

66516-2

66516-2

NO. 66516-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN LUBERS,

Appellant.

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

The Honorable Beth M. Andrus, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding police officers who searched the open trunk of Sebastian L. Lubers' car "had authority to inspect the clear plastic bag under the Open View Doctrine without first obtaining a search warrant because it was immediately apparent that the clear plastic bag contained the fruits of criminal conduct." CP 144 (conclusion of law 3.5).¹

2. The trial court erred by concluding as follows:

Excising out those parts of the affidavit for search warrant which the court finds should be suppressed due to the search of the trunk without a warrant, the court concludes that there is sufficient probable cause to support a search of the safe which was located in the trunk.

CP 147-48 (conclusion of law 3.7).

3. The trial court erred by entering the following orders:

Based upon the court's findings of fact and conclusions of law, the court denies the defense motion to suppress as to the contents of the safe, the contents of the clear plastic bag and the existence of those items in the trunk which were in open view and were immediately apparent to be evidence of a crime.

CP 148 (order 4.2).

¹ Lubers attaches a copy of the Findings of Fact and Conclusions of Law as an appendix to this brief.

Based upon the court's findings of fact and conclusions of law, the court denies the defense motion to suppress as to the contents of the safe found in the trunk.

CP 148 (order 4.4).

4. The state failed to prove beyond a reasonable doubt that Lubers knew there was stolen property in the trunk of his car, an element of both identity theft and possession of stolen property.

5. The state failed to prove beyond a reasonable doubt that, with respect to identity theft, Lubers acted with the intent to commit, or aid or abet, any crime.

Issues Pertaining to Assignments of Error

1. Did the trial court err by denying Lubers' motion to suppress the plastic baggie and safe that officers observed in open view in the trunk of Lubers' car, even though the officers searched the trunk and items without a warrant and in the absence of any recognized exceptions to the warrant requirement?

2. Did the state fail to prove beyond a reasonable doubt that Lubers knew there were identification documents and other stolen property in the trunk of his car?

3. Did the state fail to prove Lubers knowingly obtained or possessed identification cards of other, real individuals and that he acted with the intent to commit, or to aid or abet, any crime?

B. STATEMENT OF THE CASE

1. Procedure

Based on the discovery of stolen items in the trunk of Lubers' car, the state charged Lubers with five counts of second degree identity theft, four counts of third degree possession of stolen property (PSP), and one count of possession of burglary tools. CP 8-12. Lubers filed a motion to suppress evidence, which was granted in part and denied in part. CP 23-31, 139-49. As a result, one count of PSP and one count of possession of burglary tools were dismissed (counts 7 and 10). 2RP 258-60, 351-52.

The jury found Lubers guilty of the remaining counts as charged. CP 101-08. The trial court imposed concurrent 50-month standard range sentences for identity theft based on an offender score of 12, to run concurrently with three concurrent sentences of 365 days for each count of PSP. CP 152-62; RP 599-602, 606-07.

2. Pretrial hearing – motion to suppress evidence

Armed with lender Capital One's request to repossess a vehicle, Eric Mileli of Car Service picked up a 2001 BMW belonging to Lubers

and towed it from its parking spot on a Seattle street to Car Service's secured lot in Lynwood. 1RP 18, 21-28, 44-45, 130-31. Mileli opened a door to the car with a special tool so he could conduct a standard safety search of the passenger compartment for weapons. 1RP 28-30.

This activated the alarm, which Mileli knew he could shut off by disconnecting the battery. 1RP 30-31. He popped the trunk open because the battery on that model BMW was located behind a panel on the right side of the trunk behind the taillight. 1RP 31-35, 41-42, 45-46. Mileli noticed the trunk contained a safe and other items. 1RP 33. When Mileli folded the panel down to access the battery, he saw a clear baggie containing several keys tucked up above the battery and a fuse panel. 1RP 34-35, 46.

Hoping one of the keys was for the BMW, Mileli pulled the bag out of the compartment and placed it on the trunk floor. 1RP 35-36; Exs. 7-8. With the baggie now exposed, Mileli observed multiple identification and Social Security cards for different individuals contained within. 1RP 35-38, 46.²

² Police officers later found a vehicle registration inside the baggie as well. 1RP 96-98, 129-30, 134-35.

Mileli stopped searching at this point, called co-owner Terri Cody, and explained what he had found. He was asked to wait until lot assistant Danielle Whitaker arrived. 1RP 38-39. When she arrived at the lot, Whitaker also observed the baggie in the trunk. She saw only one identification card inside the baggie given the position in which Mileli left it. So she flipped it over, which enabled her to see more cards and personal items. 1RP 62-63. Whitaker called police and neither she nor Mileli touched any of the items in the trunk again. 1RP 39, 61-65.

Officer John Sadro arrived first and spoke with Mileli and Whitaker. From his vantage point outside the car's trunk, Sadro saw the baggie with identification and Social Security cards, as well as the safe. 1RP 65-66, 89-90, 95-98, 112-13; Ex. 9. Sadro contacted detectives and secured the car until they arrived. 1RP 90, 98-100.

Detective Colin Ainsworth reported to the lot and Sadro briefed him. 1RP 120-25. Ainsworth looked into the open trunk and observed a safe with a bed sheet around it, as well as the baggie, which contained keys and various Washington identification cards. Ainsworth surmised the safe may have been stolen during a burglary and the keys and card taken during vehicle prowls. 1RP 124-25, 128-30. Also partially visible in the trunk was a check made out to Lubers. 1RP 102-03, 131, 151-52.

Sadro took photographs of the items in the trunk before they were touched. 1RP 100, 109-10, 129-30. The officers later received consent to search from the owners of Car Service. 1RP 66, 126.³ They eventually collected the items from the trunk as evidence of "financial fraud, vehicle prowling, [and] possibly burglary." 1RP 132-36. Ainsworth later obtained a search warrant for the inside of the safe, which enabled him to identify its owner. 1RP 136-38; Ex. 23.

Lubers moved to suppress all evidence found in the trunk of his car. CP 21-31; 1RP 183-97. Pertinent to this appeal is the parties' discussion of the "open view" doctrine.

Lubers and the state agreed the doctrine applied to the officers' observations of the items in the trunk they could see without moving anything. CP 21-22; 1RP 188-90, 208-09. Lubers contended officers were nevertheless required to obtain a search warrant to seize any incriminating evidence observed in open view unless there were exigent

³ The trial court later found Capitol One mistakenly issued a work order to Car Service to repossess Lubers' car because Lubers and Capitol One had entered into a payment agreement to avoid repossession. CP 145 (Contested Facts 2.1). The court concluded that because of the inadvertent work order, Car Service had no authority to consent to the officers' search of the trunk. CP 146 (Conclusion of Law 3.2). The court therefore granted Lubers' motion to suppress items that were not in open view, such as the contents of a different bag and those found in the spare tire compartment. CP 147 (Conclusion of Law 3.6).

circumstances to justify a warrantless seizure. CP 21-22; 1RP 193-95. Lubers argued the trial court should suppress all the evidence collected from the trunk because Ainsworth obtained no warrant and there were no exigent circumstances. CP 22; 1RP 194-95.

Acknowledging a split of authorities, the prosecutor nevertheless maintained such evidence may be seized without a warrant even absent exigent circumstances. Supp. CP __ (sub. no. 98C, State's Response to Defendant's Motion to Suppress Evidence, at 7-9, filed 12/14/2010); 1RP 208-15.

The trial court denied Lubers' motion to suppress the baggie and its contents and the safe. CP 148 (Orders of the Court 4.2, 4.4). The court concluded the search of the trunk by Car Service personnel was a private search. CP 146 (Conclusion of Law 3.3) The court also concluded the officers' observation of items in the open trunk was not the result of a search because the open view doctrine applied to that which they could see from their non constitutionally protected vantage point. CP 146-47 (Conclusion of Law 3.4). The court held police officers may seize any item of contraband or weapon observed in open view without a warrant if it is immediately apparent it is evidence of a crime. 1RP 223-24.

Items that fell within this category and were found to be admissible were the clear plastic baggie and its contents and the safe with the sheet wrapped around it, which Detective Ainsworth said he associated with vehicle prowling, theft, and burglary. CP 145-46 (Contested Fact 2.2, 2.3); 1RP 224-25, 227. Lubers did not object to admission of the check found in the trunk. 1RP 230-31.

3. Trial

Mileli, Whitaker, Sadro, and Ainsworth testified substantially as they had at the pretrial hearing. RP 293-343, 354-393. Sadro also testified that Lubers called shortly after he had returned to the station from the repossession lot. RP 363-64. Lubers wanted his car back and Sadro told him where it was. Lubers asked about cash in the car and Sadro told him he did not see any. Lubers also said "his friends had things in the car that belonged to them and he wanted those back." RP 364-65.

Mileli testified he was in his employer's office when Lubers came for his car. He overheard Lubers tell a colleague the items were in his trunk because he was "part of a task force." RP 309-10. Mileli did not hear the context in which Lubers made the statement. RP 313-14.

Terri Cody, co-owner of Car Service, testified she was also inside the office when Lubers came for his car. Lubers said that "he was a

bounty hunter and this was part of his work." RP 338-39. Cody did not ask Lubers what he meant by the comment. RP 340.

The state also presented the testimony of each of the named victims of the five counts of identity theft, each of whom identified a piece of identification that had been found in the baggie. RP 420-23 (count 1 -- Katie Johnson -- instruction permit); RP 399-403 (count 2 -- Nicole Hardy -- Social Security card); RP 410-14 (count 3 -- Jacqueline Goode -- Washington ID card); RP 415-18 (count 4 -- Lisa Tinny -- instruction permit); RP 394-97 (count 5 -- Anthony Oetjens -- Social Security card).

As for the counts alleging PSP, Keith Leath (count 6) testified the safe found in Lubers' trunk belonged to him and had been taken from his apartment the day before Lubers' car was searched. RP 404-08. Justin Hammond (count 8) identified the vehicle registration found in the baggie as his. RP 427-31. Justin's cousin, Dawn Hammond (count 9) identified a set of car keys found in the baggie as hers. RP 434-39.

Lubers testified that two or three months before his car was picked up, he had entered into a written agreement to sell the vehicle to his roommate, Johnny Quivez. RP 482-84, 493-94. As part of the agreement, Quivez had keys to the car and could drive it. Lubers also had a key for the car and periodically drove it. RP 484-85.

Lubers had the car around the time of its repossession because his insurance company had assessed damage that occurred when someone bumped into the vehicle. RP 485. Two days before officers searched his car, Lubers received a check from American Family Insurance for the damage. RP 485-86, 494-96. Lubers put the check in the glove box of the car. RP 485-87. His name had been signed on the back of the check, but he did not write it. RP 487; Exs. 20-21.

Ainsworth testified he found the check in the trunk of the car during his search. RP 379-80, 385. To Ainsworth's trained eye, the signature appeared to have been traced. RP 386-87.

Seattle police officer Mark Garth Green testified he knew Lubers from an earlier contact and had communicated with him in person and over the telephone several times. Lubers called him requesting assistance in obtaining a payroll check he said was in his repossessed vehicle. RP 290-91. Garth Green spoke with Sadro, then called Lubers back and told him he could not get the check back because of a safe and other items found in the trunk of the vehicle. RP 291-92, 366-67. Lubers responded that the items "belonged to Josh or David, and that they were not his." RP 291-92.

Lubers testified that Quivez called him on the morning officers searched his car and explained the car had been stolen. Lubers was at his girlfriend's residence at the time. He called the police and learned the car had been repossessed. RP 489-90. He went to Car Service and picked up his car. RP 490.

Lubers testified he did not put a safe in the trunk of his car and did not know it was there. The same was true of the baggie. RP 490. He estimated he had not opened the trunk for about three months before the items were found there. RP 490.

Lubers' defense was that the state failed to prove beyond a reasonable doubt that he knew the stolen goods were in the trunk of his car. RP 537-38, 545. He maintained someone else was responsible for the stolen items, as shown by the fact someone forged his signature on the back of the insurance check found in the car's trunk. RP 538-39. Additionally, even if he had been sharing the car with Quivez and periodically driving it in the weeks before the repossession, and even if he had opened the trunk, he would not have seen the baggie because it was hidden inside the battery compartment behind a panel. RP 539.

C. ARGUMENTS

1. THE TRIAL COURT ERRED BY DENYING LUBERS' MOTION TO SUPPRESS THE BAGGIE AND SAFE BECAUSE OFFICERS UNLAWFULLY SEARCHED AND SEIZED THEM WITHOUT A WARRANT OR THE PRESENCE OF A JUSTIFIABLE EXCEPTION TO THE WARRANT REQUIREMENT.

- a. Summary of argument

Observing immediately apparent contraband in open view from a non-protected vantage point is not a "search" under Article I, section 7.⁴ The observation itself, however, provides probable cause to seek a search warrant, not to justify a warrantless search and/or seizure of the contraband. The trial court erred by concluding the officers were authorized to seize the baggie and safe from Lubers' car trunk without a warrant simply because the items were in open view and their character as contraband was immediately apparent. As a result, the court erred by admitting those items into evidence at trial. This Court should reverse the trial court's denial of Lubers' motion to suppress the baggie and safe and remand for dismissal with prejudice.

⁴ "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

- b. Officers may not search and seize even immediately apparent items of criminal activity located in an open car trunk without a warrant or the presence of a recognized exception to the warrant requirement.

Under the "open view" doctrine, an officer standing in a public place who observes contraband in the car has not "searched" the car for purposes of article I, section 7. State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986). The officer's right to *seize* the contraband, however, must be justified by a warrant or valid exception to the warrant requirement if the items are in a constitutionally protected place. Kennedy, 107 Wn.2d at 10; State v. Swetz, 160 Wn. App. 122, 134, 247 P.3d 802 (2011); State v. Lemus, 103 Wn. App. 94, 102, 11 P.3d 326 (2000). See State v. Ferro, 64 Wn. App. 181, 182, 824 P.2d 500 (1992) ("Absent a warrant, the observation of contraband is insufficient to justify intrusion into a constitutionally protected area for the purpose of examining more closely, or seizing, the evidence which has been observed."), review denied, 119 Wn.2d 1005 (1992).

In Lubers' case, the officers made no effort to obtain a search warrant before entering the open trunk and searching and seizing the plastic baggie and safe. The search and seizure were therefore unlawful unless justified by an exception to the warrant requirement. See State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) ("Even where probable

cause to search exists, a warrant must be obtained unless excused under one of a narrow set of exceptions to the warrant requirement."); State v. Gibson, 152 Wn. App. 945, 956, 219 P.3d 964 (2009) (to justify warrantless seizure, "the deputies must have had probable cause to believe that the contents of Gibson's vehicle were evidence of a crime *and* must have been faced with 'emergent or exigent circumstances regarding the security and acquisition of incriminating evidence' that made it impracticable to obtain a warrant.") (emphasis added). These exceptions include exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops. State v. Garvin, 166 Wn.2d 242, 249-50, 207 P.3d 1266 (2009).

Gibson offers an example of this rule in action. A police officer stopped the car Gibson was driving for a traffic infraction, obtained Gibson's driver's license, ran a warrants check, and learned Gibson had an arrest warrant. Another officer arrested Gibson, handcuffed him, and placed him in a patrol car. Gibson, 152 Wn. App. at 948-49.

The arresting officer then walked around Gibson's car, peered through the windows, and observed what he recognized were chemicals commonly used to manufacture methamphetamine. Gibson, 152 Wn. App. at 949. The officer entered Gibson's car to ensure the items were

secure because he knew moving the chemicals without proper equipment could pose health risks. While inside the vehicle, the officer observed more items used to manufacture methamphetamine. Once he determined the cargo was secure, he left the items in place until a colleague obtained a warrant to search and seize this evidence. Gibson, 152 Wn. App. at 949-50.

The appellate court framed the issue as "whether there were sufficient exigent circumstances to justify the seizure without a warrant." Gibson, 152 Wn. App. at 957. Because the officer understood the dangers of the chemicals inside the vehicle, the court found that the warrantless entry and search of the inside of the vehicle were justified by exigent circumstances, and that the officer's observations provided sufficient probable cause to support issuance of the warrant. State v. Gibson, 152 Wn. App. at 957-58.

In contrast, the officers' search of Lubers' trunk and safe, as well as the seizure of the baggie and safe, were not justified by exigent circumstances. Courts must consider the availability of a telephonic warrant in determining whether a warrant exception exists to justify a warrantless search and seizure. State v. Ringer, 100 Wn.2d 686, 702-03, 674 P.2d 1240 (1983), overruled in part on other grounds, State v. Stroud,

106 Wn.2d 144, 150, 720 P.2d 436 (1986); see CrR 2.3(c) (sworn testimony in support of request for search warrant "may be an electronically recorded telephonic statement."). The trial court did not consider this readily available tool in Lubers' case. The facts belie a contention officers had insufficient time to obtain a warrant by telephone. Lubers' car was parked in the secured repossession lot and was not in danger of being moved before a warrant could have been obtained. Nor were any of the items in the trunk dangerous to officers or the public. Nor did any other exceptions to the warrant requirement apply to excuse the warrantless seizure.

The great weight of authority therefore indicates officers needed a warrant to seize the goods and that the trial court erred by denying Lubers' motion to suppress the baggie and safe. Absent admission of those items, the state would be unable to sustain any of the charges. This Court should reverse Lubers' convictions and remand for dismissal with prejudice. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal is the proper remedy following a reversal for insufficient evidence).

c. Neither Louthan nor Barnes changes this result.

Lubers anticipates the state may rely on two Division Two cases, State v. Louthan and State v. Barnes.⁵ Brief discussion of each is therefore in order.

An officer stopped a vehicle driven by Louthan for a traffic infraction. While standing outside the car, the officer observed what he believed was drug paraphernalia – a homemade bong made from an orange juice container – in open view behind Louthan's seat. The officer directed Louthan out of the car, arrested him, and proceeded to search the vehicle. The officer ultimately seized the bong, which had black tar residue on it, three bindles containing a white powdery substance, a blade with black tar residue on it, two glass pipes, and a digital scale. Louthan, 158 Wn. App. 732, 738-39, 242 P.3d 954 (2010), petition for review pending, (Supreme Court No. 85608-7).

Louthan challenged the search, but only on the ground the arrest was unlawful. Louthan, 158 Wn. App. at 745. The majority held Louthan thus waived his an objection to the scope of the officer's vehicle search incident to his lawful arrest. Id.

⁵ Judge Quinn-Brintnall authored each opinion, and was joined in each by Judge Hunt. Each opinion generated a dissent.

The majority nevertheless went on to hold:

While standing outside Louthan's vehicle after having lawfully stopped Louthan for driving on a closed road, Officer Hayden saw an orange juice container bong sitting on the back seat of Louthan's car. In accordance with the open view doctrine, Hayden *lawfully seized* the drug-ingesting device he saw in open view and the trial court did not err by declining to exclude the evidence at trial.

158 Wn. App. at 746 (emphasis added).

This portion of the majority's holding is dicta, which is language that is not necessary to the decision in a given case. In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994). There was no point in addressing the merits of Louthan's arguments once the majority concluded he had waived them under RAP 2.5. Dicta has no precedential or persuasive value. State v. Watkins, 61 Wn. App. 552, 559, 811 P.2d 953 (1991). This Court should therefore ignore the majority's analysis.

In any event, the majority's conclusion does not follow from its reasoning. First, the majority held evidence observed in open view is not the product of a "search" because the observer can see that which is knowingly exposed to the public from a nonintrusive vantage point. Louthan, 158 Wn. App. at 746. Lubers concedes this is the law in Washington. Second, the observed item is not subject to any reasonable expectation of privacy and the observation is beyond constitutional

protections. Id. Third, a person has a diminished expectation of privacy in visible contents of a lawfully stopped vehicle. Id. (citing Kennedy, 107 Wn.2d at 10).

Accordingly, the officer lawfully seized the bong he saw in open view: "[B]ecause the bong was in open view there was no illegal search and Louthan's privacy rights were not violated by [the officer's] seizing of the bong." Louthan, 158 Wn. App. at 746.

The majority cited State v. Perez as supporting authority for this leap in logic. Perez, however, is inapposite. There, two officers stopped a car Perez was driving because of an equipment violation. Upon contact, one officer suspected Perez might be intoxicated and had him perform field sobriety tests on a sidewalk about 20 feet from the car. Perez, 41 Wn. App. 481, 482, 704 P.2d 625 (1985). The second officer stood near the open driver's door, looked down, and observed some wood and what appeared to be the barrel of a gun protruding from under a jacket on the floorboard. The officer pulled the jacket, discovered a shotgun underneath, and removed its ammunition. Perez, 41 Wn. App. at 482.

The court first held that, under the open view doctrine, the officer's observation of the suspicious item under the jacket was not a "search." 41 Wn. App. at 484-85. The officer's removal of the jacket and seizure of the

rifle, however, were found to be justified by the rule that "officers conducting an investigatory detention may search for and at least temporarily seize weapons if they have reason to believe that they are dealing with an armed and dangerous detainee." 41 Wn App. at 485. In other words, the court upheld the warrantless seizure under the "officer safety" rationale as articulated in Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) – a recognized exception to the warrant requirement.

Plainly, Perez does not hold that contraband observed in open view may be seized without a warrant or an applicable recognized exception to the warrant requirement. The Louthan majority's reliance on Perez for that proposition is therefore misplaced. This Court should reject any argument based on that case.

At first blush, Barnes appears to rely on the same faulty reasoning. Barnes, however, relies on a recognized exception to the warrant requirement – the search incident to arrest – to justify the warrantless seizure of immediately apparent contraband observed in open view. Because neither this nor any other warrant exception applied in Louthan's case, Barnes is not pertinent.

An officer arrested Barnes for felony harassment based on a bank employee's complaint that an angry Barnes had left the bank after threatening to get a gun and shoot everyone. Barnes, 158 Wn. App. 602, 605-06, 243 P.3d 165 (2010). After securing Barnes in the back seat of her patrol vehicle, the officer approached Barnes' car, peered through a window, and saw a gun box in open view on the front passenger seat. The officer opened the unlocked door, retrieved and opened the gun box, and observed a gun inside the box as well as bullets and a mask in the car's passenger compartment. Barnes, 158 Wn. App. at 606.

Barnes argued the search of his car was an unlawful search incident to his arrest under State v. Patton⁶ because it was unreasonable for the officers to believe his car contained evidence of felony harassment. Barnes, 158 Wn. App. at 609-11. The majority rejected the claim, finding the gun case observed in open view was relevant to the "true threat"

⁶ The Patton Court held a vehicle search incident to arrest is not justified

unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.

167 Wn.2d 379, 384, 219 P.3d 651 (2009).

element of felony harassment, *i.e.*, evidence of the crime of arrest. Barnes, 158 Wn. App. at 610-11.

The majority next addressed the trial court's suppression of the evidence on the ground the state failed to show exigent circumstances necessitating the officer's warrantless search and seizure. Barnes, 158 Wn. App. at 612-13. The majority found the trial court erred:

Once seen in open view, the gun case was immediately recognized as relevant evidence with respect to felony harassment and the "true threat" requirement to RCW 9A.46.020(1)(a)(i). Accordingly, the police officers *lawfully seized and preserved it* and the trial court erred in ordering suppression of relevant evidence that Barnes had in open view at the time of his arrest for felony harassment.

Barnes, 158 Wn. App. at 613-14 (emphasis added).

In effect, the majority held an officer may reach into an automobile and seize items without a warrant or an applicable recognized exception to the warrant requirement so long as the items are in open view and it is immediately apparent they are evidence of the crime of arrest. The "crime of arrest" requirement comes from recent cases that discuss warrantless vehicle searches incident to arrest.⁷ That exception does not apply in Lubers' case.

⁷ Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 1721, 173 L. Ed. 2d 485 (2009) ("Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of

And even if it did, Barnes is wrong. The majority's holding ignores the requirement set forth in Patton and Valdez that a warrantless vehicle search incident to arrest is unjustified where the arrestee is in no position to destroy or conceal evidence of the crime of arrest. For these reasons, this Court should reject any argument based on Barnes.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT LUBERS POSSESSED THE SAFE AND BAGGIE IN HIS TRUNK.

The mens rea of the crimes of identity theft and possession of stolen property is knowledge. RCW 9.35.020(1) provides that "[n]o person may *knowingly* obtain, *possess*, use, or transfer a means of identification . . . of another person, living or dead, with the intent to commit, or to aid or abet, any crime." The elements of possession of stolen property are: (1) *knowing possession*, either actual or constructive, of stolen property, and (2) actual or constructive knowledge the property is stolen. RCW 9A.56.140(1);⁸ State v. Jennings, 35 Wn. App. 216, 219,

the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest."); State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009) ("A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest."); Patton, 167 Wn. 2d at 384.

⁸ "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been

666 P.2d 381 (1983). The state must prove each of these elements beyond a reasonable doubt. State v. Lively, 130 Wn.2d 1, 11, 921 P.2d 1035 (1996).

Lubers contends, as he did at trial, that the state failed to prove beyond a reasonable doubt that he knew the baggie with the identification cards, vehicle registration, and keys, as well as the safe, were in his trunk. This Court therefore views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007); State v. George, 150 Wn. App. 110, 120, 206 P.3d 697 (2009).

“Actual possession” means that the goods were in the defendant's physical custody. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Constructive possession, in contrast, means the accused has dominion or control over the property itself or the premises where the property is discovered. State v. Turner, 103 Wn. App. 515, 520-21, 13 P.3d 234 (2000).

stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.”

A vehicle is considered a premises for purposes of determining constructive possession. Turner, 103 Wn. App. at 521, 13 P.3d 234 (2000). But no single factor is dispositive in determining dominion and control. Id. Dominion and control over the premises is but one factor in determining whether the accused had constructive possession of the contraband found therein. State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).⁹ "Dominion and control" means the defendant may immediately convert the contraband to his actual possession. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

Lubers was the registered owner of the vehicle. But he was not the driver or sole occupant in the time immediately preceding the officers' discovery of the stolen property. Cf., State v. Bowen, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010) ("evidence established Bowen's dominion and control over the contraband and firearm because he was the owner, driver,

⁹ Instruction 17 stated in part,

Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the [property,] whether the defendant had the capacity to exclude others from possession of the [property,] and whether the defendant had dominion and control over the premises where the [property] was located. No single one of these factors necessarily controls your decision.

CP 98.

and sole occupant of the black truck. Deputy Drogmund discovered the firearm in nothing more than a nylon bag beside the driver's seat."); State v. Huff, 64 Wn. App. 641, 654, 826 P.2d 698 (1992) (following evidence sufficient to establish beyond reasonable doubt Huff had dominion and control over the drugs: "Huff was driving a car in which drugs were found; the inside of the car smelled like methamphetamine; Huff smelled like methamphetamine; Huff did not stop when the officer was behind him with emergency lights flashing; while Huff continued to drive, his passenger, seated next to him, looked back and made furtive movements; and the drugs were found hidden under laundry in the back seat."), review denied, 119 Wn.2d 1007 (1992).

Unlike in Huff, the contraband in Lubers' car did not announce its presence by its aroma. See also State v. Reichert, 158 Wn. App. 374, 391, 242 P.3d 44 (2010) (jurors could reasonably infer defendant had constructive possession of marijuana in residence in part because of detectives' representation that they smelled a "very strong and distinct odor of marijuana" emanating from a safe in defendant's room), review denied, 171 Wn.2d 1006 (2011).

Lubers obviously did not have the capacity to exclude others from taking the property; it took Mileli only minutes to assume possession of

the vehicle and its contents. Lubers also testified his roommate, Quivez, had a key and permission to use the car, and did drive the car during the time leading up to the repossession. That either Quivez or someone other than Lubers had been in the car is supported by the fact that someone traced Lubers' signature on the back of the insurance company check that Lubers had stored in the glove box.

The state offered no fingerprint evidence from either the baggie, the safe, other items in the car, or the inside or outside of the trunk gate. Nor did the state offer gloves or other evidence that may have helped explain the absence of fingerprint evidence. Detective Ainsworth testified he recalled nothing of evidentiary value in the car's interior. RP 384.

Lubers calls this Court's attention to State v. Echeverria, 85 Wn. App. 777, 934 P.2d 1214 (1997). In that case an officer stopped a car the accused, a 15-year old juvenile, was driving. The officer looked into the car and immediately saw part of a gun barrel protruding from under the driver's seat. As the officer reached down and removed the gun, her hand hit another weapon, a "throwing star," which was next to the gun but not visible. Echeverria, 85 Wn. App. at 780. The gun and throwing star were admitted at trial, after which Echeverria was found guilty of possessing both weapons. 85 Wn. App. at 782.

The Court of Appeals affirmed the firearm conviction. It found the evidence sufficient to establish constructive possession because the gun was in plain sight at Echeverria's feet, which gave rise to a reasonable inference that he knew it was there. A rational trier of fact could thus find Echeverria possessed or controlled the gun that was within his reach. 85 Wn. App. at 783. But the court reversed the throwing star conviction, holding that because the trial court did not find the star was visible, and because "[c]lose proximity is not enough," the evidence did not establish constructive possession. Echeverria, 85 Wn. App. at 784.

The state in Lubers' case presented less evidence of constructive possession than that presented with respect to the throwing star in Echeverria. The stolen property was in the trunk and therefore neither visible to Lubers nor within his reach. Further, even if Lubers looked in the trunk, he would not have been aware of the baggie. For all these reasons, the state did not meet its burden of proving Lubers knew the stolen property was in his trunk beyond a reasonable doubt.

3. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT LUBERS INTENDED TO COMMIT, OR TO AID OR ABET, ANY CRIME, A REQUIRED ELEMENT OF IDENTITY THEFT.

The state bore the burden of proving Lubers "knowingly obtained or possessed" identification documents "with the intent to commit, or to

aid or abet, any crime[.]” CP 95-97 (instructions 9-13, "to-convict" instructions for each identity theft count); State v. Milam, 155 Wn. App. 365, 371, 228 P.3d 788, review denied, 169 Wn.2d 1023 (2010). While this may be easy in cases where the accused "used" identity documents, the evidence here did not show Lubers used the cards or otherwise intended to use them or help someone else use them to commit forgery, theft, or any other crime. Cf., State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003) (defendant used someone else's identification and forged person's name to purchase real estate).

Having said that, Lubers admits that actually using identification documents is not the sole means of committing identity theft. An individual also commits identity theft when he has possessed or obtained such documents with the intent to use. State v. Leyda, 157 Wn.2d 335, 346, 138 P.3d 610 (2006). Specific criminal intent may be inferred from an accused's conduct where it follows as a matter of logical probability. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

Intent to use the identity cards does not follow from Lubers' conduct here. Although each victim told jurors his or her identification cards were stolen during car prowls, none said Lubers or anyone else tried to use the documents to, for example, apply for a bank account or loan,

withdraw funds, avoid getting a traffic ticket, file a fraudulent tax return, or create false documents. Nor did Lubers make statements suggesting such intent. Furthermore, officers found no evidence in the car or at Lubers' residence indicating Lubers was in the business of creating false identification materials or selling identification cards or the information on them.

The prosecutor revealed the weakness of the state's proof of the intent element during closing argument:

If you look at the sheer number of items in that bag, and the fact that it is wedged way up by the battery, I suppose you could conceivably say, "Well, maybe he didn't know it was there; maybe this other guy did have the car"; or the other side of that could be he absolutely knew they were there and he was hiding them because he didn't want anyone to find them, because he knew that it was [unintelligible] and that he also intended – here is the next element, the intent to commit, aid or commit any crime – that he intended to do something criminal with them. Eight photo IDs, 10 Social Security cards. A lot to have in a Ziploc bag, shoved up behind a hidden panel where your battery is in your trunk. . . . Again the element specific to that being the intent that the State has to prove that there was an intent to commit, aid or abet a crime. . . . Certainly you would have to act intentionally to put that bag way up in the side panel. There is no other way for that bag full of IDs to have gotten there.

RP 528-29.

The prosecutor was understandably struggling given the burden of proving intent and scarcity of supporting evidence. The prosecutor was left to argue jurors could infer intent solely from the possession of a large

number of identification cards. But had the Legislature wanted to criminalize possession of stolen identity cards, it could have drafted the statute to say that. The Legislature added the intent element for a reason that is not important here. What is important is the state failed to prove the element beyond a reasonable doubt. This Court should reverse the convictions for counts 1-5 and remand for dismissal with prejudice.

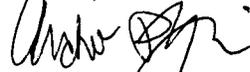
D. CONCLUSION

The trial court erred by denying Lubers' motion to suppress the baggie and safe found in the trunk of his car. Without the evidence found in the baggie, and the safe, the state cannot present sufficient evidence to sustain any of the charges. This Court should therefore reverse and remand for dismissal with prejudice. Alternatively, the state failed to prove Lubers knew any of the stolen items were in the trunk of his car. For this reason as well, this Court should reverse each conviction and remand for dismissal with prejudice. Finally, if this Court concludes the state proved knowledge beyond a reasonable doubt, it should still reverse the identity theft convictions (counts 1-5) because the state failed to prove Lubers intended to commit, or aid or abet, commission of any crime.

DATED this 5 day of July, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

APPENDIX

FILED
KING COUNTY, WASHINGTON

JAN 6 2010

SUPERIOR COURT CLERK
JON SCHROEDER
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

SEBASTIAN LARRY LUBERS,

Defendant.

NO. 10-1-00178-2 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
REGARDING DEFENDANT'S
MOTION TO SUPPRESS
PURSUANT TO CrR 3.6

THIS MATTER, having come before the court on the defendant's motion to suppress evidence pursuant to CrR 3.6, the defendant being represented by Kevin P. Donnelly and the State being represented by Jennifer Atchison, the court having heard the testimony of Detective Colin Ainsworth, Detective Dennis Montgomery and Deputy John Sadro, all of the Snohomish County Sheriff's Office, the court also having heard the testimony of Eric Mileli and Danielle Whitaker, the court having reviewed and carefully considered pretrial exhibits 1-26, the court having reviewed the briefing in this case including the motion to suppress filed on behalf of the defendant, the response by the State and reply filed on behalf of the defendant as well as hearing

1 the argument of counsel and considering additional authority cited to by counsel and
2 additional authority located by the court, the court makes the following findings of fact
3 and conclusions of law:

4
5 FINDINGS OF FACT

6 1. Uncontested Facts

7 1.1 On September 3, 2009, a black 2003 BMW license number 628XUP
8 was repossessed by Eric Mileli, an employee of a company based in Lynnwood called
9 "Car Service." The registered owner of the vehicle was the defendant Sebastian
10 Lubers. The vehicle was repossessed in the Capital Hill Neighborhood in Seattle near
11 an address that had been provided by the bank as being that of the defendant
12 Sebastian Lubers. The time of the repossession was approximately 10:45pm. The
13 vehicle was transported to Lynnwood to the "Car Service" lot where Mr. Mileli left the
14 vehicle.
15

16 1.2 The following morning at approximately 7:00am on September 4, 2009,
17 Mr. Mileli attempted to open the vehicle so that it could be processed and so that a
18 search conducted of the vehicle for possible weapons and an inventory of the vehicle
19 contents done pursuant to "Car Service" policy. An inventory and weapons search is
20 conducted in all vehicles repossessed by Car Service. Car Service, at the request of
21 the lender, will occasionally not conduct an inventory search in special and unique
22 circumstances not present in this case. In beginning this procedure, Mr. Mileli *set off the*
23 *car alarm so he* alarm attempted to access the battery which was located in the right side of the trunk. The *BMW*
24 battery was located in a hidden compartment which is accessed by pulling down a
25 panel. As Mr. Mileli pulled down a panel to access the battery, he noticed a plastic
26

1 bag containing Washington State drivers' licenses of more than one person. Mr. Mileli
 2 observed that these licenses were not of the same person and some were female.
 3 He also observed other forms of identification including social security cards and he
 4 observed keys in the bag. He placed the bag, containing the items in ^{open view in} the trunk near
 5 the compartment and did not touch the bag again.

7 1.3 Mr. Mileli was concerned about the contents of the bag so he contacted
 8 the assistant lot manager, Danielle Whitaker, and co-owner Terri Cody to make them
 9 aware of the situation. It does appear that in the course of attempting to figure out
 10 what was in the bag, that Danielle Whitaker touched the bag and opened it. The only
 11 Car Service employees who touched the bag were Danielle Whitaker and Eric Mileli.
 12 No other person associated with Car Service touched the bag. Terri Cody, a co-
 13 owner of Car Service made the decision to contact the Snohomish County Sheriff's
 14 Department.

16 1.4 The bag is a clear plastic zip-lock type bag. Its contents are observable
 17 from outside the bag. ^{Both Mr. Mileli and Ms. Whitaker believed the}
 18 contents of the bag were suspicious.

19 1.5 Deputy John Sadro responded to Car Service. When Deputy Sadro
 20 arrived, the front passenger door was open and the trunk was open. The contents of
 21 the truck ^{including the contents of the clear plastic bag} were observable to anyone looking into the trunk. Deputy Sadro observed
 22 the contents of the plastic bag. He also observed a safe which was wrapped in a bed-
 23 sheet. He also observed a GPS unit, a radar detector and part of a check on top of a
 24 paper bag. He further observed a black and yellow canvas bag which was partially
 25 open. Deputy Sadro did not touch anything in the trunk.
 26

1 1.6 Deputy Sadro was advised by both Ms. Whitaker and Mr. Mileli as to the
2 circumstances of the discovery of the bag containing the identifications as set forth in
3 findings of fact 1.1 and 1.2.

4 1.7 Detective Colin Ainsworth and Detective Dennis Montgomery arrived
5 later in the morning. Detective Ainsworth observed what was in the trunk as set forth
6 in finding of fact 1.5. Detective Ainsworth was briefed by Deputy Sadro of the
7 background as set forth in findings of fact 1.1 and 1.2.

8 1.8 Deputy Sadro began taking pictures of the outside of vehicle after
9 Detectives Ainsworth and Montgomery arrived as reflected in exhibits 1 through 5 and
10 19-22. Deputy Sadro also took pictures of the trunk with the trunk lid open prior to
11 any of the items being moved by any law enforcement personnel. Deputy Sadro took
12 pictures of items in the trunk both before and after they were removed from the trunk.

13 1.9 The following items were observed in the trunk by anyone standing
14 outside the trunk and looking in prior to any item in the truck being moved by any law
15 enforcement personnel: safe; bed-sheet, canvas bag, one (1) GPS unit, radar
16 detection unit, portions of a check, the plastic bag containing identification cards and
17 keys.

18 1.10 The canvas bag referred to in finding 1.9 contained a number of tools
19 and other items as reflected in exhibit 16. The canvas bag was slightly open as
20 reflected in exhibits 7 and 8 but only a limited view was possible. The vast majority of
21 items inside the bag were not able to be viewed prior to the bag being moved and
22 searched.

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1.11 Detective Ainsworth made the decision to search the trunk and search the items in the trunk. He was given either implicit or explicit permission to search the trunk by Terri Cody and/or Danielle Whitaker.

1.12 In the clear plastic bag were located a number of identifications from a number of different individuals, several sets of key and vehicle ownership documents. The number of identifications, the owners of the identifications and the number of keys were only known after Detective Ainsworth opened the bag to determine the contents.

1.13 In addition to the items in the canvas bag, in the trunk, not in open view to anyone outside the trunk were a number of items including a second GPS unit. In the course of the search, inside the vehicle, police located a CD case with CDs from an unknown location in the trunk but not open in clear view. Detective Ainsworth also seized two hats from the area of the trunk. There were in the trunk a number of tools scattered throughout. Flashlights were located but it is not clear whether those flashlights were in the bag or in the trunk. These other items in the trunk were not in view of anyone looking into the trunk from the outside.

1.14 Another item located was a rag filled with sparkplugs. It is not clear from ^{testimony} the record where that rag was located although it did not appear to be at a position where someone looking into the trunk from outside could have seen that rag with sparkplugs.

1.15 Detective Ainsworth also located in ^{the} spare tire compartment of the trunk ~~a hockey designed mask and~~ a heavy duty type of bolt cutter used for padlocks. This

BNA

BNA

1 compartment was hidden and from exhibits 27 and 28 it appears that carpeting had
2 to be removed to access that area. It was not in clear view.

3 1.15 Defendant Sebastian Lubers was the registered owner with the right of
4 possession, Capital One Auto Finance, Inc. was the legal owner with a security
5 interest.
6

7 1.16 Car Service had no relationship with law enforcement before or during
8 this incident such that its employees were acting on the behest of law enforcement,
9 more specifically the Snohomish County Sheriff's Office in conducting the initial
10 search of the vehicle.

11 1.17 The passenger compartment of the BMW was not searched by police.
12 An inventory search of the passenger compartment was conducted by Danielle
13 Whitaker of Car Service with Detective Ainsworth and Montgomery observing.
14

15 1.18 A pawn slip purporting to belong to the defendant was found in the
16 passenger compartment. Pictures were taken of the pawn slip but it was not seized
17 as evidence by police.

18 1.19 Based upon a search of the trunk, Detective Ainsworth seized the safe
19 and GPS units and obtained a Search Warrant from Judge Goodwin of Snohomish
20 County District Court to search the contents of the safe and to obtain ownership and
21 location information from the GPS units. A copy of the search warrant, the affidavit for
22 search warrant and the return was marked and admitted as pretrial exhibit 23. As a
23 result of the execution of the search warrant, Detective Ainsworth searched the safe
24 and found a number of items. Detective Ainsworth also searched the GPS units for
25 information as to the owner of the GPS units.
26

1 1.20 No search warrant was obtained before the search of the items in the
2 trunk by Detective Ainsworth. The vehicle was in a location where it could be easily
3 secured and in fact was secured by Deputy Sadro prior to the arrival of Detectives
4 Ainsworth and Montgomery.

5 1.21 The vehicle was returned to defendant Sebastian Lubers on September
6 4, 2009 in the afternoon. Mr. Lubers signed a release form to obtain the vehicle. He
7 was not required to pay any costs of repossession to obtain his vehicle.
8

9 1.22 Before the vehicle was released to defendant Lubers, but after Detective
10 Ainsworth had completed his search of the vehicle, Danielle Whitaker conducted an
11 inventory search of the vehicle. The record is conflicting on whether this was
12 conducted as one or more of the law enforcement officers present was observing.
13 However, pawn slips were brought to the attention of the Snohomish County
14 Detectives and deputy and pictures were taken of the pawn slip. No other items
15 found in that inventory search were brought to the attention of law enforcement or
16 brought into evidence in this case.
17

18 2. Contested Facts

19 2.1 The court finds that the defendant Sebastian Lubers had entered into an
20 agreement with Capital One Auto Finance, Inc. to make a payment the following day
21 so that Capital One Auto Finance Inc. would not repossess his vehicle. The court
22 finds that Capital One inadvertently issued a work order through its intermediary to
23 Car Service to repossess the vehicle despite this agreement.
24

25 2.2 The clear plastic bag containing identifications, social security cards,
26 other forms of identification and keys was in the trunk in a position to be seen from

1 outside the trunk. Without moving the bag, Detective Ainsworth could tell that there
2 were multiple forms of identification and keys which he associated, in his training and
3 experience with criminal behavior related to vehicle prowl.

4 2.3 When Detective Ainsworth observed the safe with the sheet wrapped
5 around it, he was aware, through his training and experience that an individual
6 stealing the safe might use the sheet to move the safe.

8 3. Conclusions of Law

9 3.1 Based upon the court's finding of fact that Mr. Lubers had an agreement
10 with Capital One Auto Finance Inc. that Capital One would not repossess the vehicle,
11 he had a reasonable expectation of privacy in the vehicle and did not expect the
12 vehicle to be searched.

13 3.2 Based upon the court's finding of fact that Mr. Lubers had an agreement
14 with Capital One Auto Finance, Inc. that Capital One would not repossess the vehicle
15 and based upon the finding that the work order for repossession was inadvertently
16 issued, Car Service did not have authority to give consent to law enforcement to
17 search the vehicle.

18 3.3 The search conducted by employees of Car Service was a private
19 search and covered by the private search doctrine under *State v. Eisenfeldt*, 163
20 Wn.2d 628, 185 P.3d 580 (2008).

21 3.4 The court concludes that when Deputy Sadro and Detectives Ainsworth
22 and Montgomery peered into the trunk that there was no search under either the
23 Fourth Amendment to the United States Constitution and Article 1, Section 7 of the
24 Washington State Constitution because the trunk door was open and items were
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1 visible to the Deputy Sadro and Detectives Ainsworth and Sadro from a non-
2 constitutionally protected area. Thus no search occurred under the Open View
3 Doctrine.

4 3.5 Detective Ainsworth had authority to inspect the clear plastic bag under
5 the Open View Doctrine without first obtaining a search warrant because it was
6 immediately apparent that the clear plastic bag contained the fruits of criminal
7 conduct.

8 3.6 The search of areas of the trunk which were not in open view, including
9 bags, the spare wheel compartment and items covered by other items without a
10 warrant violated Article 1, Section 7 of the Washington State constitution and the
11 Fourth Amendment of the United States Constitution because the contents were not
12 in open view. No search warrant was requested and no search warrant was issued to
13 search the trunk.

14 3.6 The search and/or seizure of items in plain view which were not
15 immediately apparent to be contraband or fruits of criminal conduct likewise violated
16 Article 1, Section 7 of the Washington State constitution and the Fourth Amendment
17 of the United States Constitution.

18 3.7 The court concludes that the identity information sought in the search
19 warrant of the GPS units should be suppressed under the "fruit of the poisonous tree
20 doctrine" because of this court's conclusion 3.6.

21 3.7 Excising out those parts of the affidavit for search warrant which the
22 court finds should be suppressed due to the search of the trunk without a warrant, the
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1 court concludes that there is sufficient probable cause to support a search of the safe
2 which was located in the trunk.

3 3.8 The court is not ruling on the admissibility of the pawn slips found in the
4 passenger compartment of the vehicle which were admitted into evidence in the trial.

5 ~~It does not appear that~~ the defense did not argue for suppression of this item and in
6 fact used the pictures of the pawn slips in the trial to argue for the defense position. BMA

7
8 4. Orders of the Court

9 4.1 Based upon this court's findings of fact and conclusions of law, the court
10 grants the defense motion to suppress as to the following items: those items in the
11 trunk which were not in open view including the contents of the bag, and the contents
12 of the spare tire compartment.

13 4.2 Based upon this court's findings of fact and conclusions of law, the court
14 denies the defense motion to suppress as to the contents of the safe, the contents of
15 the clear plastic bag and the existence of those items in the trunk which were in open
16 view *and were immediately apparent to be evidence of a crime.* BMA

17 4.3 Based upon this court's findings of fact and conclusions of law, the court
18 grants the defense motion to suppress as to identity information in the GPS unit which
19 was recovered pursuant to the search warrant issued by Judge Goodwin.

20 4.4 Based upon this court's findings of fact and conclusions of law, the court
21 denies the defense motion to suppress as to the contents of the safe found in the
22 trunk.

23 4.5 In addition to the above written findings of fact and conclusions of law,
24 the court incorporates by reference its oral findings and conclusions.
25
26

DATED this 6 day of ^{January, 2011.} ~~December~~, 2010.

Beth M. Andrus
SUPERIOR COURT JUDGE

Presented by:

Beth M. Andrus

Kevin P. Donnelly
Kevin P. Donnelly, #18881
Attorney for Defendant

Receipt acknowledged, notice of
presentment waived:

Jennifer Atchison
Jennifer Atchison, WSBA 33263
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 66516-2-I
)	
SEBASTIAN LUBERS,)	
)	
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 6TH DAY OF JULY, 2011, 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] SEBASTIAN LUBERS
NO. 41047-086
FEDERAL DETENTION CENTER
P.O. BOX 13900
SEATTLE, WA 98198

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF JULY, 2011.

x *Patrick Mayovsky*