

66866-8

66866-8

No. 66866-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT ALLEN MEEDS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

A police officer conducted a "weapons frisk" of Scott Meeds during a traffic stop of the car in which he was riding as a passenger. The officer determined Mr. Meeds had a pipe in his pocket that could be used to smoke methamphetamine or marijuana. The officer arrested Mr. Meeds for possession of drug paraphernalia and searched him incident to arrest, finding methamphetamine.

But bare possession of drug paraphernalia is not a crime. The warrantless arrest of a person for possessing drug paraphernalia is justified only if the officer has probable cause to believe the person used the paraphernalia in a drug-related activity in the officer's presence. Here, the officer did not have probable cause to believe Mr. Meeds used the pipe in a drug-related activity in his presence. Therefore, the arrest of Mr. Meeds, and the search incident to arrest, were unlawful. The methamphetamine seized in the search incident to arrest must be suppressed.

B. ASSIGNMENTS OF ERROR

1. Mr. Meeds's arrest was not supported by individualized probable cause, in violation of the Fourth Amendment and article I, section 7 of the Washington Constitution.

2. The search incident to arrest was unlawful, in violation of the Fourth Amendment and article I, section 7 of the Washington Constitution.

3. The trial court erred in denying the motion to suppress the methamphetamine seized from Mr. Meeds in the search incident to arrest.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A search incident to arrest is unlawful in violation of the state and federal constitutions if the underlying arrest is not supported by probable cause. Bare possession of drug paraphernalia is not a crime. To arrest a person without a warrant for possessing drug paraphernalia, the officer must have probable cause to believe the person used the paraphernalia in the officer's presence to engage in a drug-related activity. Was the arrest of Mr. Meeds for possession of drug paraphernalia—and the search incident to arrest—unlawful where the officer did not have probable cause to believe Mr. Meeds used the paraphernalia in the officer's presence to engage in a drug-related activity?

D. STATEMENT OF THE CASE

On June 29, 2009, at around 8:40 p.m., Snohomish County Sheriff Deputy James Hager stopped a car on a rural road in East

Snohomish County for driving with expired license plate tabs.

4/01/10RP 3-4. Kimberly Mathison was the driver of the car and Mr. Meeds was in the passenger seat. 4/01/10RP 4, 7. As the deputy approached the car, he could smell the odor of burnt methamphetamine emanating from the car. 4/01/10RP 4. But he could not tell specifically whether the driver or the passenger was smoking methamphetamine. 4/01/10RP 17.

Deputy Hager decided to arrest the driver for failing to register her car properly. 4/01/10RP 8-9. He called for a K-9 officer to search the car and also for backup assistance to help him manage the scene due to the presence of Mr. Meeds. 4/01/10RP 4, 6-7. Deputy Hager recognized Mr. Meeds from several past contacts he had with him. 4/01/10RP 7. On past occasions, Mr. Meeds was "aggressive" and carried knives and rocks. 4/01/10RP 7, 15-16. During Deputy Hager's last contact with Mr. Meeds, they had a brief physical altercation. 4/01/10RP 7. But this time, Mr. Meeds made no threats and was not aggressive. 4/01/10RP 13-15. Deputy Hager's suspicion that Mr. Meeds might be armed was based only on his past contacts with him. 4/01/10RP 16.

Deputy Daniel Johnson soon arrived to provide backup assistance. 4/01/10RP 8, 21. Deputy Hager told Deputy Johnson

about his past experience with Mr. Meeds. 4/01/10RP 8. Deputy Johnson proceeded to contact Mr. Meeds while Deputy Hager arrested the driver. 4/01/10RP 4, 8-9.

As Deputy Hager arrested the driver, she told him she had a methamphetamine pipe on her person and some methamphetamine in her brassiere. 4/01/10RP 4. He placed her in handcuffs. 4/01/10RP 9.

Meanwhile, Deputy Johnson approached Mr. Meeds and noticed that he was fidgeting, had one hand in his pocket, and held a cellular telephone in his other hand. 4/01/10RP 23. Deputy Johnson had Mr. Meeds step out of the car and then frisked him. 4/01/10RP 23, 29. Deputy Johnson frisked Mr. Meeds because Deputy Hager had told him Mr. Meeds was known to carry weapons, and because Mr. Meeds was reaching into his pocket. 4/01/10RP 29.

During the frisk, Deputy Johnson felt "a hard round object in the defendant's pocket and a second [sic] hard object he recognized by touch as a pipe." CP 84 (finding of fact 17). Deputy Johnson asked Mr. Meeds what the objects were and Mr. Meeds said the hard object was a rock and the other object was a "dope" pipe. CP 85 (finding of fact 18). At that point, the officer arrested Mr. Meeds

for possession of drug paraphernalia. 4/01/10RP 25. He then searched him incident to arrest and found a rock about the size of a tennis ball and a "chapstick" container with a substance inside that tested positive for methamphetamine. 4/01/10RP 25-26.

Mr. Meeds was charged with one count of possession of methamphetamine, RCW 69.50.4013. CP 81.

A CrR 3.6 hearing was held to determine whether the methamphetamine should be suppressed. At the end of the hearing, the court denied the motion to suppress.¹ CP 85. The court concluded the weapons frisk of Mr. Meeds was justified by officer safety concerns:

Officers may ask passengers to step out of car [sic] to pat them down under certain circumstances. The officers must have specific articulable facts giving rise to a reasonable belief there is an officer safety concern and warranting a pat down search of the defendant for weapons.

In this case, the defendant was known to the deputies as a person who has a habit of being aggressive toward law enforcement and to carrying items that can be used as weapons, such as knives and rocks.

The removal of the defendant from the vehicle and the subsequent pat down search for weapons were valid under the U.S. Constitution 4th Amendment and Article 1 Section 7 of the Washington State Constitution. The defendant's motion to suppress is denied.

¹ A copy of the court's written findings and conclusions is attached as an appendix.

CP 85.

The parties agreed to a bench trial on stipulated facts.

10/25/10RP 3. The trial court found Mr. Meeds guilty of possessing methamphetamine as charged. 10/25/10RP 9.

E. ARGUMENT

THE SEARCH INCIDENT TO ARREST WAS UNLAWFUL IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS, WHERE THE ARRESTING OFFICER DID NOT HAVE INDIVIDUALIZED PROBABLE CAUSE TO BELIEVE MR. MEEDS HAD COMMITTED A CRIME

Deputy Johnson seized the methamphetamine from Mr. Meeds during a search incident to arrest. 4/01/10RP 25-26. But the arrest—and the search incident to arrest—were unlawful because Deputy Johnson did not have individualized probable cause to believe Mr. Meeds had committed a crime.

1. A search incident to arrest is unconstitutional unless the underlying arrest is based upon probable cause. 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); State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); U.S. Const. amend. IV; Const. art. I, § 7.

A lawful custodial arrest creates a situation justifying the contemporaneous warrantless search of the arrestee and of the immediately surrounding area. Chimel, 395 U.S. at 763. But an arrest is unlawful, and hence unreasonable for purposes of the Fourth Amendment, if it is not based upon probable cause. Wong Sun v. United States, 371 U.S. 471, 479, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Under article I, section 7, police searches conducted without a warrant are per se unreasonable subject only to a few specific established and well-delineated exceptions, which are limited and narrowly drawn. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). One such exception is a search incident to a lawful arrest. Id. at 496-97. "It is the fact of arrest itself that provides the 'authority of law' to search, therefore making the search permissible under article 1, section 7." Id.

"A lawful arrest is a prerequisite to a lawful search" incident to arrest. State v. Grande, 164 Wn.2d 135, 139-40, 187 P.3d 248 (2008) (citing State v. Johnson, 71 Wn.2d 239, 242, 427 P.2d 705 (1967)). "[W]hile the search incident to arrest exception functions to secure officer safety and preserve evidence of the crime for which the suspect is arrested, in the absence of a lawful custodial

arrest a full blown search, regardless of the exigencies, may not validly be made." State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003). An arrest is unlawful, and hence a search incident to arrest is unlawful, if the arrest is not based upon probable cause. Grande, 164 Wn.2d at 142-43.

Probable cause to arrest exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing an offense. Parker, 79 Wn.2d at 328-29; Wong Sun, 371 U.S. at 479. The question whether probable cause exists is an objective inquiry. State v. Rodriguez-Torres, 77 Wn. App. 687, 693, 893 P.2d 650 (1995).

Probable cause for arrest is measured by the particular facts known to the arresting officer at the time of the arrest. Information or evidence obtained after the arrest cannot be considered in evaluating the existence of probable cause. Johnson v. United States, 333 U.S. 10, 16-17, 68 S. Ct. 367, 92 L. Ed. 436 (1948).

The burden is on the State to show that a police officer had probable cause to arrest. Grande, 164 Wn.2d at 141. This Court

reviews the constitutional question of whether probable cause existed *de novo*. Id. at 140.

2. Deputy Johnson did not have probable cause to arrest Mr. Meeds for mere possession of drug paraphernalia because that is not a crime. "[N]o Washington statute criminalizes 'possession of drug paraphernalia.'" State v. George, 146 Wn. App. 906, 918, 193 P.3d 693 (2008) (citing State v. Neeley, 113 Wn. App. 100, 107, 52 P.3d 539 (2002) ("bare possession of drug paraphernalia is not a crime"); State v. McKenna, 91 Wn. App. 554, 563, 958 P.2d 1017 (1998) ("mere possession of drug paraphernalia is not a crime"); State v. Lowrimore, 67 Wn. App. 949, 959, 841 P.2d 779 (1992) ("RCW 69.50.412 does not, ipso facto, make possession of drug paraphernalia a crime")); see also O'Neill, 148 Wn.2d at 584 n.8 ("Possession of drug paraphernalia is not a crime . . .").

For possession of drug paraphernalia to be a crime, a defendant must either

use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance,

RCW 69.50.412(1), or

deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.

RCW 69.50.412(2).

Thus, to prove the crime of possession of drug paraphernalia, the State must prove not only that the defendant possessed the paraphernalia, but also that he used it in a drug-related activity. George, 146 Wn. App. at 919. In addition, because use of drug paraphernalia is a misdemeanor, an officer may not arrest a person for the crime without a warrant unless it was committed in his presence. O'Neill, 148 Wn.2d at 584 n.8; RCW 10.31.100 ("A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer").²

Thus, for instance, in Neeley, the Court held the officer had probable cause to arrest Neeley for possession of drug paraphernalia, where the officer found items of paraphernalia in

² The rule that a police officer may not arrest a person without a warrant for a misdemeanor unless the crime is committed in the officer's presence is subject to several statutory exceptions, but none of those exceptions applies in this case. See RCW 10.31.100(1) - (10).

Neeley's possession and observed her act in a manner suggesting she was ingesting drugs in the officer's presence. Neeley, 113 Wn. App. at 108-09.

But in O'Neill, 148 Wn.2d at 584 n.8, by contrast, the officer did not have probable cause to arrest O'Neill for possession of drug paraphernalia, where the officer merely found a "cook spoon" in O'Neill's possession and did not observe O'Neill use the spoon in his presence. See also McKenna, 91 Wn. App. at 563 (officer did not have probable cause to arrest McKenna for possession of drug paraphernalia where officer found a pipe, cigarette wrapping papers, and a scale in McKenna's duffel bag, but did not observe her use the paraphernalia in his presence).

Here, Deputy Johnson found a "dope" pipe in Mr. Meeds's pocket during the weapons frisk. CP 84-85. He then arrested Mr. Meeds for the crime of possession of drug paraphernalia and searched him incident to arrest, finding methamphetamine. 4/01/10RP 25-26. But Mr. Meeds's mere possession of the "dope" pipe did not establish probable cause to believe he had committed a crime. O'Neill, 148 Wn.2d at 584 n.8; Neeley, 113 Wn. App. at 107; McKenna, 91 Wn. App. at 563. Therefore, the arrest—and the search incident to arrest—were unlawful unless the officer was

aware of specific facts indicating Mr. Meeds used the pipe in his presence.

3. Deputy Johnson did not have probable cause to believe Mr. Meeds used the "dope" pipe in his presence. The State must establish by clear and convincing evidence that Mr. Meeds used the "dope" pipe in the officer's presence and that the warrantless arrest was therefore justified. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009) (State must establish exception to warrant requirement by clear and convincing evidence). The State cannot do so.

Neither Deputy Johnson nor Deputy Hager observed Mr. Meeds ingest any drugs or use the "dope" pipe for any other purpose. The only evidence of drug activity was the smell of burnt methamphetamine emanating from the car when Deputy Hager approached the vehicle. 4/01/10RP 4. But Deputy Hager could not tell whether the driver or the passenger was smoking methamphetamine. 4/01/10RP 17. Because any suspicion he had of drug activity was not individualized to Mr. Meeds, the smell of burnt methamphetamine did not provide probable cause to believe Mr. Meeds was using drugs.

It is well established that "[t]he Constitution's protections against illegal search and seizure are 'possessed individually.'" Grande, 164 Wn.2d at 144 (quoting Ybarra v. Illinois, 444 U.S. 85, 92, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979)). Thus, the Constitution "requires individual probable cause that the defendant committed some specific crime." Grande, 164 Wn.2d at 145. There must be "specific evidence pinpointing the crime on a person." Id. In other words, where two or more people together are engaged in possible criminal activity, the officer must be aware of facts and circumstances indicating that the particular individual to be arrested has committed a crime. Id. at 141-43. In the context of a motor vehicle, probable cause to arrest the driver does not in itself provide probable cause to arrest a passenger; the officer must have an independent basis to connect the particular passenger to criminal activity. Id.

In Grande, an officer stopped a car in which Grande was riding as a passenger. 164 Wn.2d at 139. As the officer approached the car, he detected the odor of burnt marijuana emanating from the vehicle but could not tell whether the driver or the passenger was smoking marijuana. Id. Nonetheless, the officer arrested both of them. Id. The Washington Supreme Court

held Grande's arrest was unlawful because it was not supported by individualized probable cause. Id. at 146. There was no specific information "pinpointing the crime" on Grande and he therefore had a continuing right to his own privacy. Id. at 145-46.

Grande holds the odor of marijuana emanating from a car is not sufficient to establish probable cause to arrest a passenger. Id. at 144. For the same reasons set forth in Grande, the odor of methamphetamine emanating from the car in which Mr. Meeds was riding as a passenger did not establish probable cause to arrest him for using drugs. The officer was not aware of facts and circumstances "pinpointing the crime" on Mr. Meeds. Id. at 145-46. Thus, the State did not prove by clear and convincing evidence that it was Mr. Meeds, and not the driver, who was using methamphetamine.

Because the State did not prove Mr. Meeds—and not the driver—was ingesting drugs, the State did not prove the officer had probable cause to believe Mr. Meeds was using drug paraphernalia in his presence. The officer therefore did not have probable cause to arrest Mr. Meeds for the crime of possession of drug paraphernalia. Neeley, 113 Wn. App. at 108-09; O'Neill, 148 Wn.2d at 584 n.8; McKenna, 91 Wn. App. at 563. The arrest of Mr.

Meeds was made without individualized probable cause and was unlawful. Grande, 164 Wn.2d at 146.

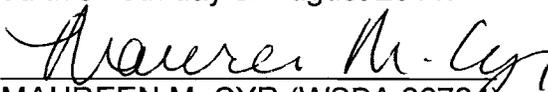
4. The evidence seized in the search incident to arrest must be suppressed. Because the officer did not have probable cause to arrest Mr. Meeds for possession of drug paraphernalia, the arrest was unlawful. Wong Sun, 371 U.S. at 479; Grande, 164 Wn.2d at 142-43.

The exclusionary rule requires suppression of all evidence directly obtained as the result of an arrest made without probable cause. Wong Sun, 371 U.S. at 485; Grande, 164 Wn.2d at 147. Here, the deputy did not have probable cause to arrest Mr. Meeds for possession of drug paraphernalia and the fruits of the search incident to arrest must be suppressed.

F. CONCLUSION

The officer did not have probable cause to arrest Mr. Meeds for the crime of possession of drug paraphernalia and the arrest was therefore unlawful. The methamphetamine seized during the search incident to arrest must be suppressed.

Respectfully submitted this 15th day of August 2011.


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APPENDIX

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SONYA KRASKI
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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

MEEDS, SCOTT ALLEN

Defendant.

No. 09-1-01336-0

CERTIFICATE PURSUANT TO
CrR 3.6 OF THE CRIMINAL RULES
FOR SUPPRESSION HEARING

On April 1, 2010, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

There were no disputed facts in this case.

1. On June 29, 2009, at approximately 8:40 p.m. it was dusk; not dark and not daylight either.
2. At a rural area of east Snohomish County, on a road with light traffic;
3. Deputy Hager of the Snohomish County Sheriff's Office conducted a traffic stop on a vehicle.

ORIGINAL

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4. When Deputy Hager contacted the driver of the vehicle, he recognized the defendant in the passenger seat.
5. Deputy Hager has history with the defendant and knows the defendant carries weapons, knives, swords, etc
6. Deputy Hager knows the defendant to be aggressive and antagonistic with law enforcement.
7. Specifically, in their last contact, the defendant had become physically combative with Deputy Hager.
8. Deputy Hager could smell the ~~odor~~^{odor} that he recognized in his training and experience to be burnt or burning methamphetamine.
9. Deputy Hager called for backup and waited for the backup to arrive.
10. Deputy Johnson, also of the Snohomish County Sheriff's Office arrived to assist/backup Deputy Hager.
11. Deputy Hager advised Deputy Johnson about the defendant's aggression and that he's known to carry weapons.
12. Deputy Johnson approaches the vehicle.
13. Deputy Johnson sees the defendant has a cell phone in one hand and his left hand is in his pocket.
14. Deputy Johnson knows of the defendant's propensity to aggression.
15. For officer safety reasons, Deputy Johnson asks the defendant to step out of the vehicle so he can pat him down.
16. The defendant does step from the vehicle and Deputy Johnson pats him down.
17. Deputy Johnson can feel a hard round object in the defendant's pocket and a second hard object he recognizes by touch as a pipe.

18. The defendant admits to Deputy Johnson the pipe is a "dope" pipe and the other object is a racket ball sized rock.

II. CONCLUSIONS OF LAW

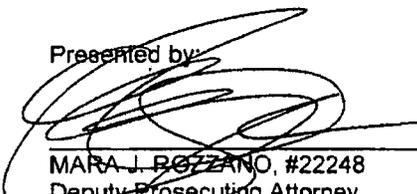
Officers may ask passengers to step out of car to pat them down under certain circumstances. The officers must have specific articulable facts giving rise to a reasonable belief there is an officer safety concern and warranting a pat down search of the defendant for weapons.

In this case, the defendant was known to the deputies as a person who has a habit of being aggressive toward law enforcement and to carrying items that can be used as weapons, such as knives and rocks.

The removal of the defendant from the vehicle and the subsequent pat down search for weapons were valid under the U.S. Constitution 4th Amendment and Article 1 Section 7 of the Washington State Constitution. The defendant's motion to suppress is denied.

DONE IN OPEN COURT this 17 day of May, 2010.


JUDGE K. COWSER

Presented by:

MARA J. BOZZANO, #22248
Deputy Prosecuting Attorney

Copy received this 12th day of May, 2010.


Brian Sullivan, #38066,
Attorney for Defendant

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

STATE OF WASHINGTON,
Respondent,

SCOTT MEEDS,
Appellant.

NO. 66866-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

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SIGNED IN SEATTLE, WASHINGTON, THIS 15TH DAY OF AUGUST, 2011.

X _____ 