

64008-9

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No. 64008-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GREGORIO ORTEGA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF
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A. ARGUMENT.

ORTEGA'S UNAUTHORIZED SEARCH AND SEIZURE MAY NOT BE VALIDATED UNDER THE FELLOW OFFICER RULE OR BY CONCOCTING PROBABLE CAUSE TO ARREST FOR A DIFFERENT OFFENSE

As explained in Ortega's opening brief yet largely ignored by the prosecution, under Article I, section 7, an arrest must be predicated on a valid warrant or upon authority of law, which is not established simply by an officer's possession of probable cause. State v. Afana, _ Wn.2d _, 2010 WL 2612616, *2 (July 1, 2010) (without a warrant, "[u]nless it can be shown that the search in question fell within one of the carefully drawn exceptions to the warrant requirement, we must conclude that it was made without authority of law"); State v. O'Neill, 148 Wn.2d 564, 585, 62 P.2d 489 (2003) ("authority of law" mandatory prerequisite for arrest under Washington Constitution); State v. Barker, 143 Wn.2d 915, 921, 25 P.3d 423 (2001) ("probable cause alone does not establish the authority of law for an officer outside his jurisdiction to effect a warrantless arrest."). Here, the police lacked authority to arrest Ortega and the State did not prove it had such authority at the CrR 3.6 hearing.

1. The fellow officer rule does not broadly apply to any offense in Washington. The State argues that RCW 10.31.100 does not limit the application of one officer's authority to arrest a person based on actions that officer did not observe, even though the plain language of RCW 10.31.100 says otherwise. Response Brief at 19. Under RCW 10.31.100, a police officer lacks authority to arrest a person for committing a misdemeanor offense unless the officer witnessed the offending behavior or a statutory exception applies. State v. Walker, 157 Wn.2d 307, 322, 138 P.3d 113 (2006) ("legislature may provide exceptions to the common law 'in the presence' rule"). RCW 10.31.100 contains no exception for drug traffic loitering. See Opening Brief, p. 8-9.

As the Court recognized in Walker, the long-standing "in the presence" requirement may be limited by the legislature without violating the constitution. Because RCW 10.31.100 does not authorize an officer to arrest a person for the misdemeanor offense of drug traffic loitering, without a warrant, unless it was committed in the presence of the arresting officer, the arresting officer lacked authority to arrest Ortega when he did not see Ortega commit any offense in his presence.

The prosecution claims that State v. Gaddy, 152 Wn.2d 64, 71, 93 P.3d 872 (2004), implicitly authorizes the police to arrest people without warrants for any offenses under the fellow officer rule. But the State's own recitation of Gaddy demonstrates that this reading of Gaddy is incorrect. Response Brief at 18-19. In Gaddy, the Court disposed of arguments that it should consider the fellow officer rule, holding that the case did not implicate the fellow officer rule. Id. Additionally, the offense at issue in Gaddy was driving with a suspended license, and RCW 10.31.100 specifically authorizes a police officer to arrest a person without a warrant for driving with a suspended license. Id. at 70. Thus, it is impossible to read Gaddy as implicitly authorizing an arrest without a warrant for misdemeanor offenses.

Similarly, the State incorrectly explains the legal issues at stake and holding of Torrey v. City of Tukwila, 76 Wn.App. 32, 882 P.2d 799 (1994). The legal issue in that federal civil rights case filed under 42 U.S.C. § 1983 was whether the officers "deprived [the plaintiffs] of rights secured by the United States Constitution or federal law." Id. at 37. The decision in Torrey was not cited or considered in Walker, where the Supreme Court explored the constitutionality of the fellow officer rule under Article I, section 7.

157 Wn.2d at 307. It is not binding precedent, or even helpful analysis, of the officer's authority to arrest Ortega for a misdemeanor offense he did not see.

Article I, section 7 and RCW 10.31.100 dictate the police officer's authority to arrest a person without a warrant. The arresting officer did not have a warrant or observe Ortega commit a crime, and accordingly lacked legal authority to arrest and search him.

2. The State did not prove it had probable cause to arrest Ortega for selling drugs when the officer did not see money or drugs. The State concedes, as it must, that the observing police officer, Chad McLaughlin, did not see Ortega or another person with money, drugs, or items that he could plausibly divine as either. Response Brief at 10. Yet it concocts a claim that the police could have arrested Ortega for selling drugs, even if the arresting officer did not think he had probable cause and the court did not find he had probable cause for that specific offense.

The prosecution relies on State v. White, 76 Wn.App. 801, 888 P.2d 169 (1995), aff'd on other grounds, 129 Wn.2d 105 (1995), where the defendant was arrested as a participant in a drug transaction. Like Ortega, the police in White did not actually see

drugs exchanged when watching the on-the-street interactions between three people. But unlike Ortega's case, the police in White saw one participant (the "buyer") count and deliver money to another participant (the "seller"). The police saw the "seller" drop a small object to the ground, which the buyer immediately picked up, momentarily put into his mouth, and then handed money to the seller. 76 Wn.App. at 803.

The specific indicia in White, of exchanging money for a small object, are not present here. The facts of White are no more helpful than any other case, and the State offers no other case where the court found probable cause to arrest for narcotics sales solely upon nods and possible exchanges without even seeing money or items.

The State offers a nonsensical distinction between Ortega's case and State v. Neth, 165 Wn.2d 177, 183 P.3d 658 (2008). In Neth, there were a number of suspicious circumstances indicating Neth used or sold drugs: a large amount of cash, a large number of small plastic baggies, and "hits" by a drug-trained K-9, but these suspicions did not amount to probable cause. Id. at 185. While Neth was not seen potentially exchanging items with others on the street, Ortega was not seen with a large amount of cash, identified

by a K-9 as having drugs, in possession of the tools of drug transactions. In both cases, the officers' suspicions of something nefarious did not and do not amount to probable cause to arrest for selling or possessing drugs.

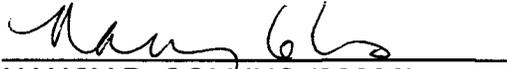
Significantly, the observing police officer McLaughlin did not believe he had probable cause to arrest Ortega for a felony drug offense. The officer did not believe he had even probable cause to arrest the suspected "buyers," who also would have committed felony offenses if they were buying drugs. The court did not find the officer had probable cause to arrest Ortega for selling drugs. CP 81-82. The prosecution's efforts to assert, on appeal, that there was probable cause to arrest Ortega for a felony are not supported by the record or the case law. Because Ortega's arrest and search violated the Fourth Amendment and Article I, section 7 of the Washington Constitution, the evidence gathered should have been found inadmissible at trial. Afana, 2010 WL 2612616 at *4.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Gregorio Ortega respectfully requests this Court reverse the trial court's ruling and find he was arrested without authority of law.

DATED this 13th day of July 2010.

Respectfully submitted,



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STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	
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GREGORIO ORTEGA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MICHAEL PELLICCIOTTI, DPA	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF JULY, 2010.

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