ladson, 138 Wn.2d at 359. Evidence is fruit of an illegal search when it "has been come at by exploitation of the primary illegality." Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Evidence derived directly and indirectly from illegal police conduct must be excluded. State v. Le, 103 Wn. App. 354, 361, 12 P.3d 653 (2000). For example, where evidence derived from an unconstitutional search and excludable as fruit of the poisonous tree is used as the basis for an additional search, suppression of evidence

recovered from the additional search is required. Eisfeldt, 163 Wn.2d at 640-41.

Because the State fails in its burden to prove a lawful search incident to arrest, evidence found in the car must be suppressed. In addition, evidence recovered from Bottroff's person, Gregory's residence, and Gregory's cell phone must also be suppressed as fruit of the poisonous tree. All of this evidence derived through police exploitation of the initial illegal search of the car after Gregory's arrest. As recognized by the prosecutor,¹⁰ the search warrants for the residence and the cell phone must fall because probable cause does not exist to search those places once the tainted information is excised from those warrants. See State v. Ross, 141 Wn.2d 304, 311-12, 4 P.3d 130 (2000) (illegally obtained information must be excised from the affidavit supporting the warrant). This Court should reverse Gregory's conviction and dismiss the charge with prejudice. State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for conviction because Court concluded motion to suppress evidence should have been granted); State v. Boethin, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (dismissing charges because remaining evidence insufficient to prove guilt beyond a reasonable doubt).

¹⁰ 2RP 4.

2. THE SEARCH INCIDENT TO ARREST WAS ILLEGAL BECAUSE GREGORY DID NOT HAVE IMMEDIATE ACCESS TO THE PASSENGER COMPARTMENT OF THE CAR AT THE TIME OF THE SEARCH.

The United States Supreme Court's recent decision in Arizona v. Gant, __U.S.__, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) controls the outcome here. Gant held "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Gant, 129 S. Ct. at 1723.

Gregory was not within reaching distance of the passenger compartment at the time of the search and therefore the search incident to arrest could not be justified on that ground under the Fourth Amendment. There was no "evidentiary basis" for the search under the Fourth Amendment because Gregory was arrested for escape from community custody. See id. at 1719 (contrasting Gant's arrest for driving with a suspended license to cases where suspects were arrested for drug offenses).

a. Police Could Not Lawfully Search The Car Because Gregory Was Not Within Reaching Distance Of The Passenger Compartment At The Time Of The Search.

Under Chimel v. California, "police may search incident to arrest only the space within an arrestee's 'immediate control,' meaning the area

from within which he might gain possession of a weapon or destructible evidence." Gant, 129 S. Ct. at 1714 (quoting Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)) (internal quotation marks omitted). "That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." Gant, 129 S. Ct. at 1716.

The Court applied the Chimel rule to vehicle searches in New York v. Belton, holding an officer who lawfully arrests the occupant of an automobile may contemporaneously search the passenger compartment of the automobile and any containers therein. New York v. Belton, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Many courts subsequently understood Belton "to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." Gant, 129 S. Ct. at 1718.

Gant rejected this broad reading of Belton because it would "untether the rule from the justifications underlying the Chimel exception." Id. at 1719. For this reason, the Court held "the Chimel rationale authorizes police to search a vehicle incident to a recent

occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Id. "Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." Id.

Gant got out of his car after an officer called to him, shut the door, and approached the officer. Id. at 1710. The officer arrested Gant 10 feet to 12 feet from his car for driving with a suspended license. Id. at 1710, 1714. Police handcuffed him and placed him in the back of a patrol car. Id. An officer then searched Gant's car and discovered cocaine. Id. The Court held the search was unconstitutional under the Chimel rationale because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search. Id. at 1714.

As in Gant, Gregory was in no position to reach into his car to access a weapon or to destroy or conceal evidence of the crime of the search. Gregory was arrested, handcuffed, and placed inside a police vehicle. There was no realistic possibility that he could access the interior of the car being searched.

Gant came out after the trial court decided the suppression issue in Gregory's case. The trial court relied on Stroud and Adams, which adopted the now discredited broad reading of Belton, to justify the search

incident to arrest. This was error under the Fourth Amendment. Gregory was secured when officers searched his car. Under Gant, a search incident to arrest could not be justified under a Belton rationale because Gregory, as the sole arrestee at the time of the initial search, was in no position to access weapons or evidence from the car at the time of the search.

- b. Police Did Not Have Reason To Believe They Would Find Evidence Of The Crime For Which Gregory Was Arrested And Therefore The Search Incident To Arrest Cannot Be Justified On This Basis.

Gant also held for the first time that "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." Gant, 129 S. Ct. at 1714. The search in Gant could not be justified on this alternative basis because no evidence of the offense of arrest of driving with a suspended license could possibly be obtained by a search of his vehicle. Id. at 1715, 1719.

Setting aside the issue of whether this expanded justification for the search incident to arrest exception could ever pass muster under article I, section 7, it is clear the search in Gregory's case cannot be justified on an evidentiary basis under the Fourth Amendment either. Police had no reason to believe evidence of Gregory's escape from community custody would be found in the car. Police waited until Gregory left in the car

before they arrested him in order to place themselves in a position to search the car for drugs. But Gregory was not arrested for a drug-related crime. He was arrested based on the outstanding warrant for his arrest for escape from community custody. To have a valid search incident to arrest following Gant, when there is no purpose to protect law enforcement present, "the search must seek evidence to support the crime of arrest, not some other crime, be it actual, suspected, or imagined." State v. Henning, 209 P.3d 711, 719 (Kan. 2009). The search of the car was unlawful and all evidence derived from that search must be suppressed as fruit of the poisonous tree. See C. 1. d., supra.

3. THE SEARCH INCIDENT TO ARREST WAS ILLEGAL BECAUSE GREGORY DID NOT HAVE IMMEDIATE ACCESS TO THE PASSENGER COMPARTMENT OF THE CAR AT THE TIME OF THE ARREST.

A search incident to arrest is justified under article I, section 7 only if the passenger compartment of a vehicle is in the immediate control of the arrestee at the time of arrest. When police arrested Gregory, he was 10 feet away from the car, immediately placed on the ground and handcuffed. The subsequent search incident to arrest was unconstitutional because Gregory did not have immediate access to the car's passenger compartment.

Article 1, section 7 "prohibits warrantless searches of vehicles incident to arrest where the suspect is not physically proximate to the

vehicle at the time of arrest." Webb, 147 Wn. App. at 267. A valid search incident to arrest requires that a suspect have immediate access to the passenger compartment of his vehicle at the time of arrest. State v. Rathbun, 124 Wn. App. 372, 378, 101 P.3d 119 (2004) (proper question is whether vehicle was within the arrestee's immediate control when arrested, "not whether the arrestee had control over the vehicle at some point prior to his or her arrest."). If Gregory "could suddenly reach or lunge into the compartment for a weapon or evidence, the police may search the compartment incident to his arrest. If he could not do that, the police may not search the compartment incident to his arrest." State v. Johnston, 107 Wn. App. 280, 285-286, 28 P.3d 775 (2001).

The State bears the burden of establishing the "search incident to arrest" exception. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). To that end, the State has the burden of proving facts necessary to establish its lawfulness. Webb, 147 Wn. App. at 270, 274.

The search incident to arrest in this case was unlawful because the State failed to prove facts showing Gregory could suddenly reach or lunge into the passenger compartment at the time of arrest. He was 10 feet from his car, on the ground, and handcuffed. The passenger door of the car and its window were closed. These facts do not justify the trial court's conclusion that the search incident to arrest was lawful under article I,

section 7. Cf. State v. Quinlivan, 142 Wn. App. 960, 963, 970-71, 176 P.3d 605 (2008) (search incident to arrest invalid where officer arrested driver only after driver left his vehicle, locked the door, and sat some distance away on a curb because driver no longer has access to the passenger compartment of his car by that time). The car interior was not in Gregory's immediate control at the time of arrest.

The trial court relied on State v. Adams as authority that the search incident to arrest in Gregory's case was lawful. 2RP 46-48; State v. Adams, 146 Wn. App. 595, 191 P.3d 93 (2008), review granted, 165 Wn.2d 1036, 205 P.3d 131 (2009). Adams, which upheld the validity of a vehicle search based on the defendant's proximity to the vehicle at the time of arrest, is distinguishable. Adams, 146 Wn. App. at 605. In that case, the suspect was "in close temporal and spatial proximity to his car when he was arrested. He was never more than four or five feet from his car, and was at all times closer to it than was the deputy. He could have reached it quickly in a couple [of] steps." Id. In distinguishing cases where searches incident to arrest had been found unlawful, Adams relied on the arrestee's belligerence and the fact that he did not move away from the car as factors supporting the search in that case.

Unlike Adams, Gregory was 10 feet from his car at the time of his arrest, not four or five feet, and he was not at all times closer to it than the

officers. Gregory, unlike the belligerent Adams, was cooperative. There is no testimony that officers feared for their safety. Gregory was handcuffed and compliant at the time of his arrest. He was in no position to immediately access anything in the car at that time.

Stroud is also distinguishable. In that case, officers arrested two suspects after seeing evidence of criminal activity, handcuffed them, and placed them in the back of a patrol car. Stroud, 106 Wn.2d at 145. After the men were in the patrol car, one of the officers searched the car and found a sawed-off shotgun, heroin and methamphetamine. Id. The Court held there was a valid search incident to arrest because "[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence." Id. at 152. In so holding, however, the court found the search valid because the men were lawfully arrested next to their car while the engine was running and the door was open. Id. at 153.

Gregory's case is different. Gregory was arrested 10 feet from his car, where he lay on the ground and was handcuffed by police. The State here failed to show Gregory was close enough to the car under circumstances that would have allowed him to gain immediate access to the car or any of its contents. Cf. State v. Perea, 85 Wn. App. 339, 344,

932 P.2d 1258 (1997) ("Had Perea remained in his car or beside his car, with the door open or unlocked, until he was arrested, Stroud's bright-line rule would have permitted a search of the passenger compartment of the vehicle.").

Gregory was not in close proximity to the car when he was arrested and did not have immediate access to the passenger compartment. The search therefore does fall within the search incident to arrest exception to the warrant requirement under article I, section 7. The search of the car was unlawful and all evidence derived from that search must be suppressed as fruit of the poisonous tree. See C. 1. d., supra.

4. THE SEARCH WARRANT AFFIDAVITS DID NOT ESTABLISH PROBABLE CAUSE TO SEARCH GREGORY'S RESIDENCE OR HIS CELL PHONE BECAUSE THE AFFIDAVITS DID NOT SUPPLY THE REQUIRED NEXUS BETWEEN DRUG-RELATED ACTIVITY AND THE PLACES TO BE SEARCHED.

Affidavits in support of warrants to search for drug-related evidence inside Gregory's residence and cell phone did not provide probable cause to believe such evidence would be found in the places to be searched. Defense counsel was ineffective in failing to move to suppress evidence on this ground.

a. There Was No Probable Cause To Believe Evidence Of Criminal Activity Would Be Found In Gregory's Residence Or His Cell Phone.

Search warrants are valid only if supported by probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." Id. Probable cause to search "requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." Id. (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). In determining the validity of a search warrant, the reviewing court considers "*only* the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested." State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988).

Appellate courts generally review the issuance of a search warrant for abuse of discretion and normally give deference to the issuing judge or magistrate. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, the trial court acts in an appellate-like capacity at a suppression hearing and its review, like the appellate court's review, is limited to the four corners of the affidavit supporting probable cause. Id. The trial

court's assessment of probable cause is therefore a legal conclusion reviewed de novo. Id.

A warrant to search for drug related evidence in a particular place must be based on more than generalized notions of the supposed practices of drug dealers. Thein, 138 Wn.2d at 147-48. Police must do more than show a suspect is probably involved in drug dealing and the suspect resides at the place to be searched. Id. at 141, 147-48. Rather, the warrant must contain specific facts tying the place to be searched to the crime. Id. "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." Id. at 147.

In Thein, the affidavit contained specific information tying the presence of narcotics activity to a certain residence, but not the address to be searched pursuant to the warrant. Id. at 136-138, 150. The affidavit also contained generalized statements of belief, based on officer training and experience, about drug dealers' common habits, particularly that such persons commonly keep a portion of their drug inventory, paraphernalia, drug trafficking records, large sums of money, financial records of drug transactions, and weapons in their residences. Id. at 138-39. The affidavit expressed the belief that such evidence would be found at the suspect's address. Id. at 139. The Court held such generalizations do not establish

probable cause for issuance of a search warrant for an alleged drug dealer's residence because probable cause must be grounded in fact. Id. at 146-47.

Gregory's case compares favorably to Thein. Police suspected Gregory was a drug dealer and knew where he lived. The affidavit to search Gregory's residence recites Christiansen's belief, based on training and experience, that drug traffickers keep a wide variety of drug-related items in their residences. Pretrial Exh. 6 at 2-4. The affidavit then recites facts leading up to application for the search warrant. Pretrial Exh. 6 at 4-6. The confidential informant mentioned in the affidavit had nothing to say about where Gregory dealt drugs or where he kept his supply. Cf. State v. Maddox, 152 Wn.2d 499, 511-12, 98 P.3d 1199 (2004) (sufficient nexus between residence and drug dealing established where affidavit recounted confidential informant's controlled drug buy at defendant's house three days before warrant issued and specific facts regarding defendant's long history of dealing drugs to informant).

The fact that police found drugs and drug paraphernalia in the car after Gregory and Bottroff left the residence on June 13 does not supply the necessary nexus. In State v. Mejia, it was reasonable to infer that a drug dealer's house contained cocaine after police observed the dealer leave a meeting with an informant, travel directly to the house in question, travel back to informant, and only then gave the informant cocaine. State

v. Meija, 111 Wn.2d 892, 898, 766 P.2d 454 (1989). That closed circle of drug dealing associated with the house in Meija, which allowed for the reasonable inference that the dealer kept drugs there, is missing from Gregory's case.

In State v. G.M.V., Division Three found a sufficient nexus between drugs and a residence where police made two controlled buys, the dealer left the house and then returned after the first controlled buy, and returned to the house after the second controlled buy. State v. G.M.V., 135 Wn. App. 366, 369, 372, 144 P.3d 358 (2006). Unlike G.M.V., there is no pattern of Gregory leaving and returning to the residence after controlled buys. The affidavit did not establish Gregory stored or dealt drugs in his house rather than somewhere else, such as the car he was riding in before arrest. Cf. Goble, 88 Wn. App. at 511-12 (affidavit established Goble received illegal drugs at post office box, but no probable cause to believe contraband would be present in Goble's house because affidavit did not establish Goble previously stored or dealt drugs in his house rather than out of a different place such as his car). The search warrant for Gregory's residence is not supported by probable cause to believe evidence of drug trafficking would be found there.

The warrant to search the contents of the cell phone also falls for lack of nexus. The affidavit in support of the cell phone warrant recites

Christiansen's belief that drug traffickers often use cell phones and that information related to drug activity are commonly stored as recoverable data in cell phones. Pretrial Exh. 4 at 5-6. Such information includes the names and numbers of drug trafficking associates and communications with suppliers, customers, and accomplices. Pretrial Exh. 4 at 5. Based on this belief, Christiansen maintained evidence associated with possession of methamphetamine with intent to distribute was located inside Gregory's cell phone recovered from his pocket during the search incident to arrest. Pretrial Exh. 4 at 6.

"Probable cause to issue a search warrant requires some showing that evidence of criminal activity or a crime will be found in the place to be searched." State v. Anderson, 105 Wn. App. 223, 225, 19 P.3d 1094 (2001). Again, general statements regarding the common habits of drug dealers are insufficient to establish probable cause. Thein, 138 Wn.2d at 151; see also State v. Nordlund, 113 Wn. App. 171, 183-84, 53 P.3d 520 (2002) (search warrant affidavit for computer failed to show nexus between computer and evidence of sex crime; general statements about the common habits of sex offenders based on officer's training and experience insufficient to establish a specific factual nexus that evidence of illegal activity was likely to be found in computer).

The warrant for the cell phone fails this test. There is no information in the affidavit establishing Gregory ever used his cell phone as part of drug activity. The informant does not mention a cell phone. The mere fact that the cell phone was found on his person incident to his arrest does not establish he used the device to facilitate drug dealing. To uphold the search of this cell phone, this Court would need to create a per se rule that the presence of a cell phone on a person coincident with an area where drugs are found justifies the search of the entire contents of the owner's cell phone, even though there is no indication that the owner ever used the phone in any way to facilitate drug trafficking. That rationale is too akin to the discredited rationale that allowed search of residences based on the simple fact that a drug dealer lived there. Something more is required than control over a place to establish the requisite nexus between the place to be searched and the thing to be seized.

b. Defense Counsel Was Ineffective In Failing To Raise Lack Of Nexus To Invalidate The Search Warrants.

Gregory's trial counsel did not raise the nexus argument as a basis to attack the legality of the search warrants issued for Gregory's residence and cell phone. Counsel was ineffective in failing bring a suppression motion on this ground.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Id. at 226. Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

"A criminal defendant receives constitutionally ineffective assistance of counsel where no legitimate strategic or tactical explanation can be found for a particular trial decision." State v. Meckelson, 133 Wn. App. 431, 433, 135 P.3d 991 (2006). "Failure to bring a plausible motion to suppress potentially unlawfully obtained evidence is one such decision." Id.

Prejudice is established where there is a reasonable probability the trial court would have granted the suppression motion. State v. McFarland, 127 Wn.2d 322, 337, 337 n.4, 899 P.2d 1251 (1995). A motion to suppress evidence based on lack of nexus in the search warrant affidavits

would have succeeded for the reasons set forth at C. 4. a., supra. Prejudice is therefore established.

The strong presumption that defense counsel's conduct is not deficient is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (defense counsel's failure to move for suppression of drugs abandoned in vehicle after defendant was unlawfully seized was both deficient and prejudicial). Counsel may legitimately decline to move for suppression on a particular ground if the motion would have failed. State v. Nichols, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007). Here, however, a motion to suppress evidence based on lack of nexus would not have failed. Failing to bring a motion to suppress evidence when a search warrant is invalid constitutes ineffective assistance. G.M.V., 135 Wn. App. at 372. The nexus argument was available to counsel based on established case law and his failure to challenge the search warrants on this ground cannot be explained as a legitimate tactic.

While a claim of ineffectiveness due to failure to move to suppress on a particular basis can be undermined to some degree if counsel moved to suppress on another ground, no court has ever held counsel legitimately failed to move for suppression on a particular ground where such motion probably would have succeeded based on established law available at the

time of trial. Nichols, 161 Wn.2d at 15 (counsel's motion to suppress on other grounds suggested counsel made a reasoned decision not to move to suppress on the basis of pretext, "particularly in light of the paucity of evidence supporting any subjective intent to stop the vehicle for speculative investigative purposes."). "[B]oth Strickland prongs will be satisfied if counsel fails to seek suppression where the record suggests that a motion likely would have succeeded." State v. Horton, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006).

D. CONCLUSION

For the reasons stated, this Court should reverse conviction and dismiss the charge with prejudice.

DATED this 5th day of August 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62568-3-I
)	
CHRISTOPHER GREGORY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTOPHER GREGORY
DOC NO. 305622
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF AUGUST, 2009.

x Patrick Mayovsky

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STATE OF WASHINGTON
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