SUPREME COURT NO. 100467-2

NO. 53921-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESSICA TURNBOUGH,

Petitioner.

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

The Honorable Chris Lanese & James Dixon, Judges

PETITION FOR REVIEW

MARY T. SWIFT
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Jessica Turnbough asks this Court to grant review of the court of appeals' unpublished decision in State v. Turnbough, No. 53921-7-II, filed August 24, 201 (Appendix A). The court of appeals denied Turnbough's motion for reconsideration on November 12, 2021 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted to resolve whether peremptory challenges are enshrined in the impartial jury trial rights of article I, sections 21 and 22 of our state constitution, where they were guaranteed by law at the time our state constitution was adopted, and, additionally, does that require a return to the rule that reversal is required when the defense is forced to use a peremptory challenge to remove a biased juror and thereafter exhausts all remaining peremptory challenges?

2. Is this Court's review needed to decide whether the new bail jumping amendments, which downgraded most failures

to appear to a gross misdemeanor or no crime at all, apply retroactively to cases that are not yet final?

3. Is this Court's review necessary to overrule the incorrect and harmful holding in State v. Ollivier, 178 Wn.2d 813, 312 P.3d 1 (2013), which interpreted CrR 2.3(d) as not requiring service of a warrant at the outset of a search, inconsistent with the language and purpose of the rule, and further creating an increased risk of physical confrontation?

C. STATEMENT OF THE CASE

Jessica Turnbough has a significant history of trauma and injury serving as a paratrooper in the United States Army. CP 136-37; 6RP 312. Her chronic injuries cause her debilitating migraines, as well as balance and coordination issues. CP 138; 6RP 312, 325-28.

In the early morning hours of October 21, 2017, Trooper Robert Howson observed Turnbough driving under the speed limit and drifting onto the shoulder. 3RP 13. Howson pulled Turnbough over and noted her slurred speech, bloodshot eyes,

and the odor of intoxicants. 3RP 15. Turnbough offered to take a breathalyzer test, but when she refused field sobriety tests because of her injuries, Howson placed her under arrest. 3RP 16; 5RP 145-46.

Howson transported Turnbough to the hospital, where he obtained a search warrant to draw Turnbough's blood. 3RP 16, 21-23. Turnbough asked for a copy of the warrant before the blood draw. 3RP 23. Howson refused, telling Turnbough, "That's not how it works." 3RP 42-43, 46. Howson later said he did not provide Turnbough a copy of the warrant because he would have had to return to his patrol car to print a copy. 3RP 25-26. Turnbough did not receive a copy of the warrant until after the blood draw was completed. 3RP 27, 48.

Turnbough explained she was "very upset" because she was not provided a copy of the warrant and so she could not be sure the blood draw was legal. 3RP 46-47. Howson agreed Turnbough became "belligerent and somewhat argumentative"

because "she wanted to fight us in resistance to getting the blood test administered." 5RP 129.

The blood draw, taken approximately an hour and a half after the traffic stop, revealed a blood alcohol content of 0.14. 6RP 253, 267-68.

Before trial, Turnbough moved to suppress the results of the blood draw, arguing Trooper Howson violated CrR 2.3(d) and the plain language of the warrant by deliberately refusing to present her with a copy of the warrant before the blood draw. CP 69-72; 3RP 54-55. The court denied the motion, finding the warrant did not need to be served before the search and Howson "complied with the spirit of the law." 3RP 59-62; CP 77-79.

Turnbough was charged with felony DUI and was released on bail.[1] CP 5; Ex. 8. For more than a year, Turnbough appeared for her court hearings, arriving late to only a single hearing. CP 182.

[1] Turnbough has a prior vehicular assault conviction from 2007, which elevated the DUI charge to a felony. CP 107.

Turnbough's omnibus hearing was scheduled for February 14, 2019. 5RP 172. However, all night before the hearing, Turnbough suffered one of her debilitating migraines. 6RP 312-13. Turnbough must inject medication at the onset of a migraine and is forbidden by her neurologists from driving afterwards. 6RP 312-15, 327-28. Turnbough alerted pretrial services and defense counsel that she would be unable to attend the omnibus hearing. 6RP 315.

Nevertheless, when Turnbough did not appear for omnibus the next morning, the court ordered a warrant to issue for her arrest. 5RP 177-78; Ex. 10. The bench warrant issued on February 19. Ex. 11. Turnbough turned herself in at the next available walk-on calendar, February 26. 5RP 200-01; 6RP 319. Turnbough's bail was reinstated and the warrant quashed. Exs. 12, 13.

Based on her single failure to appear, Turnbough was charged with felony bail jumping. CP 80. The jury found Turnbough guilty of bail jumping, despite her assertion of an

uncontrollable circumstances defense, and guilty of the felony DUI. CP 81, 83, 103. In sentencing Turnbough for bail jumping, the court noted it "was not a situation where Ms. Turnbough was thumbing her nose at the court." 8RP 17-18. The court believed "[t]here was a reason she didn't show up for court, and she rectified it as quickly as she could have." 8RP 18.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Court's review is necessary to decide whether peremptory challenges are enshrined in the impartial jury trial right of article I, sections 21 and 22, where they were guaranteed by law when our state constitution was adopted and, additionally, whether that necessitates a return to the *Parnell* rule.

During voir dire, Prospective Juror 4 expressed his belief that there should be a "zero tolerance" policy for drinking and driving. 5RP 44. Juror 4 reiterated this belief multiple times. 5RP 54. When asked if he could set those opinions aside, Juror 4 responded, "I do have unconscionable biases already with drinking and driving because of that." 5RP 54.

Defense counsel moved to strike Juror 4 for cause. 5RP 86. The court denied the motion, erroneously finding, "Juror number four advised that he could remain fair and impartial and could follow the instructions on the law." 5RP 86. Turnbough's attorney was forced to expend a peremptory challenge to excuse Juror 4 and then exhausted all remaining peremptory challenges. CP 171-72.

The court of appeals agreed with Turnbough that the trial court abused its discretion by failing to dismiss juror 4 for cause, where Juror 4 expressed actual bias and "show[ed] an unequivocal inability to remain impartial." Opinion, 7.

The court of appeals, however, disagreed that reversal of Turnbough's convictions was necessary. Opinion, 9. On appeal, Turnbough acknowledged Juror 4 did not actually sit on her jury, but asserted article I, sections 21 and 22 of our state constitution together necessitate a return to the rule of State v. Parnell, 77 Wn.2d 503, 463 P.2d 134 (1969), abrogated by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001). Br. of Appellant, 28-38. The

Parnell rule required reversal when the defense was forced to use a peremptory challenge on a biased juror and exhausted all remaining peremptories. 77 Wn.2d at 508.

In the 2001 Fire decision, however, five justices abandoned the Parnell rule. The court instead applied the recent U.S. Supreme Court decision in United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000), which held a defendant fails to show prejudice and, therefore, cannot obtain reversal when no biased juror actually sits on the jury. Fire, 145 Wn.2d at 165. The lead opinion in Fire reasoned the Parnell rule was constitutionally based and, because there was no showing that article I, *section 22* was more protective than the Sixth Amendment, Martinez-Salazar controlled. Fire, 145 Wn.2d at 163-64.

However, the lead opinion emphasized Fire did not conduct a Gunwall[2] analysis or make an independent state constitutional argument. Id. Nor did the lead opinion address

[2] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

article I, *section 21*, which mandates "[t]he right of trial by jury shall remain inviolate." "The term 'inviolate' connotes deserving of the highest protection" and "indicates that the right must remain the essential component of our legal system that it has always been." Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

Division Two concluded Fire and Division Three's decision in State v. Munzanreder, 199 Wn. App. 162, 398 P.3d 1160 (2017), controlled in Turnbough's case. Opinion, 9. The Munzanreder court held, "[i]n nearly 100 years, our state has yet to recognize any state or local concern with respect to a defendant's right to an impartial jury that would justify interpreting article I, section 22 differently than how federal courts have interpreted the Sixth Amendment." 199 Wn. App. at 174. Division Three criticized Munzanreder for "repeatedly conflat[ing]" article I, section 21 and section 22. Id. On reading the two provisions in conjunction, the court merely held, "we disagree with his analysis," without further discussion. Id.

This Court has never squarely addressed whether article I, sections 21 and 22 must be read in conjunction to provide for a stronger impartial jury trial right than the federal constitution. However, multiple prior decisions from this Court suggest that they must and, therefore, Munzanreder must be overruled.[3]

In Gunwall itself, this Court recognized, "Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently." 106 Wn.2d at 61. This is consistent with principles of statutory construction, and constitutional provisions must be interpreted, like statues, according to their plain meaning. State v. Gray, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012) (a statute's plain meaning should be discerned from context, "related provisions," and the statutory scheme as a whole). This Court has further recognized "the fact that the Washington Constitution

[3] A full Gunwall analysis is provided in Turnbough's opening brief. Br. of Appellant, 30-37.

mentions the right to a jury trial in two provisions instead of one indicates the general importance of the right under our state constitution." State v. Smith, 150 Wn.2d 135, 151, 75 P.3d 934 (2003).

These authorities indicate Munzanreder artificially separated our two state constitutional jury trial rights, incorrectly reading them in isolation. Furthermore, Fire does not control on this question because Fire did not brief the state constitutional argument or the effect of article I, section 21, and so the Fire court did not address it. In re Elec. Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue.").

Case law is clear that our "inviolate" jury trial right guaranteed in article I, section 21 means "more than the preservation of the mere form of trial by jury." State v. Strasburg, 60 Wash. 106, 116, 110 P. 1020 (1910). The "purpose of article I, section 21 was to preserve inviolate the right to a trial by jury as it existed at the time of the adoption of the

constitution." Smith, 150 Wn.2d at 150-51. Consequently, whether our jury trial right is more protective in a particular circumstance "'must be determined from the law and practice that existed in Washington at the time of our constitution's adoption in 1889.'" State v. Clark-El, 196 Wn. App. 614, 621, 384 P.3d 627 (2016) (quoting Smith, 150 Wn.2d at 151).

In City of Pasco v. Mace, 98 Wn.2d 87, 98-100, 653 P.2d 618 (1982), this Court held the state jury trial right extended to misdemeanors, because the law as it existed when our state constitution was adopted provided the right to a jury trial for misdemeanors. See also Strasburg, 60 Wash. at 121-24 (legislature could not abolish insanity doctrine because it existed when our state constitution was adopted and was therefore enshrined in the jury trial right).

The same analysis establishes the Parnell rule is constitutionally mandated. Just like in Mace, peremptory challenges were guaranteed in both civil and criminal cases when the state constitution was adopted. Code of 1881 §§ 207, 208,

1079. In fact, they were provided for in the first statutes passed in 1854 when Washington was a territory. Laws of 1854, p. 118 § 102; p. 165 § 186.15. Given this history, the right to peremptory challenges is preserved under our state constitution as part of the jury right in article I, sections 21 and 22.

In Martinez-Salazar, the Court reasoned peremptory challenges are not mandated under the federal constitution. 528 U.S. at 311. This makes sense because legislation authorizing peremptory challenges in federal cases was enacted in 1790, a year after the federal constitution was ratified. Id. at 311-12. Because peremptories were provided by our territorial laws when Washington adopted its constitution, a different result is warranted. See Mace, 98 Wn.2d 97-98 (recognizing this distinction for misdemeanor jury trials).

Additionally, there is no need for our state to proceed in lockstep with federal courts on this issue. Other states apply an independent state rule similar to Parnell. See, e.g., Shane v. Commonwealth, 243 S.W.3d 336, 341 (Ky. 2007) (reversing

where defense was forced to use a peremptory to remove a juror who should have been dismissed for cause, and exhausted all peremptory challenges); State v. Good, 43 P.3d 948, 961 (Mont. 2002) (same). The Montana Supreme Court explained a Parnell-type rule is sound because otherwise a defendant's number of peremptory challenges is effectively reduced, affording the prosecution an "unmistakable tactical advantage" and compromising "the impartiality of the jury." Good, 43 P.3d at 961.

Since Fire, trial court error in refusing to dismiss a biased juror has forced defense attorneys to either expend one of their precious few peremptories or gamble on a biased jury in the hopes of winning reversal on appeal.[4] But Fire did not address whether peremptory challenges and the Parnell rule are part of

[4] See Thomas Ward Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 MICH. L. REV. 785, 819 (2020) ("[I]n all but the most unusual cases, the [Martinez-Salazar] Court has shut the door on defendants' ability to contest either the erroneous grant or the erroneous denial of a challenge for cause.").

the jury trial right guaranteed by article I, *section 21*, when read in conjunction with article I, section 22. It is a question this Court must answer, particularly in light of Division Three's incorrect decision in Munzanreder. RAP 13.4(b)(1), (3), (4).

2. This Court's review is needed to resolve the open question of whether, under this Court's decision in *Wiley*, the legislature's downgrading of the crime of bail jumping applies retroactively to cases not yet final.

On March 7, 2020, the legislature passed Engrossed Substitute House Bill 2231, changing the definition and classification of bail jumping. Laws of 2020, ch. 19, §§ 1, 2. The new legislation took effect on June 11, 2020, after Turnbough missed her omnibus hearing. Id.

Under the old law, felony bail jumping required only failure to appear "before any court of this state." RCW 9A.76.170(1), (3). Under the new law, felony bail jumping requires failure to appear *for trial*. Laws of 2020, ch. 19, § 1(1)(a). The legislature downgraded failure to appear for a court date *other than trial* to a gross misdemeanor or no crime at all.

Id. § 2. Failing to appear for court is no longer criminal if the person moves to quash the warrant within 30 days and has no prior warrants for failing to appear in the current case. Id. § 2(1).

The new law does not contain a formal statement of legislative intent. However, legislative hearings show agreement that the existing scheme was overly harsh and not used as originally planned, which was to deter people from intentionally evading justice. Br. of Appellant, 38-39 (citing representative statements at hearings on the bill).

Under the new law, Turnbough's failure to appear likely qualifies as no crime at all. Turnbough failed to appear for omnibus—not trial—due to a migraine that rendered her unable to drive. She had no prior warrants for failing to appear in the current case. The bench warrant issued on February 19, 2019. Turnbough quashed the warrant on February 26, 2019, well within the 30-day window required by the new law.

Turnbough does not dispute the general applicability of Washington's "saving statute," RCW 10.01.040, which

"generally requires that crimes be prosecuted under the law in effect at the time they were committed." State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007).

However, in State v. Wiley, 124 Wn.2d 679, 687, 880 P.2d 983 (1994), this Court addressed the distinction between legislative amendment to the elements of a crime and legislative downgrade of an entire crime, in which case the legislature "has judged the specific criminal conduct less culpable." "[A] change in elements does not affect prior convictions under the SRA." Id. at 688. However, when the legislature "has reassessed the culpability of criminal conduct" and "downgrades the status of an offense . . . a sentencing court must give retroactive effect to the Legislature's decision." Id. at 687-88.

The legislature did not just amend the elements of bail jumping—it downgraded the entire crime. It is now a felony only to fail to appear for trial. The legislature created a new section making it only a gross misdemeanor, or no crime at all, to fail to appear for court hearings other than trial. Laws of 2020, ch. 19, §

2. By downgrading or decriminalizing most failures to appear, the legislature reassessed the culpability of bail jumping and the harsh penalties that flowed from it. See State v. Slater, 197 Wn.2d 660, 674, 486 P.3d 873 (2021) (the new law signals "the legislature's shift away from the criminalization of FTAs accompanied by motions to quash."). Under Wiley, retroactive effect must be given to the change in the bail jumping law.

But courts have been reluctant to apply Wiley. Indeed, the court of appeals in Turnbough's case simply applied its prior decision in State v. Brake, 15 Wn. App. 2d 740, 476 P.3d 1094, review dismissed, 197 Wn.2d 1016 (2021), in rejecting Turnbough's argument. Opinion, 9-10. Division Two in Brake did not address Wiley, instead finding the legislature did not make any express statement of retroactivity and so the saving statute applied to the bail jumping amendments. Brake, 15 Wn. App. 2d at 745-46; but see State v. Gradt, 192 Wn. App. 230, 234, 366 P.3d 462 (2016) (saving clause is in derogation of the common law, must be strictly construed, and therefore "an

intention to affect pending litigation need not be declared in explicit terms in the repealing act").

This Court in State v. Ross, 152 Wn.2d 220, 239, 95 P.3d (2004), noted the Wiley court did not address the saving clause. Significantly, however, neither Ross nor any other decision from this Court has overruled Wiley, only distinguished it.

In Ross, for instance, this Court held a change in the classification of a prior conviction for offender score calculations did not have retroactive effect under the saving statute. 152 Wn.2d at 240. The Ross court distinguished Wiley because "the amendments in this case do not reflect a legislative determination that the offenses are less culpable." Id. This Court explained "the Wiley court addressed the effect of SRA amendments that downgrade crimes from a felony to a misdemeanor," whereas "the amendments in this case do not reflect a legislative determination that the offenses are less culpable." Id. at 239.

This Court made the same distinction recently in State v. Jenks, 197 Wn.2d 708, 725, 487 P.3d 482 (2021). In Jenks,

"second degree robbery was removed from the list of most serious offenses: no crime was downgraded from a felony to a misdemeanor," and so legislative amendment to Washington's three strikes law did not apply retroactively to pending cases for crimes committed before the amendment's effective date. Id. By contrast, this Court explained, "Wiley held that a change is retroactive when a crime is downgraded from a felony to a misdemeanor." Id.

Thus, the applicability and vitality of Wiley remain open questions, yet to be resolved by this Court. Downgrading and decriminalizing the entire crime of bail jumping reflects a legislative determination that those who fail to appear for court hearings, yet quickly seek to quash their warrants and have had no other warrants issued, are less culpable. The legislature corrected what was an extremely harsh penalty for being late to or missing court, often with reasonable explanations. The amendments reflect a "fundamental reappraisal of the value of punishment" for bail jumping. Wiley, 124 Wn.2d at 687.

Under Wiley, the legislative downgrading of most failures to appear should apply retroactively to cases like Turnbough's that are not yet final. This Court's guidance is necessary to resolve this issue and because Brake conflicts with the holding of Wiley. RAP 13.4(b)(1), (4). Turnbough's case also presents this Court an opportunity to provide a fair and just result to individuals who, because of the date on which they missed court, must still face a *felony* and all its attendant consequences, rather than no charge at all. Slater, 197 Wn.2d at 674-75 (recognizing people miss court for "many innocent reasons," often "because of issues of indigency rather than a desire to disobey the legal system," and criminalizing failures to appear "disproportionately impacts indigent people and people of color").

3. This Court's current interpretation of CrR 2.3(d) is inconsistent with the essential functions of the warrant—notice and assurance of legality—necessitating this Court's review to overrule *Ollivier*.

The two essential functions of a warrant are notice and assurance of legality to the person whose property is about to be

searched or seized. Trooper Howson deliberately refused to provide Turnbough a copy of the search warrant before the blood draw, despite her request to see it. This contravened both the language and the purpose of CrR 2.3(d), along with the warrant itself, which require service of the warrant at the outset of the search. This Court's contrary holding in Ollivier is incorrect and harmful, necessitating this Court's review to overrule it.

Physical intrusion into the body to draw blood requires a warrant or a recognized exception to the warrant requirement. Missouri v. McNeely, 569 U.S. 141, 148, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). There are two essential functions of the warrant: (1) notice and (2) assurance of legality. United States v. Williamson, 439 F.3d 1125, 1132 (9th Cir. 2006). First, the warrant gives notice to the person subject to the search what the officers are entitled to seize. Id. Second, the warrant "provide[s] the property owner with sufficient information to reassure him of the entry's legality." Michigan v. Tyler, 436 U.S. 499, 508, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978).

Court rules are interpreted in the same way as statutes and must be "construed consistent with their purpose." State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001). Criminal Rule 2.3 outlines warrant and search procedures. CrR 2.3(d) specifies, in pertinent part:

> The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt.

The warrant in Turnbough's case similarly mandated, "A copy of said warrant shall be served upon the person from whom the blood is to be extracted . . . ." CP 67.

In State v. Ollivier, 161 Wn. App. 307, 319, 254 P.3d 883 (2011), the court of appeals held CrR 2.3(d) "requires that officers conducting a search provide the occupant with a copy of the warrant prior to commencing the search." This Court reversed, holding, without any analysis or discussion of purpose behind the rule, "Nothing in the language of the rule says that a

copy of the warrant must be provided before the search is begun." Ollivier, 178 Wn.2d at 852. The court of appeals in Turnbough's case recognized it was bound to follow Ollivier. Opinion, 5-6.

Ollivier is incorrect and harmful, warranting this Court's review and correction under RAP 13.4(b)(4). Only this Court can overrule its prior precedent. The holding of Ollivier is untethered from the language and, more importantly, the purpose of the rule. Use of the present tense "is" in both the rule and the warrant indicate the warrant must be provided to the individual *before* the search—the person whose blood *is to be taken*. This interpretation is also consistent with twin functions of the warrant: notice and assurance of legality. Presenting the warrant after the fact achieves neither of these.

The Ninth Circuit interpreted the former federal counterpart, Rule 41(d), to require a complete copy of the warrant be provided at the outset of the search, absent exigent circumstances. United States v. Gantt, 194 F.3d 987, 1005 (9th Cir. 1999), overruled on other grounds by United States v. W.R.

Grace, 526 F.3d 499 (9th Cir. 2008). The rule then provided, similar to CrR 2.3(d):

> The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken . . . . [5]

Gantt, 194 F.3d at 1000 (quoting Rule 41(d)).

Federal agents directed Gantt to sit in a hallway while they conducted a three-hour search of her apartment. Id. at 996. Even after the Gantt asked to see the warrant, the agents just showed her the face of the warrant. Id. Just like in Turnbough's case, Gantt was provided a copy of the search warrant only after the search was completed and Gantt was arrested. Id.

The Gantt court held Rule 41(d) "must be interpreted in the light of the important policies underlying the warrant requirement—to provide the property owner assurance and notice

[5] Notably, the federal rule specified "was taken" rather than "is taken," as in CrR 2.3(d), yet was still interpreted to require the warrant be presented at the outset.

during the search." Id. at 1001. These functions are achieved only if the warrant is served at the outset of the search. Id. at 1001-02. Moreover, if service after the fact sufficed, the Gantt court explained, there would be no need for the first half of Rule 41(d); it would be "rendered mere surplusage." Id. at 1003. Canons of construction dictated "the more demanding requirement be the preferred requirement." Id. The Gantt court further noted its sister circuits were in accord that "failure to serve the warrant on the subject of the search prior to the search is a violation of Rule 41(d)." Id. at 1004.

Ollivier failed to interpret CrR 2.3(d) with its purpose in mind. The incorrect holding allows law enforcement to flout the basic functions of the warrant requirement. It further deprives individuals of the assurance that law enforcement has legal authority to invade their private affairs.

Indeed, Division Three has expressed doubt about the correctness of Ollivier in an unpublished case:

> The Ollivier court ignored the rule's language that the law enforcement officer must give the accused a copy of the warrant if the accused is present. Posting of the warrant, if the accused is present, does not satisfy the rule. The Ollivier court technically read CrR 2.3(d) accurately, because the rule does not identify at what time the officer must hand the accused a copy of the warrant. *One might, however, question the purpose of handing a copy of the search warrant to the accused after completion of the search.*

State v. Whitford, No. 35576-4-III, 2019 WL 480465, at *4 (Feb. 7, 2019) (emphasis added). The emphasized language drives home the error of Ollivier. Court rules must be interpreted with their purpose in mind. Gantt does so; Ollivier does not.

Perhaps even more importantly, the holding of Ollivier is harmful. The Gantt court recognized withholding the warrant increases the likelihood of physical confrontation:

> Persons prone to physical confrontation with armed federal agents are not less likely to resort to violence if the warrant is kept from them. In fact, such persons may be more likely to conclude agents are overstepping their authority if they are not provided a warrant, particularly after asking to see one. Courts have typically assumed that the absence of a warrant creates a "greater potential for confrontation and violence." United States v. Hepperle, 810 F.2d

> 836, 839 (8th Cir. 1987). One of the purposes of requiring agents to "hand[] the occupant (when present) the warrant, like that of the 'knock and announce' rule, is to head off breaches of the peace by dispelling any suspicion that the search is illegitimate." United States v. Stefonek, 179 F.3d 1030, 1035 (7th Cir. 1999).

Gantt, 194 F.3d at 1002. One need not look far to find recent examples of this. For instance, the tragic killing of Breonna Taylor—who was shot to death in her own bed on a "no-knock" warrant—may have been avoided had service been required at the outset. Turnbough, herself, became hostile and belligerent when she was refused a copy of the warrant and therefore could not verify the blood draw's legality. 3RP 46-47.

The incorrect holding of Ollivier is inconsistent with both the language and purpose of CrR 2.3(d) and, furthermore, puts police and citizens at greater risk of physical confrontation. Ollivier should be overruled and CrR 2.3(d) should be interpreted consistent with the two essential functions of the warrant requirement—notice and assurance of legality—to require service of the warrant at the outset of the search.

E. CONCLUSION

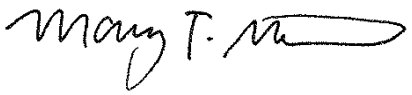
For the reasons discussed above, this Court should grant review and reverse the court of appeals.

DATED this 13th day of December, 2021.

I certify this document contains 4,979 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorney for Petitioner

Appendix A

Filed
Washington State
Court of Appeals
Division Two

August 24, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JESSICA A. TURNBOUGH, Appellant.	No. 53921-7-II UNPUBLISHED OPINION

VELJACIC, J. — A jury convicted Jessica Turnbough of felony driving under the influence and bail jumping. She appeals, arguing that she was deprived of her rights under CrR 2.3(d) when an officer refused to provide a physical copy of a search warrant before conducting a blood draw. She also argues she was deprived of her right to an impartial jury when she was forced to use three peremptory challenges to dismiss biased jurors. Turnbough further argues that she should be resentenced for her bail jumping charge because RCW 9A.76.170 was amended after her conviction. Finally, Turnbough argues that the court incorrectly imposed legal financial obligations (LFOs) even after it found she was indigent and that the judgment and sentence form incorrectly states the statutory subsections she was convicted under. We affirm Turnbough's convictions, but we remand to the trial court to remove certain LFOs and for correction of the judgment and sentence.

FACTS

Trooper Robert Howson pulled over Turnbough after witnessing her cross over the fog line while driving below the speed limit. After speaking with Turnbough, Howson noticed she was slurring her speech, had droopy blood shot eyes, and lethargic mannerisms. He asked her to perform a field sobriety test, but she refused. Howson arrested Turnbough and transported her to a hospital for a blood draw.

Howson sought and received a warrant to draw Turnbough's blood. Turnbough demanded to see a copy of the warrant prior to her blood draw. Howson showed Turnbough part of the warrant on his laptop. The portion he showed Turnbough contained the judge's signature. He did not produce a physical copy because his printer was in his patrol car, but he told Turnbough that a copy would be provided after the blood draw.

Turnbough's toxicology results showed an alcohol concentration of 0.147 grams per 100 milliliters of alcohol, 1.1 nanogram per milliliter of Tetrahydrocannabinol (THC), 48 nanograms per milliliter of carboxy THC, 4.0 milligrams per liter of meprobamate, and 0.66 milligram per milliliter of trazodone. The State charged Turnbough with one count of felony driving under the influence.

Turnbough moved to suppress the toxicology evidence, arguing that the search was illegal because Howson lacked probable cause, Howson refused to produce a physical copy of the search warrant, and Turnbough was deprived of an attorney. The trial court denied the motion to suppress. Prior to trial, Turnbough failed to appear for an omnibus hearing and the State amended the information to include a charge of bail jumping.

During jury selection, Turnbough used peremptory challenges to dismiss three jurors after the trial court refused to dismiss them for cause. At the beginning of jury selection, the court asked the prospective jurors if any of them would be unable to accept the law as provided by the court regardless of what they believed the law should be. None of the challenged jurors responded. Turnbough challenged jurors 4, 5, and 17.

Juror 4 said he had a strong emotional response towards drunk driving. He stated that he had served in the military and lost unit members to drunk driving and that he had "a zero tolerance feeling" about drinking and driving. 1 Report of Proceedings (RP) at 54. When asked if he could remain impartial, he said, "The only thing I can say is the facts. If the facts are presented in the proper way, in the prevailing way of the truth is the only way I can decide. But underlying that I do have unconscionable biases already with drinking and driving because of that." 1 RP at 54.

Juror 5 stated he knew the prosecuting attorney and that this could "[p]otentially" affect his impartiality. 1 RP at 21. Later he said that he had experience working as a corrections deputy and worked with drug and alcohol abusers. Based on that experience, he believed people in jail for drug and alcohol often said what officers wanted to hear and that he was cynical as a result. Speaking more on his cynicism, he added, "So whether that's for the prosecution or defense may be hard to say." 1 RP at 56.

When juror 17 was asked whether she had personal experiences with drunk driving, she said her parents had been struck by a drunk driver when she was 12 and that they suffered significant injuries. She had previously said that a close friend had been killed by a drunk driver. Turnbough asked her if those events would prevent her from being impartial, and she responded, "I would hope not, but I don't know. To be totally honest, to dive into it, I really don't know." 1 RP at 51. Turnbough followed up, asking, "So you're not certain that you could be, you know,

impartial based on—" and juror 17 said, "No, not when I started hearing evidence. I don't know." 1 RP at 51. Later, juror 17 was asked if she would be able to follow the courts instructions and she answered yes.

The State made no effort to inquire further into juror 4's, 5's, or 17's statements. After the jurors were challenged for cause, the trial court stated that the jurors had advised that they could remain "fair and impartial." 1 RP at 86-87. Turnbough used peremptory challenges to dismiss jurors 4, 5, and 17.

The jury convicted Turnbough of felony driving under the influence. The verdict form listed three alternative means for conviction:

> QUESTION 1: Was the defendant Jessica Ann Turnbough under the influence of [sic] affected by intoxicating liquor, marijuana, or any drug?
>
> . . . .
>
> QUESTION 2: Was the defendant Jessica Ann Turnbough under the combined influence of or affected by intoxicating liquor, marijuana, and any drug?
>
> . . . .
>
> QUESTION 3: Did the defendant Jessica Ann Turnbough have sufficient alcohol in her body to have an alcohol concentration of .08 or higher within two hours after driving as shown by an accurate and reliable test of the defendant's blood?

Clerk's Papers (CP) at 82.

The jury's verdict was only unanimous for question three, the finding that she had an alcohol concentration exceeding .08 per RCW 46.61.502(1)(a). The judgment and sentence form stated that Turnbough was convicted under "RCW 46.61.502(1)(a)(b)(c)(6)(b)(ii)." CP at 106. The jury also convicted Turnbough of bail jumping.

During sentencing, the trial court stated, "The court will order that Ms. Turnbough pay only the $500 crime victim assessment." RP (July 24, 2019) at 19. However, the trial court

imposed a criminal filing fee and community supervision fees on Turnbough's judgment and sentence. Turnbough appeals.

ANALYSIS

I. PROVIDING COPY OF SEARCH WARRANT

Turnbough argues that the State violated her right under CrR 2.3(d) when Howson denied her request for a physical copy of the search warrant before her blood draw. We disagree.

A. Legal Principles

We review a trial court's factual findings on a motion to suppress as verities on appeal if supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Where factual findings are undisputed, the issue may be determined as a matter of law. *State v. Kipp*, 179 Wn.2d 718, 726, 317 P.3d 1029 (2014). We review matters of law de novo. *Id*.

CrR 2.3(d) states in relevant part, "Execution and Return With Inventory. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken." (Emphasis omitted.) CrR2.3(d) does not require an officer to provide a copy of the warrant prior to conducting a search. *State v. Ollivier*, 178 Wn.2d 813, 852, 312 P.3d 1 (2013).

B. Analysis

Turnbough does not challenge any findings of fact, and instead argues that the trial court erred when it determined the police officer was not required to provide a copy of the warrant prior to Turnbough's blood draw.

Turnbough requests us to overrule or ignore *Ollivier*. However, she provides no authority that would empower us to do so. Because *Ollivier* is binding authority and applies to this case, we

hold that the State did not violate Turnbough's rights under CrR 2.3(d) when it failed to furnish a copy of the search warrant prior to conducting the blood draw.

II. RIGHT TO AN IMPARTIAL JURY

Turnbough argues that she was forced to use her three peremptory challenges on jurors that the court should have excused for cause, violating her right to an impartial jury under the Washington Constitution, which provides more protection than the United States Constitution. We agree that the trial court erred in failing to dismiss juror 4 for cause, but we disagree that this error entitles Turnbough to a new trial because juror 4 was not seated on the jury.

A. Denial of For Cause Challenges

Turnbough argues that the trial court should have granted his requests to strike jurors 4, 5, and 17 for cause. We agree regarding juror 4 but not regarding the other two jurors.

1. Legal Principles

We review a trial court's denial of a juror challenge for cause for an abuse of discretion. *State v. Munzanreder*, 199 Wn. App. 162, 176, 398 P.3d 1160 (2017). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

A trial court provides the protections of an unbiased jury by dismissing jurors who are biased. *See* RCW 2.36.110.

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110.

A juror may be challenged due to actual bias, shown by "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that

the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). "'[E]quivocal answers alone do not require a juror to be removed when challenged for cause, rather, the question is whether a juror with preconceived ideas can set them aside.'" *Munzanreder*, 199 Wn. App. at 176 (quoting *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). A party can rehabilitate a biased juror if a "thorough and thoughtful inquiry" shows they are capable of unbiased decision making regarding the case. *State v. Gonzales*, 111 Wn. App. 276, 281, 45 P.3d 205 (2002). The party claiming bias must provide proof that shows more than a possibility of prejudice. *Gonzales*, 111 Wn. App. at 281.

2. Analysis

Turnbough argues that juror 4's statements during jury selection showed he was biased against drinking and driving. We agree. Juror 4 admitted to a bias that would influence his interpretation of the facts. His statement shows an unequivocal inability to remain impartial. The trial court determined that juror 4 "advised he could remain fair and impartial," but the State fails to show how the record supports that decision. 1 RP at 87. The State could have attempted to rehabilitate juror 4 via a thorough and thoughtful inquiry, but it failed to do so. Absent an affirmative statement from juror 4 that he could remain impartial, the trial court's decision that juror 4 was unbiased is based on untenable grounds. The trial court abused its discretion by failing to dismiss juror 4 for cause.

Turnbough also argues that jurors 5 and 17 were biased and should have been dismissed for cause. However, the record shows their statements were equivocal. Juror 5 said his familiarity with the prosecuting attorney could "potentially" impact his judgment, and later he said that his cynicism would neither benefit the defense nor the prosecution. 1 RP at 21, 56. Neither statement

indicates a bias that mandates dismissal. Similarly, while juror 17 said that she was "not certain" she could be impartial, later she said she could follow the court's instructions on interpreting the facts. 1 RP at 51, 63. Juror 17's responses also do not show bias mandating removal for cause.

B. Entitlement to New Trial

Turnbough argues that she is entitled to a new trial because she was forced to use a peremptory challenge on juror 4. We disagree.

1. Legal Principles

The Supreme Court in *State v. Fire* held that there is no right to a new trial under the Fifth Amendment to the United States Constitution if a party uses a peremptory challenge to dismiss a biased juror. 145 Wn.2d 152, 159, 34 P.3d 1218 (2001). The mere use of a peremptory challenge on a juror that should have been dismissed for cause is insufficient to prove a claim that a party was deprived of their right to an impartial jury. *Id*.

Turnbough argues that article I, sections 21 and 22 of the Washington Constitution provide greater protection than the Fifth Amendment. She essentially claims that she has a constitutional right not to use her peremptory challenges on jurors that should have been stricken for cause.

When a party claims the Washington Constitution provides more protections than the United States Constitution, we conduct a *Gunwall*[1] analysis to evaluate the claim. *Munzanreder*, 199 Wn. App. at 172. The six *Gunwall* factors are: (1) the textual language of the state constitution, (2) significant differences in the texts of parallel provisions of the federal and state constitutions, (3) state constitutional and common law history, (4) preexisting state law, (5) differences in structure between the federal and state constitutions, and (6) matters of particular state interest or local concern. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

[1] *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

Article I, section 21 of the Washington State Constitution states that "the right of trial by jury shall remain inviolate." Article I, section 22 states in relevant part, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." Such right "requires a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Boiko*, 138 Wn. App. 256, 260, 156 P.3d 934 (2007).

2. Analysis

Turnbough asks us to conduct a *Gunwall* analysis of article I, sections 21 and 22 and conclude that they offer more protection than the United States Constitution. However, we already conducted this analysis in *Munzanreder*, and held that the Washington right to an impartial jury provides the same protection as the United States Constitution. 199 Wn. App. at 172. Accordingly, we decline to reanalyze this issue, and we evaluate Turnbough's claims under existing law.

Even though juror four should have been dismissed *for cause*, he was nevertheless dismissed from the jury by Turnbough's use of her peremptory challenges. Turnbough does not argue that a biased juror was actually empaneled. Because Turnbough has not shown a biased juror was empaneled and that she was therefore deprived of her right to an impartial jury, she is not entitled to a new trial. *See Fire*, 145 Wn.2d at 159.

III. RETROACTIVE APPLICATION OF AMENDED RCW 9A.76.170

Turnbough argues that RCW 9A.76.170 as amended in July 2020 should apply retroactively to her case. We disagree.

In a recent case, this court determined that the amendments to RCW 9A.76.170 do not apply to crimes committed prior to its enactment. *State v. Brake*, 15 Wn. App. 2d 740, 743-46,

476 P.3d 1094 (2020). For that reason, we hold that RCW 9A.76.170 as amended does not apply to Turnbough.

IV. LEGAL FINANCIAL OBLIGATIONS

Turnbough argues, and the State concedes, that the trial court incorrectly imposed the criminal filing fee and community custody supervision fee as LFOs. She also argues, and the State concedes, that the trial court should specify that her LFOs cannot be satisfied from her federal supplemental security income. We agree.

RCW 10.01.160(3) states in relevant part, "(3) The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." Because the court found that Turnbough was indigent, imposition of the criminal filing fee was improper under RCW 10.01.160(3).

The trial court may impose discretionary community custody supervision fees under RCW 9.94A.703(2)(d) even if a defendant is indigent. *State v. Spaulding*, 15 Wn. App. 2d 526, 537, 476 P.3d 205 (2020. However, the State concedes that the trial court did not intend to impose any other discretionary LFOs because the court stated that it was only imposing the crime victim penalty assessment.

Finally, under federal law, social security benefits cannot be used to pay legal financial obligations. *See* 42 U.S.C. § 407(a); *State v. Catling*, 193 Wn.2d 252, 260, 438 P.3d 1174 (2019). The State agrees.

We remand to trial court to remove the criminal filing fee and the community custody supervision fee from the judgment and sentence. The trial court should also clarify that Turnbough's LFOs cannot be satisfied through her federal supplemental security income.

V. SCRIVENER'S ERRORS

Turnbough argues that the trial court erred in indicating she was convicted under RCW 46.61.502(1)(b) and (c) because the jury was only unanimous under RCW 46.61.502(1)(a). We agree.

A scrivener's error is one that, when amended, would correctly convey the intention of the trial court, as expressed in the record at trial. *State v. Priest*, 100 Wn. App. 451, P.2d 452 (2000). The amended judgment should either correct the language to reflect the trial court's intention or add the language that the trial court inadvertently omitted. *State v. Snapp*, 119 Wn. App. 614, 627, 82 P.3d 252 (2004). The remedy for a scrivener's error in a judgment and sentence is to remand to the trial court for correction. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016); CrR 7.8(a).

A person can be convicted of felony driving under the influence if:

> (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
> (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or
> (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug.

RCW 46.61.502(1)(a)-(c).

The trial court erred in stating that Turnbough was convicted under RCW 46.61.502(1)(b)-(c) on the judgment and sentence because the jury only convicted Turnbough under RCW 46.61.502(1)(a). The State concedes that the judgment and sentence is incorrect. Therefore, we remand for the trial court to correct this scrivener's error.

CONCLUSION

We affirm Turnbough's convictions, but we remand to the trial court to remove certain LFOs and to correct the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Maxa, P.J.

Cruser, J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

November 12, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JESSICA A. TURNBOUGH, Appellant.	No. 53921-7-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Jessica Turnbough, by and through her attorney, moves this court to reconsider its August 24, 2021 unpublished opinion. After consideration, we deny the motion. It is

SO ORDERED

Panel: Jj. Maxa, Cruser, Veljacic

FOR THE COURT:

Veljacic, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

December 13, 2021 - 11:41 AM

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