

No. 63597-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

LESLIE ANN KULL,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred in denying the defendant's CrR 3.6 motion to suppress illegally seized cocaine evidence.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err in denying the defendant Leslie Kull's CrR 3.6 motion to suppress physical evidence obtained when a Lynnwood police officer searched a box that was present in the passenger compartment of a vehicle driven by Robert Keenan following his arrest, in violation of the Fourth Amendment, Art. 1, § 7 of the Washington Constitution, and Arizona v. Gant?¹

2. Did the trial court also err in denying the defendant's CrR 3.6 motion to suppress where police officers searched the box, which the officer believed to be a belonging of Ms. Kull's, in violation of the Fourth Amendment, Art. 1, § 7 of the Washington Constitution, and State v. Parker?²

3. Was the cocaine evidence supporting Ms. Kull's VUCSA conviction, which was located in a patrol car and assumed to have been dropped by her during transport, the fruit of the illegal search that is the subject of Assignments of Error 1 and 2?

¹Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

²State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999).

C. STATEMENT OF THE CASE

1. **Procedural history.** Leslie Kull was found guilty in a stipulated trial of possession of a controlled substance (cocaine) pursuant to RCW 69.50.401, following unsuccessful litigation of a CrR 3.6 motion to suppress physical evidence. CP 44-98, 139-40.

The cocaine evidence was located after a Lynnwood police officer conducted a warrant check using the name of Robert Keenan, the apparent driver of a vehicle that required police assistance to be pushed to the side of the road. After discovering a warrant for Keenan's arrest and taking him into custody, the police officer searched various containers inside the vehicle which he believed were associated with the passenger, Leslie Kull. In one of the containers, a box, the officer located cocaine. CP 105-12.

The trial court ruled that the officer was legally entitled to search the driver, Mr. Keenan's, vehicle and all unlocked containers therein, pursuant to State v. Stroud.³ CP 110. The court employed the Stroud rationale to justify the search of the box, and did not address State v. Parker. See CP 110-11.

³State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986).

Ms. Kull was sentenced to a standard range term of 18 months incarceration. CP 23-37. She appeals. CP 5.

2. CrR 3.6 Factual Findings. Following a CrR 3.6 hearing, the trial court found as follows.⁴

On October 21, 2008, shortly before midnight, Officer Coleman Langdon of the Lynnwood Police Department was on patrol in the City of Lynnwood. At 200th St. SW and 56th Ave. W, he came upon a stalled pickup truck partially blocking the intersection. Officer Langdon observed two people, a male, and the defendant Leslie Kull, unsuccessfully attempting to push the truck. Officer Langdon could not ignore the situation due to the circumstances presented, which included the fact that 200th Street is a main arterial road. He stopped his patrol car and spoke with the male at the driver's side door of the truck who stated the truck had run out of gas. CP 1, 105.

The male asked for Officer Langdon's assistance in pushing the truck. Officer Langdon indicated that before he could help push a vehicle, a signed liability waiver needed to be completed because of the potential of the police car damaging the

⁴The trial court's CrR 3.6 findings, which take the form of a few lengthy paragraphs rather than separately numbered findings, are inextricably intertwined with findings the court entered with respect to its CrR 3.5 ruling on the admissibility of statements Ms. Kull made to the police. CP 105-12.

truck. Officer Langdon did not have such a waiver in his patrol car, so he radioed for another patrol car to bring one to the scene. CP 105-06.

Because he needed to know who he was dealing with for the waiver, and for general safety reasons, Officer Langdon asked the male to identify himself via his name and date of birth. In response, the male gave Officer Langdon a prison identification card identifying him as Mr. Robert Keenan. Officer Langdon retained Mr. Keenan's identification while he advised a dispatcher of Mr. Keenan's information. Officer Langdon held the identification for 15 to 20 seconds and returned it to Mr. Keenan. A short time later, dispatch advised that Mr. Keenan had two misdemeanor warrants for his arrest, including one for possession of drug paraphernalia. CP 106.

Officer Langdon placed Mr. Keenan under arrest, and advised the defendant that she was free to go. The time that elapsed when the civil assist turned into a criminal matter was minimal. In quick succession, almost immediately, Officer Langdon told the defendant she could leave. CP 106.

The defendant asked to retrieve a case located on the passenger floorboard of the truck's interior. Officer Langdon said

yes and asked if he could look inside the case. The defendant said yes. Officer Langdon looked inside the case and found nothing of concern. Officer Langdon gave the case to the defendant. During this exchange, the defendant chose to remain at the scene and did not walk away. CP 106.

Very shortly after handing over the case, Officer Langdon asked the defendant if she was the owner of a wooden box he had found on the passenger floorboard near the defendant's case. When Officer Langdon asked the defendant about the wooden box, her demeanor changed. She became noticeably nervous and said the box was not hers. Officer Langdon opened the box and found what he recognized through his training and experience as a drug pipe. Mr. Keenan denied the pipe was his. Officer Langdon arrested the defendant for Possession of Drug Paraphernalia. Mr. Keenan then told the officers that the pipe was his. Officer Langdon said it was too late. CP 106.

Officer Langdon properly read both Mr. Keenan and the defendant their Miranda⁵ rights from a card he carries in his pocket. Lynnwood Police Officer Jorgenson transported the

⁵Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

defendant, Ms. Kull, to the Lynnwood Police Department in his patrol car. At no point did the defendant request counsel or invoke her right to remain silent. Officer Jorgenson searched the rear of his patrol car after the defendant was removed from it and found a metal case which appeared to contain cocaine. Upon questioning by Officer Langdon, the defendant admitted that the substance was hers. This admission occurred approximately 10 to 15 minutes after her rights were read at the scene. CP 107.

On December 13, 2008, the defendant was apprehended shoplifting at JC Penny in the City of Lynnwood. Officer Jorgenson responded and contacted the defendant. He properly advised her of her Miranda rights, which she said she understood and agreed to waive. Officer Jorgenson began questioning the defendant about the theft case and did not speak to her about the October 21st incident. The defendant told him she was facing 18 months from her last arrest, and said she needed treatment instead of prison. Jorgenson asked Kull when she was last arrested, and she said, "When I dumped that crack in your back seat." CP 107. Officer Jorgenson was aware that the defendant was facing charges from the October 21st incident, that she was represented by counsel, and that she had upcoming hearings.

3. Defendant's arguments in favor of suppression. Ms.

Kull argued (1) that the officer's act of taking the defendant's name and/or identification and using it to run a warrant check constituted a seizure without reasonable suspicion of criminal activity; (2) that any search of Mr. Keenan's vehicle's passenger compartment incident to arrest was contrary to the constitution pursuant to New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) and the reasoning of State v. Gant, 162 P.3d 640 (Ariz. 2007), and (3) that there were no grounds to associate Ms. Kull with the box containing drug paraphernalia and therefore no probable cause to arrest her. CP 130-35; 2/19/09 at 107-11.

4. CrR 3.6 Ruling. The trial court denied the defense motion to suppress the cocaine evidence. 2/20/09RP at 2-11; CP 108-11. In its legal ruling, the court held as follows:

This case began as a civil contact where the officer came upon a road hazard at a main arterial intersection. The officer could not just drive away from this situation. Mr. Keenan and the defendant wanted help moving the truck out of the intersection. Before he could help, the officer needed to have a waiver form filled out. The disabled vehicle was large and heavy. Two people had been unable to move it at all. It was apparent that the police

car would need to be used, which could have damaged the truck. The officer did not want to run the risk, and should not have to, of he and the department being sued for trying to help. CP 108-09.

It was not unreasonable for the officer to ask Mr. Keenan to identify himself. This was a civil contact. The officer needed to know who he was dealing with for purposes of the waiver. He also stated he wanted to radio the name to dispatch so they would know who he was with if he wasn't heard from again. The most cogent testimony on this point was on direct when Officer Langdon said he asked for Mr. Keenan's name and date of birth, and Mr. Keenan responded by giving his prison identification card. The officer had not asked for "hard" identification. On cross, the defense attempted to elicit that the officer had demanded hard identification. In response to a leading question, the officer agreed that he had asked for "identification." It was not clarified whether that meant oral or physical identification. The court is satisfied that it was a request for oral identification. CP 109.

In the end, it makes little difference to the court's determination. Even if the officer had requested physical identification, he only retained it for the 15-20 seconds it took to radio it in and then gave the identification back. Even if a seizure

had arguably occurred, at that point it had ended, and it had lasted less than one minute. CP 109.

Additionally, while for purposes of this analysis the court assumes the defendant has standing to challenge a search which led to the discovery of evidence used against her, the defendant cannot assert rights personal to Mr. Keenan. CP 109.

It was permissible for the officer to obtain Mr. Keenan's name. Once his name was obtained, the officer discovered his warrants and arrested him. Mr. Keenan was placed in handcuffs, and the civil contact turned into a criminal one. The officer immediately informed the defendant she was free to go. Right away she asked for her case, and the officer agreed to get it for her and asked permission to look inside. She agreed. This took very little time. The defendant was given her case and was free to go. The officer did not tell her she had to remain for any reason, but she chose to do so. CP 109.

Prior to Mr. Keenan's arrest, there was no reason to discuss whether the defendant was free to go or not. The court finds it difficult to conceive of an officer, upon being asked for help, telling the people asking for help that they are free to go. This is nonsensical. CP 110.

Once Mr. Keenan was arrested, the passenger compartment of the vehicle and all unlocked containers therein were subject to search incident to arrest. It was not unreasonable for the officer to retrieve the item the defendant requested rather than have her go into a vehicle he had not yet searched himself. It is clear from all the testimony, including the defendant's, that she voluntarily agreed to allow the police to look in the case in which they located nothing of concern. CP 110.

The defendant's demeanor quickly changed when asked about the wooden box. She became visibly nervous and denied any knowledge of the box. Upon opening the box, which he had a right to do, the officer found a drug pipe. Prior to finding this drug pipe, the police had not detained the defendant in any way. She was also not subject to custodial interrogation prior to that point. CP 110.

Mr. Keenan stated he knew nothing of the pipe. The defendant complains that this statement was made prior to Mr. Keenan's advisement of rights, but the defendant cannot assert Mr. Keenan's Fifth Amendment rights. Regardless, Mr. Keenan's statement was voluntary. CP 110.

The officer had probable cause to arrest the defendant for possession of drug paraphernalia with or without her statement admitting she was a passenger in the truck for the following reasons: The officer came upon a disabled truck at midnight with two people trying to push it out of an intersection. The male is identified as the driver. Upon arrest of the driver, the only other person there asks if she can get her belongings out of the truck. CP 110. When asked about another box in the truck, her immediate response is to get nervous apparently about being associated with this item. The officer had probable cause to believe that she had been a passenger in the truck and was in possession of the pipe. CP 110. When you add in her statement that she had been a passenger, there is probable cause as well. As previously noted, the court is satisfied that the defendant did tell the officer she had been a passenger in the truck. Thus, the defendant was properly arrested and evidence obtained as a result of that arrest is admissible at trial. CP 110-11.

D. ARGUMENT

1. THE SEARCH OF AN UNLOCKED CONTAINER IN MR. KEENAN'S VEHICLE "INCIDENT TO ARREST" VIOLATED THE FOURTH AMENDMENT AND ARTICLE 1, § 7 IN THE ABSENCE OF ACTUAL EXIGENCY.

This Court reviews the trial court's conclusions of law following a suppression hearing *de novo*. State v. Williams, 148 Wn. App. 678, 683, 201 P.3d 371 (2009). Here, the search of Mr. Keenan's vehicle "incident to arrest," during which Ms. Kull's box was located and searched, violated the Fourth Amendment and Article 1, § 7 in the absence of actual exigency.

a. **Any search of items located in the passenger compartment of Mr. Keenan's truck required "actual exigency" once he was handcuffed.** Warrantless searches are presumptively unreasonable, and will be deemed improper absent a valid exception based upon an emergency. Chimel v. California, 395 U.S. 752, 764-65, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). In order to lawfully search a vehicle incident to the arrest of the driver, the search must be justified by an actual need to prevent access to weapons or evidence within the arrestee's immediate control. *Id.* at 762; see New York v. Belton, 453 U.S.

454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) (defining permissible scope of automobile search incident to arrest where destruction of evidence likely).

In Chimel, the court identified the exigencies permitting a search incident to arrest as (1) “the need to seize weapons and other things which might be used to assault an officer or effect an escape,” and (2) “the need to prevent the destruction of evidence of the crime.” Chimel, 395 U.S. at 764. The scope of a search “must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” Id. at 761-62 (quoting Terry, 392 U.S. at 29).

Here, there was no exigency. Mr. Keenan, the driver, was arrested and then handcuffed. CP 109. There was no assertion of any need to search Keenan’s truck relating to his arrest. Under recent Supreme Court case law, Officer Langdon therefore had no authority to search the passenger compartment of the vehicle or any unlocked containers therein. Importantly, the trial court specifically and expressly relied on the officer’s supposed authority to search Mr. Keenan’s passenger compartment, and any articles therein, incident to his arrest, as the basis for the legality of searching the box. CP 110 (finding that “the passenger

compartment of the vehicle and all unlocked containers therein were subject to search incident to [Keenan's] arrest").

b. This Court should hold that the search of the box found in the passenger compartment of Mr. Keenan's truck was illegal under *Arizona v. Gant*. The search of the box found within the passenger compartment was illegal under emergent Supreme Court case law. In *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the Supreme Court analyzed an issue undecided by *Chimel*, *Belton*, or other prior United States Supreme Court cases, regarding whether vague concerns of officer safety or purely speculative concerns about the destruction of evidence justify the warrantless search of an automobile. Prior to *Gant*, the rule in Washington was that a vehicle driver's lawful arrest provided the police with authority of law to conduct a search of that car incident to arrest, including its passenger compartment and any unlocked containers in the passenger compartment. *State v. Vrieling*, 144 Wn.2d 489, 492, 28 P.3d 762 (2001); *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986).

The *Gant* Court ruled that Supreme Court precedent draws a bright line rule regarding the scope of a search incident to

arrest, but does not always permit a search of a vehicle for every arrest, and there must be a permissible basis for such a search predicated on the required exigency, based on individual circumstances. Arizona v. Gant, 129 S. Ct. at 1719-20. The Court stated that law enforcement officers must demonstrate an actual and continuing threat to their safety posed by an arrestee, or a need to preserve evidence related to the crime of arrest from tampering by the arrestee, in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured.

Police 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. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, 129 S.Ct. at 1719.

Notably, the Washington Supreme Court has previously held that under the state constitution, the search incident to arrest exception to the warrant requirement is not a "right" possessed by law enforcement, but is dependent upon the existence of actual exigent circumstances. See State v. White,

129 Wn.2d 105, 112-113, 915 P.2d 1099 (1996) ("The validity of a search incident to arrest depends upon the existence of exigent circumstances such as the need to seize weapons which the arrestee may seek to use to resist arrest or escape or the need to prevent the destruction of evidence of the crime"); see also State v. Rathbun, 124 Wn. App. 372, 380, 101 P.3d 119 (2004). What is important for Fourth Amendment and state constitutional purposes is that the successful custodial arrest and handcuffing of a suspect, as occurred here with respect to Mr. Keenan, eliminates the exigent circumstances which supposedly justify the search of a vehicle's passenger compartment - the potential destruction of evidence and officer safety - obviating the need for police officers to conduct a search without first obtaining a warrant.

The Washington Courts now follow Gant's reasoning. See, e.g., State v. Harris, ___ P.3d ___, 2010 WL 45755, Wash.App. Div. 2, January 07, 2010 (No. 36565-1-II); State v. Valdez, ___ P.3d ___, 2009 WL 4985242, Wash., December 24, 2009 (No. 80091-0). And several other states that have considered the issue in recent years have drawn markedly different conclusions than Stroud under their own state

constitutions. Rejecting Belton entirely, they allow vehicle searches incident to arrest only when necessary "to ensure police safety or to avoid the destruction of evidence." State v. Eckel, 185 N.J. 523, 539, 888 A.2d 1266 (2006); see also Commonwealth v. White, 543 Pa. 45, 669 A.2d 896 (1995); Camacho v. State, 119 Nev. 395, 75 P.3d 370 (2003); State v. Pittman, 139 N.M. 29, 127 P.3d 1116 (N.M. Ct. App. 2005); State v. Bauder, 924 A.2d 38 (Vt. 2007).

This Court should hold that the search "incident to arrest" conducted by Officer Langdon, of the box found in the passenger compartment, was illegal as a warrantless search under the Fourth Amendment and Article 1, § 7, in the absence of actual exigency.

2. THE COCAINE EVIDENCE WAS THE FRUIT OF OFFICER LANGDON'S UNCONSTITUTIONAL POLICE SEARCH OF A VEHICLE PASSENGER'S PROPERTY IN VIOLATION OF STATE V. PARKER.

In the alternative to her argument that the search of the "box" was illegal because it was conducted as part of a passenger compartment search contrary to Arizona v. Gant, Ms. Kull argues that the search of the box was illegal because the

officer believed it to be hers – i.e., the belonging of a non-arrested passenger.

a. This Court should review Ms. Kull’s claim that the search of the box was outside the scope of authority granted by the arrest of the driver, Mr. Keenan. In seeking suppression of the cocaine evidence, Ms. Kull’s trial counsel argued, inter alia, that there were no grounds to associate Ms. Kull with the box containing drug paraphernalia and therefore no probable cause to arrest her. CP 130-35; 2/19/09 at 107-11. The proper argument in the alternative to counsels’ contentions under State v. Gant, and one plainly supported by all the facts adduced at the CrR 3.6 hearing below, was that the arrest of the driver of the truck, Mr. Keenan, did not give the Lynnwood police any lawful authority to search articles belonging to his passenger, Ms. Kull:

The arrest of one or more vehicle occupants does not, without more, provide the “authority of law” under article I, section 7 of our state constitution to search other, nonarrested vehicle passengers, including personal belongings clearly associated with such nonarrested individuals.

State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001)

(citing State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999)).

If the precise theory Ms. Kull relies on in the present appeal was not adequately presented to the trial court below, Ms. Kull may nonetheless challenge the search of the box as illegal under Parker, because the argument stakes out a claim of manifest error affecting her constitutional rights. RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Admission of evidence obtained in a search conducted without authority of law is an error of constitutional magnitude, within the meaning of RAP 2.5(a)(3). State v. Busig, 119 Wn. App. 381, 181 P.3d 143 (2003), review denied, 151 Wn.2d 1037 (2004); U.S. Const. amends. 4 and 14; Wash. Const. art. 1, § 7.

Furthermore, actual prejudice – the necessary additional component of a RAP 2.5(a)(3) argument on appeal – is evident from the record, because the nature of the box as belonging to a passenger, not the arrestee Mr. Keenan, was clearly shown during the CrR 3.6 hearing, and the box’s search led to Ms. Kull’s arrest and the discovery of the evidence supporting her conviction for possession of cocaine. All of the facts needed to address this issue were fully developed, and are contained in, the record of the proceedings below, and Ms. Kull may now

argue Parker on appeal even if it is somehow deemed to be the first time she is doing so. State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998); State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Finally, in the alternative, Ms. Kull can raise the Parker theory by arguing that her counsel's failure to do so below (if any) was a violation of her right to effective assistance of counsel, guaranteed by the Sixth Amendment. U.S. Const. amend. 6. Because the record below is fully developed on the issue of the search of the box, and the fact that the box did not belong to the driver Mr. Keenan, Kull can show (1) that her defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable probability that, but for the deficient conduct, the outcome of the possession trial would have differed. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The doctrine of ineffective assistance of counsel is well-recognized as having application in the context of a failure of trial counsel to seek

suppression of illegally seized evidence. See, e.g., Personal Restraint of Reichenbach, 153 Wn.2d 126, 130-31, 101 P.3d 80 (2004). It applies here if this Court concludes that the precise legal argument presented on appeal was not adequately presented to the trial court below.

b. The search of the box was conducted by Officer Langdon without “authority of law.”

Each individual possesses the right to privacy, meaning that he has the right to be left alone by police unless there is probable cause to believe based on objective facts that he is committing a crime. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). This probable cause requirement is derived from the language of the Fourth Amendment to the United States Constitution, which provides that

[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, and no warrants shall issue, but upon probable cause[.]

(Emphasis added.) U.S. Const. amend 4. The Washington Constitution similarly protects individuals' right to privacy in article I, section 7, stating that “[n]o person shall be disturbed in

her private affairs, or her home invaded, without authority of law.” Wash. Const. art. 1, § 7.

Under these rules, a warrantless search in the absence of probable cause is per se illegal. State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). Exceptions to this rule are narrowly drawn, White, 135 Wn.2d at 768-69, and the State bears a heavy burden in showing that such a search falls within one of the exceptions. See State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

The constitutional protections discussed supra, and the presumption of illegality of a search, fully apply to the passengers in a vehicle where the driver is stopped and/or arrested. State v. Rankin, 151 Wn.2d 689, 699, 92 P.3d 202 (2004); State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999); see also Ybarra v. Illinois, 444 U.S. 85, 92, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) (holding that the Constitution's protections against illegal search and seizure are “possessed individually”). Thus Ms. Kull’s right of privacy was not subject to invasion simply because the driver of a vehicle in which she was riding was lawfully detained. City of Spokane v. Hays, 99 Wn. App. 653, 658, 995 P.2d 88 (2000). As a vehicle

passenger, Ms. Kull held an independent, constitutionally protected privacy interest, because the right of privacy in one's affairs "is not diminished merely upon stepping into an automobile with others." State v. Parker, 139 Wn.2d at 489.

The Court in Parker noted that the arrest of one or more vehicle occupants does not, without more, provide "'authority of law' under article I, section 7 of our state constitution to search other, non-arrested vehicle passengers, including personal belongings." Parker, 139 Wn.2d at 502-03; see also State v. Larson, 93 Wn.2d 638, 642-45, 611 P.2d 771 (1980) (lawful vehicle stop does not by itself provide grounds to investigate passenger; article I, section 7, requires independent basis to search passenger). The Court expounded a specific rule providing that the "personal effects of a passenger, such as a purse, jacket, or container, known to the officers to belong to the passenger, may not be searched incident to the arrest of the driver if not in the 'immediate control' of the driver." State v. Vrieling, 144 Wn.2d at 494, and n.2 (summarizing Parker).

Thus, in Ms. Parker's case, the Court reversed the trial court's ruling denying suppression, where the police searched a purse found in the passenger compartment of a vehicle after

the driver was arrested for driving with a revoked license. Parker, 139 Wn.2d at 490. The purse was plainly not associated with the arrestee, but rather, the police officer knew it was the personal effect of a passenger. Parker, 139 Wn.2d at 490, 504. In the companion case of Ms. Jines, the Court similarly ordered suppression where the driver of the car in which Jines was riding was arrested for driving with a suspended license, and the police search of the vehicle incident to arrest was illegally expanded to include a search of a jacket that the facts made plain was the personal effect of Jines. Parker, 139 Wn.2d at 490-91, 504.

Here, the “box” searched by Officer Langdon was plainly a belonging associated with Ms. Kull. Although Ms. Kull claimed the box was not hers, it was this fact, along with her nervousness, that caused the officer to believe that the belonging was hers. CP 106. Given that Officer Langdon was in possession of that knowledge and belief, under these facts, Officer Langdon’s search of Ms. Kull’s box was in violation of the Fourth Amendment and Article 1, § 7.

**3. THE EVIDENCE OF THE COCAINE
FOUND IN OFFICER
JORGENSEN'S PATROL CAR
MUST BE SUPPRESSED AND THE
DEFENDANT'S POSSESSION
CONVICTION REVERSED.**

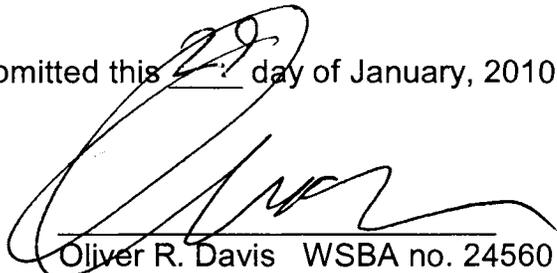
Evidence which is the product of an unlawful search or seizure is not admissible. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Evidence will be excluded as fruit of the illegal seizure unless the illegality is not the "but for" cause of the discovery of the evidence, and suppression is required where the challenged evidence is in some sense the product of illegal governmental activity. Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, 615 (1984) (citing United States v. Crews, 445 U.S. 463, 471, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 537 (1980)). Here, the cocaine found to have been dropped by Ms. Kull in Officer Jorgenson's patrol car, during her transport to the precinct, would not have been discovered but for the illegal search of the box in Mr. Keenan's passenger compartment and Kull's subsequent arrest for contraband. Absent that cocaine evidence, there was insufficient evidence to support Ms. Kull's conviction at the stipulated trial for cocaine possession, and that conviction must

therefore be reversed as violative of due process. U.S. Const.
Amend. 14.

E. CONCLUSION

Based on the foregoing, Ms. Kull requests that this Court
reverse the trial court's denial of her CrR 3.6 motion, and
reverse her conviction.

Respectfully submitted this 29 day of January, 2010.



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