

NO. 63319-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

TAN VO,

Appellant.

REC'D
JUL 30 2009
King County Prosecutor
Appellate Unit

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FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

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

The Honorable Julie Spector, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it concluded police had probable cause to arrest appellant.

2. The trial court erred when it denied a motion to suppress all evidence obtained as a result of appellant's unlawful arrest.¹

Issues Pertaining to Assignments of Error

1. A Seattle Police officer claimed to see appellant engaged in multiple exchanges of unidentified objects. On the last such exchange, the officer claimed to see the exchange of money and suspected crack cocaine. Although police had reasonable suspicion of criminal activity, did the court err when it concluded they had probable cause to arrest appellant?

2. In light of appellant's unlawful arrest, should all evidence gathered incident to that arrest have been suppressed?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Tan Vo with one count of possessing a controlled substance (cocaine) with

¹ The court's written findings and conclusions on the motion to suppress are attached to this brief as an appendix.

intent to deliver, in violation of RCW 69.50.401(1), (2)(a). CP 1-4. Vo moved to suppress all evidence of the cocaine, arguing it was the product of an unlawful search and seizure in the absence of probable cause. CP 5-9. Following a CrR 3.6 hearing, the court denied the motion. CP 57-62. A jury found Vo guilty, the court imposed a standard range sentence, and Vo timely filed his Notice of Appeal. CP 13, 49, 51, 63-73.

2. Substantive Facts

The court's written findings of fact from the CrR 3.6 hearing accurately reflect the evidence from that hearing. CP 57-58. Seattle Police Officer James Lee is a ten-year veteran with the Seattle Police Department, and previously served as an officer with the Los Angeles Police Department. 1RP² 5. He has received training focused on narcotics arrests, acted as an undercover buyer, and, in the last seven years, been involved in 20 to 50 narcotics arrests a month. 1RP 5-7.

On the evening of August 18, 2008, Officer Lee was acting as a surveillance officer, standing atop a hotel at 3rd Avenue and Bell Streets in the Belltown neighborhood. 1RP 8-9. This is a high

² This brief refers to the verbatim report of proceedings as follows: 1RP – January 27, 2009; 2RP – January 28, 2009; 3RP – January 29, 2009; 4RP – March 13, 2009.

narcotics area in downtown Seattle and designated a SODA zone (Stay Out of Drug Area). 1RP 9, 29. Using 10 x 50 binoculars, Lee spotted Vo enter the area and stop at a street corner. 1RP 10. According to Lee, known drug users approached Vo and stood near him. 1RP 11. He then "made multiple hand-to-hand deals with several of these people." 1RP 11. Because Vo's back was to Officer Lee, however, Lee admitted he was unable to see what was being exchanged. 1RP 12.

Vo eventually turned back around facing Lee. According to Lee, a white female approached Vo. After a brief conversation, Vo produced a "bundle" containing white rocks that Lee believed to be cocaine and stood out against a black glove Vo was wearing. 1RP 12-13. Vo untwisted the bundle, removed a rock, and gave it to the female. After examining it, she handed Vo money and walked away. 1RP 13-14.

Officer Lee contacted an arrest team and provided the officers with a description of Vo. 1RP 13. Vo twisted the bundle closed and cuffed it in his right hand. 1RP 14. An arrest team of two officers drove up in a black Chevy Tahoe, pulled in along the curb near Vo, and approached him to make the arrest. 1RP 29-32.

As the officers went to take hold of Vo, he dropped the bindle on the sidewalk. 1RP 15, 32. The officers confiscated the bindle and conducted a search incident to arrest. 1RP 33.

Defense counsel argued that while officers likely had reasonable suspicion to investigate Vo based on Officer Lee's observations, they did not have probable cause to arrest him since nothing was done to confirm Vo had been selling cocaine; for example, questioning those to whom he allegedly sold cocaine to confirm Lee's suspicions. Therefore, all evidence seized incident to Vo's arrest, including the bindle, had to be suppressed. 1RP 63-64.

The court disagreed. 1RP 67-69. It found that based on Officer's Lee's experience and observations, he had probable cause to believe that Vo was guilty of drug-traffic loitering (a crime under the Seattle Municipal Code) or possession with intent to deliver a controlled substance. CP 59-60.

At trial, the State's evidence was similar to that from the CrR 3.6 hearing regarding Officer Lee's observations and the circumstances of Vo's arrest. See generally 2RP 27-91. A forensic scientist testified that the material in the bindle weighed 6.03 grams and contained cocaine. 3RP 18-19. The arresting officers also

testified that in a search incident to Vo's arrest, they found \$89.00 in crumpled bills in his front pants pocket and \$431.00 in his wallet. 2RP 69, 84-85.

The defense called Dwight Hearn as a witness. Hearn is an acquaintance of Vo's – they smoke crack together – and was present for Vo's arrest. 3RP 27, 30-31. He testified that Vo was not selling crack and did not drop the bindle. 3RP 29. Rather, an African American man – known to Hearn as a drug dealer – dropped the bindle on the ground when he saw the police Tahoe and Vo "was just in the way." 3RP 28, 34-37. Hearn and others were waiting to grab the bindle when police pulled up and arrested Vo. 3RP 28-30, 34, 37.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE MOTION TO SUPPRESS.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution,³ warrantless arrests must be supported by probable cause. State v.

³ The Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"

Article 1, § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Bonds, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831 (1983). Probable cause exists only "when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed." State v. Huff, 64 Wn. App. 641, 646-47, 826 P.2d 698, review denied, 119 Wn.2d 1007 (1992). Whether the facts satisfy the probable cause requirement is a question of law this Court reviews de novo. Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996); State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); State v. Dearbone, 125 Wn.2d 173, 178, 883 P.2d 303 (1994).

Here, the suspected crimes were drug-traffic loitering and possession of a controlled substance with intent to deliver. "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 [illegal drug activity]." SMC 12A.20.050(B). The statute lists circumstances that "may be considered in determining whether the actor intends such prohibited conduct" but these circumstances do not by themselves constitute the crime. SMC 12A.20.050(C). These include whether the suspect "[r]epeatedly . . . engages passersby in conversation." SMC

12A.20.050(C)(3). A person is guilty of possessing a controlled substance with intent to deliver when he possesses a controlled substance with that intent. RCW 69.50.401(1).

As an initial matter, the fact this area of Seattle is known for illicit drug activity is insufficient to establish probable cause. "It is beyond dispute that many members of our society, live, work, and spend their time in high crime areas, a description that can be applied to parts of many of our cities." State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980). Moreover, associating with individuals suspected of criminal activity (here, known drug users) does not establish probable cause, either. See State v. Broadnax, 98 Wn.2d 289, 296, 654 P.2d 96 (1982) ("Merely associating with a person suspected of criminal activity does not strip away the protections of the fourth amendment to the United States Constitution."), overruled on other grounds, Minnesota v. Dickerson, 508 U.S. 366 (1993).

The circumstances in Vo's case fall short of those in other cases in which probable cause was properly found.

In State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650 (1995), an officer saw a man hand the defendant money and then pick a small item out of the defendant's hand. As the officer

approached, someone yelled “police.” The second man took his money back from the defendant and dropped the object on the ground. The defendant picked up the object and placed it in his pocket. He attempted to “hurry away from the scene,” looking over his shoulder and watching the officer as he did so. The officer stopped the defendant and pulled cocaine from his pocket. Rodriguez-Torres, 77 Wn. App. at 689-90. Under these circumstances, this Court upheld the search of the defendant’s pocket because the officer had quite clearly seen a drug transaction. Id. at 693-94. In contrast, Vo did not flee the scene when police arrived. Therefore, officers did not have the same confirmation of suspicion that a drug deal had taken place.

This Court has held that multiple exchanges of unidentified objects between a suspect and passersby, under suspicious circumstances, can establish probable cause for arrest. See State v. Fore, 56 Wn. App. 339, 343-345, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990). In Fore, an experienced officer watched as the defendant repeatedly exchanged with motorists in a park a substance packaged in small plastic baggies for cash. The officer also noted the suspect had a larger bag, inside of which he

could see several smaller bags containing “green vegetable matter.” Fore, 56 Wn. App. at 340-342.

Whereas the officer in Fore had a clear view of several transactions involving baggies for cash, as previously discussed, Officer Lee could not see what, if anything, Vo had exchanged with anyone prior to the last interaction with the white female. Police did not question any of these individuals. The lone exchange with the white female, whom police also failed to speak with in an attempt to confirm their suspicions, falls well short of the officer’s observations in Fore.

Vo’s case bears greater similarity to State v. Poirier, 34 Wn. App. 839, 664 P.2d 7 (1983). Officers in that case observed Poirier standing in a restaurant parking lot. A second man arrived at the location in his car, parked, and approached Poirier. Officers continued to watch as the two men exchanged items that appeared to be white envelopes or packages. Both men were arrested. A search revealed a package of suspected cocaine and a package of money on the men. Id. at 841-842. This Court found that while the circumstances may have warranted officers approaching and speaking with the two men, and police may have special skills in

recognizing street sales, the evidence fell short of probable cause to arrest the men. Id. at 842-843.

While there are some distinctions between Poirier and Vo's case – there was no evidence the parking lot in Poirier was known for narcotics traffic or that the exchanged envelopes were characteristic of packaged drugs – these distinctions are insufficient to justify a different outcome. Both cases involve officers making premature arrests predicated on what they perceived to be the sale of narcotics without sufficient confirmation. Based on the information available to Officer Lee, a person of reasonable caution would not have believed that Vo was guilty of drug-traffic loitering or possession of cocaine with intent to deliver.

This is not to say Officer Lee was required to simply to leave Vo alone. There was sufficient information to support a Terry⁴ stop, under which an officer may briefly detain and question a person reasonably suspected of criminal activity. State v. Alcantara, 79 Wn. App. 362, 365, 901 P.2d 1087 (1995); State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995). Terry also permits officers to frisk suspects, but only if they have reasonable grounds to believe a suspect is currently armed and dangerous.

⁴ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994); Rodriguez-Torres, 77 Wn. App. at 690. There is no evidence officers viewed Vo as dangerous. Any other search (other than for weapons) would have been limited to circumstances where the “plain view” doctrine or probable cause justified it. Alcantara, 79 Wn. App. at 366; Rodriguez-Torres, 77 Wn. App. at 652.

Here, Officer Lee dispensed with an investigative stop and simply decided to have Vo arrested. And incident to that unlawful arrest, police discovered the cocaine⁵ and money that ultimately led to Vo’s conviction. Under the Fourth Amendment, all fruits of an illegal seizure must be suppressed. State v. Byers, 88 Wn.2d 1, 7-8, 559 P.2d 1334 (1977)(citing Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963)), overruled in part on other grounds, State v. Williams, 102 Wn.2d 733, 741 n.5, 689

⁵ According to police, Vo dropped the bundle of cocaine on the ground, which could raise the issue of abandonment. Generally, police may retrieve voluntarily abandoned property without violating an individual's constitutional rights. State v. Nettles, 70 Wn. App. 706, 708, 855 P.2d 699 (1993), review denied, 123 Wn.2d 1010 (1994); State v. Whitaker, 58 Wn. App. 851, 853, 795 P.2d 182 (1990), review denied, 116 Wn.2d 1028 (1991). But property is not voluntarily abandoned where a defendant demonstrates (1) unlawful police conduct and (2) a causal nexus between that conduct and the abandonment. Nettles, 70 Wn. App. at 708; Whitaker, 58 Wn. App. at 853. Here, officers were engaged in an unlawful seizure (arrest), which led to Vo’s decision to drop the bag. See 1RP 32. Therefore, the necessary nexus is established. Indeed, the State has never argued, and the trial court did not find, abandonment in this case.

P.2d 1065 (1984). The court erred when it refused to suppress the evidence in this case.

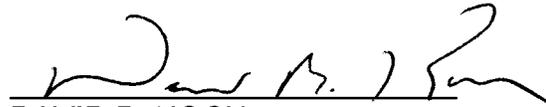
D. CONCLUSION

There was not probable cause to arrest Vo. The fruits of that arrest must be suppressed. His conviction should be reversed and dismissed.

DATED this 29th day of July, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

 ORIGINAL

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

TAN VAN VO,

Defendant,

No. 08-1-07795-7 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on January 27, 2009 before the Honorable Judge Julie Spector. After considering the evidence hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- a. On August 13, 2008 at about 8:00 p.m., Seattle Police officers were conducting a surveillance operation in the Belltown neighborhood of Seattle.
- b. Seattle Police Officer James Lee was on the roof of the Belltown Inn conducting surveillance.
- c. Officer Lee has more than 12 years of law enforcement experience, has made 20-50 narcotics arrests a month in the last seven years, has purchased narcotics undercover more than 25 times, and has conducted narcotics surveillance more than 100 times.
- d. Officer Lee is familiar with the packaging and appearance of various narcotics, including crack cocaine.
- e. Officer Lee was using 10 x 50 binoculars and had a clear and unobstructed view of the 100 block to the 300 block of Bell Street.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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TESTED

45

- 1 f. This area was known to the officers as a high narcotics area and is located in
2 SODA (Stay Out of Drug Areas) Zone #1.
3 g. At that time, Officer Lee saw an Asian male, later identified as the Defendant, in
4 the 200 block of Bell Street.
5 h. Officer Lee described the Defendant as wearing a blue short-sleeved shirt, jeans
6 shorts that went down to his ankles, and a single black glove on his right hand.
7 i. In a search incident to the Defendant's arrest, Sergeant Hazard found \$520 on his
8 person.

9 2. FINDINGS AS TO THE DISPUTED FACTS

- 10 a. As the Defendant stood at the corner of 2nd Avenue and Bell Street, he was
11 approached by several people with whom he would walk several feet, stop, and
12 make quick hand-to-hand exchanges.
13 b. An unidentified white female walked up to the Defendant.
14 c. After a brief conversation, the Defendant produced a clear bindle of suspected
15 crack cocaine.
16 d. The Defendant held the suspected crack cocaine in his right hand and it stood out
17 against his black glove.
18 e. The Defendant was facing Officer Lee.
19 f. Officer Lee saw the Defendant unwrap the bindle.
20 g. Using his thumb and forefinger, the Defendant dropped the suspected crack
21 cocaine into the white female's open palm.
22 h. The white female examined the suspected crack cocaine in her palm.
23 i. The white female then handed paper currency to the Defendant.
j. As the arrest team officers moved in, Officer Lee saw the Defendant rewrap the
bindle of suspected crack cocaine and cuff it in his right hand.
k. As Officer Boggs and Sergeant Hazard moved in to arrest, all officers saw the
Defendant drop the bindle of cocaine onto the sidewalk.
l. Officer Lee and Sergeant Hazard are credible witnesses.
m. The Defendant is not credible. He lied about his ability to recognize crack
cocaine and the existence of prior drug convictions involving cocaine. He also
changed his story about what he was doing in the area from just passing through
to waiting for a friend who went into a convenience store.

3. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
SOUGHT TO BE SUPPRESSED:

Defendant contends that the officers lacked probable cause to arrest him and that the
subsequently discovered cocaine and cash should be suppressed.

Probable cause to arrest exists where the totality of the facts and circumstances known to
the officers at the time of arrest would warrant a reasonably cautious person to believe an offense

1 is being committed. State v. Herzog, 73 Wn. App. 34, 53, 867 P.2d 648 (1994). In making this
2 determination, reviewing courts must give consideration to an arresting officer's special
3 expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980).
4 Probable cause to arrest requires more than "a bare suspicion of criminal activity," State v.
5 Terravona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986), but does not require facts that would
6 establish guilt beyond a reasonable doubt. State v. Conner, 58 Wn. App. 90, 98, 791 P.2d 261
7 (1990).

8 According to Seattle Municipal Code 12A.20.050(B), "[a] person is guilty of drug-traffic
9 loitering if he or she remains in a public place and intentionally solicits, induces, entices, or
10 procures another to engage in [illegal drug activity]." The code provision provides a non-
11 exclusive list of circumstances that an officer may consider in determining whether probable
12 cause exists including whether an individual "[r]epeatedly beckons to, stops or attempts to stop
13 passersby, or engages passersby in conversation..." SMC 12A.20.050(C).

14 RCW 69.50.401(1) criminalizes the delivery and possession with intent to deliver a
15 controlled substance. A person commits the crime of delivery of a controlled substance when he
16 or she (1) delivers a controlled substance and (2) knows that the substance delivered is a
17 controlled substance. Id. Deliver or delivery means the actual or constructive transfer of a
18 controlled substance from one person to another. RCW 69.50.101(f). Cocaine is a controlled
19 substance. RCW 69.50.206. An individual possesses a controlled substance with intent to
20 deliver it when he or she (1) possesses a controlled substance and (2) possesses the controlled
21 substance with intent to deliver it. RCW 69.50.401(1).

22 Here, Officer Lee was conducting surveillance of the 100 to 300 block area of Bell Street,
23 a known high narcotics area. During that time, the Defendant was approached by several drug

1 users loitering in the area. On each occasion, Officer Lee saw the Defendant engage the drug
2 user in a brief conversation before walking with them and performing a hand-to-hand transaction
3 with them. In the final transaction, Officer Lee saw the same pattern described above but also
4 saw the Defendant handle what appeared to him based on his training and experience to be a
5 bundle of crack cocaine. He saw the Defendant remove rocks of suspected cocaine from the
6 bundle, drop them into the palm of the buyer, saw the buyer examine the rocks, and saw the
7 buyer hand the Defendant currency in exchange for the rocks. Based upon the officer's training
8 and experience, he had probable cause to believe the Defendant had just conducted multiple
9 hand-to-hand drug transactions. The officers thus had probable cause to arrest the Defendant for
10 Drug Traffic Loitering, Violation of the Uniform Controlled Substances Act - Delivery of
11 Cocaine, and Violation of the Uniform Controlled Substances Act - Possession with Intent to
12 Deliver Cocaine.

13 Nonetheless, Defendant cites to State v. Poirier, 34 Wn. App. 839, 664 P.2d 7 (1983) to
14 support his contention that the officers lacked probable cause to arrest him. But Defendant's
15 reliance on Poirier is misplaced as the officers' observations present here, certainly surpass the
16 minimal factual findings entered by the Poirier court to support its denial of suppression.

17 In Poirier, the factual findings, in their entirety, were as follows:

18 I.

19 On or about the 13th day of September, 1980, officers Scott and Bennett of the
Tacoma Police Department were working as security officers for a restaurant
known as the Dynasty. [sic]

20 II.

21 That on that date, the officers were standing in a position outside the business
near an open door and observed defendant Poirier standing in the parking lot.

22 III.

23 The officers then observed defendant Dimercurio arrive at the location of the
restaurant in the parking lot. The defendant exited the vehicle and approached
Mr. Poirier.

IV.

1 The officers then observed Mr. Poirier and Mr. Dimercurio exchange items that
2 appeared to be white envelopes or packages. Both defendants were then arrested
and searched, and during said search a package of suspected cocaine and a
package of money were removed from the defendants.

3 Id. at 841-42. The court noted that although the testimony would have supported different and
4 stronger findings, specifically regarding the officers' training and experience and the appearance
5 of the objects exchanged, it was bound by the written findings prepared by the prosecutor and
6 entered by the court. Id. at 840-42. The court concluded that the written factual findings failed
7 to establish (1) the officer's familiarity with either party; (2) that this area was known for drug
8 sales; or (3) that the envelopes exchanged had any distinctive characteristics making them
9 recognizable as packages of drugs. Id. at 843. The court thus held that the findings did not
10 support the conclusion that the officer had probable cause to arrest and suppressed the
11 subsequently discovered evidence. Id.

12 In contrast, here, we have evidence of the factors lacking in the Poirier court's findings.
13 This particular area is known to the officers based upon their experience as a high narcotics area.
14 Further, the description of items exchanged in this case is far more detailed than the "white
15 envelopes or packages" described in the Poirier findings. Here, Officer Lee actually saw the
16 drugs and cash involved in the exchange. Based upon Officer Lee's training, experience, and
17 detailed observations of illegal activity, there was probable cause to arrest the Defendant.

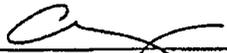
18 In addition to the above written findings and conclusions, the court incorporates by
19 reference its oral findings and conclusions. Defendant's motion to suppress is denied.

20 Signed this 13 day of March, 2009.
21

22 
23 _____
JUDGE JULIE SPECTOR

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Presented by:

 26624

Deputy Prosecuting Attorney
Approved as to form only

 22617

Attorney for Defendant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63319-8-I
)	
TAN VO,)	
)	
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 30TH DAY OF JULY, 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] TAN VO
DOC NO. 752059
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JULY, 2009.

x *Patrick Mayovsky*