No. 48315-7-II

94221-8

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

v.

KEVIN COX

PETITION FOR REVIEW

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Cases

A. Identity of Petitioner

Kevin Cox seeks review of the Court of Appeals decision terminating review and remanding his case to the Superior Court for trial.

B. Court of Appeals Decision

The Court of Appeals decision reversed the Superior Court suppression order. It also held that, although there is no order accepting appellate jurisdiction or a stay of the trial, that Mr. Cox' right to speedy trial was not violated.

C. Issue Presented for Review

Should this Court accept review to determine whether the filing by the government of a notice of appeal pursuant to RAP 2.2(b) automatically tolls the right to a speedy trial under CrR 3.3, even though the appellate court has neither accepted review nor granted a stay as required by CrR 3.3(c)(2)(iv)?

D. Statement of the Case

After being arrested for possessing a firearm, Kevin Cox appeared before the Clallam County Superior Court on May 27, 2015 for a preliminary hearing. The Court found that release on personal

recognizance would not assure his appearance and set bail at $5000. CP, 69. On May 29, 2015, Kevin Cox was formally charged and arraigned for Unlawful Possession of a Firearm in the Second Degree. CP, 4. On June 3, 2015, the Court later released without bail on conditions of release. CP, 66.

On August 6, 2015, the Court granted a defense motion to continue the trial to allow for trial preparation. CP, 63.

On September 10, 2015, the defense filed a motion to suppress pursuant to CrR 3.6 and *Franks v. Delaware*[1] CP, 38. The trial court held a hearing on October 28, 2015 at which time the arresting officer, Donald Ponton, testified about the circumstances that led to him petitioning for a search warrant of Mr. Cox' vehicle. RP, 1. A transcript of the telephonic search warrant was also available. CP, 23. The trial court held that the Officer Ponton twice conveyed to the magistrate that Mr. Cox "admitted that he had a firearm in the vehicle when those statements are clearly untrue and were made in reckless disregard of the truth and were not the actual statements and underlining circumstances that would be needed to support probable cause." CP, 13. Based upon this conclusion, the trial court suppressed the firearm.

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[1] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Mr. Cox' trial was scheduled for November 18, 2015. CP, 62. For reasons that are unclear from the record, there was no hearing on November 18, but there was a hearing on November 19. On that date, the Court set a hearing for November 25 and entered an order allowing Mr. Cox to travel to eastern Washington for Thanksgiving. CP, 56. On November 25, 2016, at the request of the prosecutor, the trial court made a finding that the suppression ruling had the "practical effect of terminating the State's case." CP, 4. The State filed a notice of appeal on November 30, 2015. CP, 45. Of note, the State never asked for a stay of the trial, and one has never been entered.

On December 18, 2015, the Court entered a further order modifying the conditions of release. CP, 44. This order includes requirements that Mr. Cox keep the court updated on his address, not possess firearms or other dangerous weapons, maintain contact with his attorney, and not possess or consume illegal drugs. Mr. Cox, an avid hunter his entire life, remains under conditions of release, which effectively prevent him from hunting in any form, including bow hunting. Mr. Cox has been subject to these conditions of release for the past 15 months and counting.

E Argument Why Review Should be Granted

Mr. Cox has been subject to conditions of release for over 21 months pending trial. After one defense continuance to allow trial preparation, Mr. Cox trial was scheduled for November 18, 2015 The trial did not take place as required. Additionally, the State neither dismissed the case without prejudice nor sought a stay of the proceedings. On November 25, 2015, the State asked, and received, for a finding from the trial court that the court's pretrial ruling had the "practical effect of terminating the State's case." But the State did not terminate the case. Instead, the case has been in limbo for over 15 months, with Mr. Cox subject to conditions of release. At this time, there is no trial pending.

Generally, an out-of-custody defendant has a right to trial within 90 days of his arraignment. CrR 3.3. He also has a Sixth Amendment right to a speedy trial. *Barker v Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Occasionally, circumstances will arise when the government will want to appeal a trial court order and long delays of the trial are required. In order to balance the right of the government to appeal against the constitutional rights of defendants, including double jeopardy and speedy trial rights, Washington has created several procedures for government appeals. These procedures are set out in RAP 2.2(b) and CrR 3.3(c)(2)(iv).

RAP 2.2(b) sets out the circumstances under which the State may file an appeal in a criminal case. One such instance is when the trial court issues a pretrial ruling suppressing evidence if the trial court expressly finds that the practical effect of the order is to terminate review. RAP 2.2(b)(2) In Mr. Cox' case, the trial court did suppress evidence and made the requisite finding. But the filing of a notice of appeal pursuant to RAP 2.2(b)(2) does not stay the time for trial under CrR 3.3. CrR 3.3 requires a second step.

CrR 3.3(c)(2)(iv) excludes from the "Time for Trial" the period when a case is on appeal, but only after the "acceptance of review or grant of a stay by the appellate court." In the Court of Appeals, the Court rejected Mr. Cox' speedy trial objection, implying that the time for trial was excluded after the Court of Appeals' "acceptance of review." See Opinion, 11. The error in the Court's reasoning is that the Court of Appeals never accepted review.

Generally, review may be sought in the Court of Appeals in two instances: review as a matter of right ("appeals") and review by permission of the reviewing court ("discretionary review"). RAP 2.1. When review is sought by discretionary review, a court order will be issued granting or denying review. RAP 2.2(e). A trial court retains full authority to act in a case before "review is accepted by the appellate court"

unless the appellate court directs otherwise. RAP 7.1. Once the Court of Appeals grants discretionary review, there is an order accepting review and the time for trial is tolled under CrR 3.3.

But there is normally not an order "accepting review" when review is sought by way of a notice of appeal. Instead, the normal procedure is to seek a stay pursuant to RAP 8.2. Several cases illustrate the proper two-step procedure.

In *State v. LaTourette*, 49 Wn.App. 119, 741 P.2d 1033 (1987), the defendant successfully moved to suppress key evidence in the State's case. The State first sought a finding from the trial court that the practical effect of the order was to terminate the case. The State then sought a stay of the proceedings in order to not infringe on the defendant's right to a speedy trial. Similarly, in *State v. Brown*, 64 Wn App. 606, 825 P 2d 350 (1992), after the trial court dismissed several aggravating circumstances, the State appealed the dismissals and sought a stay of the trial. Accord *State v. Reed*, 51 Wn App. 597, 754 P.2d 1041 (1988) (State sought stay of proceedings while appealing pretrial ruling).

These cases illustrate the two-step process for seeking government appeals. For the first step, the State must file a notice of appeal or a notice of discretionary review. If the notice of appeal is pursuant to RAP 2.2(b)(2), it must also obtain a finding from the trial court that the

practical effect of the suppression order is to terminate the case. This first step, therefore, takes place in the trial court. The second step is for the Court of Appeals to issue either an order accepting review or an order staying the proceedings. This second step, therefore, takes place in the appellate court.

In *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995) this Court held that technical violations of RAP 2.2(b) will be overlooked when the "violation is minor and results in no prejudice to the other party and no more than a minimal inconvenience to the appellate court." *Olson* at 319. But in this case, the procedure used by the State was neither minor nor non-prejudicial to Mr. Cox.

The rule violation in this case which skipped the second step was not minor. The State does not automatically get a stay of the proceedings by filing the notice of appeal. The rule requiring the State to seek and obtain a formal stay in the appellate court serves an important function: it helps to ensure the State is not using the appellate process to trample on the defendant's constitutional rights. As one recent Court of Appeals case emphasized, use of the appellate process to delay cases and gain procedural advantages can result in constitutional violations. *State v. Rich*, 160 Wn.App. 647, 248 P.3d 597 (2011) (prosecutor's repeated appeals caused a three year delay and violated defendant right to speedy

sentencing) Requiring the State to file a motion for stay and the Court of Appeals to independently rule on the motion helps to ensure all defendants are protected.

In Mr. Cox' case, both the State and the Court of Appeals assumed that the filing of the notice of appeal operated as a stay as a matter of law, but the rule says otherwise. There needs to be a separate action by the Court of Appeals either accepting review (in cases involving discretionary review) or staying the case (in direct appeals). Neither happened in this case and the violation was not minor.

The procedure used here also prejudiced Mr. Cox. He has been under the jurisdiction of the Clallam County Superior Court for 21 months now, the last 15 of which have been since his trial date. He is required to keep the court updated on his address, maintain contact with his attorney, and not possess or consume illegal drugs. Most important to Mr. Cox, he is prohibited from possessing firearms or other dangerous weapons, including weapons he would otherwise be allowed to possess, such as bows and arrows. Mr. Cox is an avid hunter and would normally be allowed to hunt with a bow, but his conditions of release prohibit that. Although Mr. Cox is out-of-custody, were he to violate his conditions of release, he could be remanded to custody and serve out the remainder of this appeal under lock and key, despite the fact that he has never been

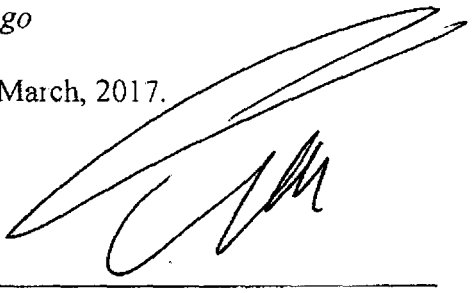
convicted of a crime. The decision of the State to attempt to terminate the prosecution while simultaneously keeping him under the court's jurisdiction for an indefinite period of time is highly prejudicial to Mr Cox.

Although RAP 2.2(b) and CrR 3.3 are clear that government appeals require affirmative action by both the trial court and the appellate court, this issue is not one this Court has directly addressed. It is, therefore, an issue of substantial public interest that has never been directly addressed by the Court. RAP 13.4(b)(4). It would provide important guidance to future litigants to know that the filing of the notice of appeal is insufficient and a separate motion for stay must be sought. This Court should grant review and reverse the Court of Appeals.

F. Conclusion

This Court should grant review and remand for an Order dismissing Mr. Cox' case for violation of his speedy trial pursuant to RAP 2.2, CrR 3.3 and *Barker v. Wingo*.

DATED this 1st day of March, 2017.



Thomas E. Weaver, WSBA #22488
Attorney for Respondent

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

STATE OF WASHINGTON, Respondent, vs. KEVIN COX, Defendant.	Court of Appeals No.: 48315-7-II DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On March 1, 2017, I e-filed the Petition for Review in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent via email to the Appeals Department of the Clallam County Prosecuting Attorney's Office (prosecutor@co.clallam.wa.us) through the Court of Appeals transmittal system.

On March 1, 2017, I deposited into the U S Mail, first class, postage prepaid, a true and correct copy of the Petition for Review to the defendant:

Kevin Cox
1137 Montana Street, Unit 306
Missoula, MT 59808

////

The Law Office of Thomas E Weaver
P.O Box 1056
Bremerton, WA 98337
(360) 792-9345

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

DATED: March 1, 2017, at Bremerton, Washington

Alisha Freeman

The Law Office of Thomas E. Weaver
P O Box 1056
Bremerton, WA 98337
(360) 792-9345

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Division Two

January 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. KEVIN WALLACE COX, Respondent.	No. 48315-7-II UNPUBLISHED OPINION

SUTTON, J. — The State of Washington appeals the trial court's order suppressing evidence following a *Franks*[1] hearing and effectively terminating the State's case against Kevin Wallace Cox. In addition to responding to the State's appeal, Cox argues that we should decline to consider the State's appeal and dismiss his charge with prejudice because the trial court violated his time-for-trial rights by failing to either dismiss the charge or stay the trial pending this appeal. We hold that (1) Cox has failed to show that there was a time-for-trial violation that precludes us from considering this appeal and (2) the trial court erred when it granted the suppression motion. Accordingly, we reverse the trial court's decision suppressing the firearm evidence following the *Franks* hearing and remand this matter to the trial court for further proceedings.

[1] *Franks v. State of Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

FACTS

I. BACKGROUND FACTS

On May 25, 2015, officers from the Forks Police Department contacted Kevin Cox after he had been released from the Forks Community Hospital. The officers were informed that Cox was suicidal, that he "possibly possessed a gun" at his apartment, and that he was walking back to his apartment at "Sarge's Place."[2] Clerk's Papers (CP) at 9-10 (FF 1-3). At some point, the officers were also informed that the manager from Sarge's Place had advised someone that Cox had a gun, that the manager believed it was in Cox's car, and that others from Sarge's Place were sitting on the car's trunk and had planned to try to "prevent [Cox] from getting into the trunk and accessing the gun."[3] CP at 25.

The officers attempted to contact Cox, but he was uncooperative. The officers eventually restrained Cox, and he was returned to the hospital. At the hospital, Cox told Officer Donald Ponton that he (Cox) had an air rifle and an air pistol in his car and that he had sold all of his real firearms. But when Ponton told Cox that he planned to get a warrant to search the car, Cox told Ponton there could be two 9 mm magazines in the car. After Ponton asked Cox whether he still had the guns that used the magazines, Cox responded that "he wasn't sure, but that they might be under the front seat." CP at 25. Cox also revealed that he was a convicted felon.

Ponton obtained a telephonic search warrant for Cox's vehicle to search for a firearm. During the search, the officers found a firearm in the vehicle.

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[2] Sarge's Place is a shelter for homeless veterans.

[3] It is not clear from the record when the officers obtained this information.

II. PROCEDURAL FACTS

A. *FRANKS* HEARING

The State charged Cox with second degree unlawful possession of a firearm. Cox moved to suppress the firearm evidence under *Franks*. At the *Franks* hearing, the trial court listened to a recording of Ponton's telephone conversation with the judge who issued the search warrant, reviewed Ponton's arrest report, and heard testimony from Ponton.

The recorded conversation with Judge Wood, who issued the search warrant, was played in court:

> OFFICER: Okay, so today we came in contact with an individual. His name is Kevin Cox. We got reports that he was suicidal and he had just left the hospital and [was] released from the hospital and was heading back to his apartment on foot. I [came] in contact with him, walking down the middle of the road, asked if he would speak with me. He was very agitated and refused to speak with me. So, I was walking behind him, trying to get him to talk. *We had information that he had a gun, possibly in his possession or at his apartment.* So, we walked behind him, trying to get him to comply or to talk to us and he wouldn't. Asked if he had any weapons and he brandished a knife that was open, opened blade knife. I warned him that I would tase him. He put his hands up and then reached for the knife and we tased him and took him into custody. He didn't assault me with the knife or anything like that. *We got him over to the hospital and after talking with him over at the hospital for awhile* [sic], *he said he has a gun in his car. He's got two air guns; an air rifle and an air pistol, but then later on he said he might have a 9 millimeter in his car as well.* He is a convicted felon, so he's unable to have those in his possession, I'm trying to get into his car. If I can get into it, it's [a] Toyota Corolla, bearing license plate, ARJ9170, any containers in there or the trunk, any areas that could contain rifles or guns. So, that's what I'm looking for.
>
> JUDGE: Okay, you've confirmed that [he has] a prior conviction, felony conviction?
>
> OFFICER: Yeah, Deputy Pursley has had dispatch run him. He is a felon.
>
> JUDGE: Okay and *he's admitted he's got a possible firearm in his vehicle then*, huh?

> OFFICER: *Yeah, he said it would be under the front seat, the front driver's seat, if he did have it. He said there are magazines in the trunk and then in the trunk there would be a gun.*[4]
>
> . . . .
>
> JUDGE: Okay, well, I find there's probable cause for it, so you can sign my name, George Wood, to the warrant.

Verbatim Report of Proceedings (October 28, 2015) (VRP) at 35-37 (emphasis added).

Ponton's arrest report describes the information the officers had received from the manager of Sarge's Place and Ponton's conversations with Cox at the hospital. In this report, Ponton stated that Cox had first told him that he had an air rifle and an air pistol in his car and that he had sold his "regular firearms." When Ponton told Cox that he planned to get a warrant, Cox told Ponton there could be two 9 mm magazines in the car. After Ponton asked Cox whether he still had the guns that used the magazines, Cox responded that "he wasn't sure, but that they might be under the front seat."

Ponton's testimony was consistent with his statements in his arrest report. Ponton testified that Cox initially told him that there were two air guns in his car and that he thought he "might have sold the other regular guns," but that Cox eventually said he "might have some 9 millimeter magazines and that if he did have the guns, it would be under the front seat." VRP at 12. Ponton then testified:

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[4] The "draft" transcript prepared by the Forks Police Department differs from the Verbatim Report of Proceedings of the recording as it was played in court. The "draft" states, "Yes, he said it would be under the front seat front driver seat if he did have it he said there are magazines in the truck [sic] and in the front seat so that would be it[.]" CP at 23. The actual recording is not part of our record, so we cannot verify which version is correct.

> Referring, in my line of thinking, I'm thinking 9 millimeter magazines don't fit in air rifles, so when [he] said the guns would be under the front seat, I assumed that there were 9 millimeter pistols under the front seat and then that's—basically, that's what I based my probable cause for the search warrant off of.

VRP at 12.

The State asked Ponton, "Okay and in your remembrance, is that your basis for the probable cause is that what you believed you said to the judge in your asking for a search warrant?" VRP at 13. Ponton responded,

> Yeah, I told the judge that we had prior information that he had a gun and that he was gonna hurt himself, he's gonna kill himself and that *he did tell me that he had a gun in his car and that it would be under the front seat or possibly had a gun in in his car*, it'd be under the front seat.

VRP at 13 (emphasis added).

On cross examination, Ponton admitted that he did not know why the manager from Sarge's Place thought Cox had a gun in his car. He also admitted that Cox had told him that he had sold all of his "regular" firearms. VRP at 21.

Cox's counsel then questioned Ponton about what he said to Judge Wood. Ponton admitted he had not told Judge Wood that Cox said he had sold all of his "actual firearms." VRP at 25. Ponton also admitted he told Judge Wood that Cox said he might have a 9 millimeter in his car. Cox's counsel then asked how Ponton responded when Judge Wood asked him if Cox "has a possible firearm in his vehicle then?" VRP at 25. Ponton stated that Judge Wood used the word "possible," and that he (Ponton) responded, "Yes." VRP at 25-26.

Cox's counsel then asked Ponton if he had ever clarified that Cox never actually said he had a gun in his car and that he said only that he might have guns in his car. Ponton responded, "I

think that's what—wasn't that just what that said? I thought that that's what that said, is that he said there are possible guns under the seat." VRP at 26.

Cox's counsel then asked Ponton if he had testified earlier that he had assumed there was a 9 mm pistol under the front seat because of what Cox said about the magazines. Ponton responded, "Yes, I assumed it would be a 9 millimeter." VRP at 26. The following discussion then occurred:

> [Defense Counsel]: Okay, so when you said that he has a gun in his car and also the air pistol and the air rifle, that statement was based on your assumption that he had a gun because he told you he had the 9 millimeter magazines?
>
> [Ponton]: Yes, as well as, that he said that if he had them, the gun, referring to the guns, if he had the guns it [sic] would be under the front seat.

VRP at 26.

The trial court then questioned Ponton about his statement to Judge Wood that Cox said he had a gun in his car. The trial court referred to the portion of the telephonic affidavit stating, "[H]e said that he has a gun in his car, two air guns; and air rifle and pistol, and then later on said he might have a 9 millimeter in his car." VRP at 30. The court then asked, "So, when you said the phrase, 'He said that he has a gun in his car,' and then you describe two air guns; air rifle and air pistol. I guess I'm asking you, why you use the phrase, 'that he said he has a gun in his car.'" VRP at 30.

Ponton responded, "Because he said that he may have the guns under his front seat and so—the pistol under his front seat and so I said it that way. I didn't—it wasn't a—I don't know why other than that, that he said he had it under his front seat or that he may have it under his front seat." VRP at 30. Ponton then stated, "I thought I later clarified that." VRP at 31.

The court responded:

> Yeah, and I'm gonna go on with that, because later then even Judge Wood, who responded to you and asked a question in the affidavit. He said, quote, "So, he admitted that he has a possible firearm in his vehicle then, huh?" unquote. And then you made a response, "He said it would be under the front seat, front driver seat, if he did have it."
>
> Okay, so that's a correct representation of Judge Wood's question to you and then you said, "If he did have it."

VRP at 31. Ponton responded, "Right." VRP at 31.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial court suppressed the firearms and issued written findings of fact and conclusions of law:

FINDINGS OF FACT

> 1. Kevin Cox was contacted by Forks Police Officers after they received a report that Mr. Cox had been released from the Forks Hospital, that he was suicidal and that he possibly possessed a gun. At the hearing, it was not clear who was the source of this information; and in the affidavit of Officer Ponton to Judge Wood by telephone on May 25, 2015, at 1:19 a.m., the Officer did not indicate the above but simply said that he had reports that Cox is released from the hospital, that he was suicidal and headed back to his apartment on foot.
>
> 2. Upon the officer's contacting Cox, Cox did not wish to speak with the officers, that he was headed home and was close to "Sarge's Place" where he resided and that he was on his cell phone talking to his mother. Mr. Cox did not threaten the officers nor assault them.
>
> 3. Officer Ponton and Officer Pursley continued to walk behind him to try to get him to talk to them. Ponton indicated he had information that Cox might possibly have a gun in his possession or at his apartment, but where that information came from was not apparent in the affidavit. While they walked behind him trying to "get him to comply or talk to us," he was asked if he had a weapon. He said, "What do you think, I'm a vet" and then "displayed a knife" pursuant to that request. In the affidavit to the Judge, Officer Ponton used the phrase "he brandished a knife" but then in testimony and in his police report indicated in response to the

question about weapons that he pulled a knife from his pocket, held it in the air and then put the knife back in his pocket.

4. Despite having never assaulted or threatening the officers and the officer admitting in the affidavit that "he didn't assault me with the knife or anything like that," Mr. Cox was tased, put in a choke hold and taken back to the hospital from which he had just been released.

5. Officer Ponton in testimony indicated that a Kep Kepler from Sarge's Place said that he thought Mr. Cox had a gun and persons from Sarge's were sitting on the trunk of Mr. Cox's car to ensure that he could not access his car when he got home. This information was not included in the information provided to the magistrate in the affidavit.

6. In the affidavit, Officer Ponton stated, "we got him over to the hospital and uh after talking to him at the hospital for a while he said he has a gun in his car, two air guns, an air rifle and air pistol and then later on said that he might have a 9mm in his car as well [as] he is a convicted felon."

7. In testimony at the hearing, Officer Ponton acknowledged that Mr. Cox never said "that he has a gun in his car." In fact when asked if he had any guns in the car, Mr. Cox stated that he had an air rifle and an air pistol; in regard to firearms, he said "no I sold them all"; and in regard to why the officer told the magistrate that "he said that he has a gun in his car," Officer Ponton testified that he assumed this because on further questioning at the hospital Mr. Cox after being told by the officer that he was getting a search warrant for Mr. Cox's car that Cox indicated there might be two 9mm magazines under the front seat.

8. *In the affidavit to the magistrate, Office Ponton specifically stated "then later on he said he might have a 9mm in his car."* Officer Ponton indicated he said this because he assumed anyone who still had magazines would still have a weapon.

9. *When the magistrate (Judge Wood) questioned the Officer during the telephonic affidavit whether Cox admitted he had a firearm in his vehicle, Officer Ponton said yes.*

10. Throughout the hearing, there was no testimony from Officer Ponton that Mr. Cox said he had a firearm in his car.

11. *The magistrate found probable cause for a search of the Toyota Corolla at 1:23 a.m. on May 25th based on Officer Ponton's assertions to the magistrate that Cox said he had a gun in his car and nowhere in the taped affidavit for search warrant was there any information for the magistrate as to any statements from*

witnesses or Kep Kepler or any hospital personnel supporting the Officer's conclusionary statement in the taped affidavit that "we had information that he had a gun possibly in his possession or at this apartment."

CONCLUSIONS OF LAW

. . . .

In the case at bar the defense maintains that the affidavit to obtain the warrant contains false and conclusionary statements. *In this case, the Officer in his affidavit stated at least on two occasions within the brief taped statement to the magistrate that Mr. Cox said he had a gun in the car.* Based on Officer Ponton's own testimony, what he maintain [sic] to the Judge in the affidavit was not true. It is argued by the State that this was not an intentional or reckless falsehood. The case of *State v. Stephens*, 37 Wn. App. 76[,] 67[8] P.2d 832 (1984)[,] is helpful in this analysis. In that case, officers in their affidavit for search warrant state that they "observed" the defendant watering marijuana plants despite the actual facts being that the officers saw the defendant go into an area where marijuana plants were and the police later determined that they had been watered. The truth is that no actual observation took [place]. In *Stephens* then this information needed to be excised from the warrant because "When the Officer neglected to list the facts and circumstances which led to that conclusion, the Officer usurped the function of the detached and impartial magistrate. This he cannot do. The untrue statement of the affiant in that case, that the defendant was actually seen watering the plants, was the single most pervasive fact in the affidavit that would establish probable cause to issue the warrant." *In the case at bar, the single most pervasive fact in the affidavit that the Officer recited to the magistrate was that on at least two occasions in his statement he claimed that Mr. Cox admitted that he has a gun in his car. No actual statement was made by Mr. Cox to allow the Officer to make that rather specific conclusion and the remedy for such a misstatement with reckless disregard of the facts is to excise the offending language. State v. Sweet*, 23 Wn. App. 97, 596 P.2d 1080 (1979). In the case at bar, the defendant was entitled to a hearing because there was an initial showing of a misrepresentation by the officer and *in testimony before the court Officer Ponton admitted that his conclusions that Cox "said he had a gun in his car" were false. The magistrate issued the warrant based on at least two times in the affidavit where the officer maintained that Mr. Cox admitted that he had a firearm in the vehicle when those statements are clearly untrue and were made in reckless disregard of the truth and were not the actual statements and underlining* [sic] *circumstances that would be needed to support probable cause.* After the court excises these conclusionary statements put forward by the officer to the magistrate, this court cannot find that after excising these reckless conclusions that there was enough probable cause contained in the affidavit for search warrant to justify it.

> Further, in reviewing the validity of any warrant we may consider only information before the magistrate at the time the warrant was issued. *Seattle v. Leach*, 29 Wn. App. 81, 627 P.2d 159 (1981). The information provided by the officer during testimony concerning bystanders or other persons at Sarge's Place or the statements of Kep Kepler cannot be include in this analysis because they were not presented to the magistrate at the time of the issuance of the warrant. As stated in *State v. Stephens*, "the integrity of the judicial process demands at the very least that the information provided be truthful if the magistrate's authority is to be respected and appropriately fostered. To hold otherwise would undermine the entire warrant procedure."
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> . . . .
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> Therefore, the trial court in excissing [sic] what the court sees as false material in the search warrant affidavit finds that the search warrant should be voided and will exclude the fruits of the search of the Toyota Corolla that was subject of this warrant.

CP at 9-15 (emphasis added). The trial court later issued an order clarifying the findings of fact and conclusions of law on the *Franks* hearing, stating that the November 4, 2015 decision "has the effect of suppressing the firearm from evidence and therefore has the practical effect of terminating the State's case." CP at 46.

The State appeals the trial court's ruling granting the *Franks* motion and suppressing the firearm.

ANALYSIS

I. TIME-FOR-TRIAL ISSUE

As a preliminary matter, Cox argues that we should decline to consider the State's appeal and dismiss the unlawful possession of a firearm charge with prejudice because the trial court violated his time-for-trial rights by failing to either dismiss the charge or stay the trial pending this

appeal. The State responds that the time for trial is tolled when the appeal is accepted for review. We agree with the State.

Generally, a defendant who is not detained in jail shall be brought to trial within 90 days of the commencement date.[5] CrR 3.3(b)(2). The initial commencement date is the date of arraignment. CrR 3.3(c)(1). But the commencement date can be reset upon the occurrence of certain events. The relevant event here is the acceptance of review of the State's appeal.

CrR 3.3(c)(2) provides:

> *On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero.* If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.
>
> . . . .
>
> (iv) Appellate Review or Stay. *The acceptance of review* or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(Emphasis added). Cox does not assert that the time-for-trial period expired before we accepted review of the State's appeal. Thus, he does not establish a time-for-trial violation.

Citing *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995), Cox does, however, appear to assert that the commencement date does not reset under CrR 3.3(c)(2) unless the trial court dismisses the charge without prejudice or stays the trial date. But he cites no authority establishing that the trial court must stay the trial date to be entitled to the benefit of CrR 3.3(c)(2). Nor does *Olson* support the conclusion that the trial court must dismiss the charge to trigger CrR 3.3(c)(2).

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[5] It appears that Cox was not in jail following the *Franks* hearing.

In *Olson*, "[t]he State filed a motion, affidavit and order of dismissal, apparently so the State could appeal the suppression order under RAP 2.2(b)(1)." 126 Wn.2d at 317 (citation omitted). The trial court granted the motion and dismissed the charges. *Olson*, 126 Wn.2d at 317. The State then appealed the dismissal, which was based on the trial court's suppression of evidence. *Olson*, 126 Wn.2d at 317-18. Far from stating that dismissal of the charge was required in order to obtain review, our Supreme Court questioned whether dismissal of the charge in order to obtain review under RAP 2.2(b)(1) was necessary given that RAP 2.2(b)(2) "allows [for] an appeal of a pretrial suppression order 'if the trial court expressly finds that the practical effect of the order is to terminate the case.'" *Olson*, 126 Wn.2d at 317 n. 1 (quoting RAP 2.2(b)(2)). Thus, *Olson* does not support Cox's claim that the trial court was required to dismiss the case before the State could benefit from the new commencement date under CrR 3.3(c)(2).

Cox also asserts that although the *Olson* court stated that courts will overlook minor technical violations of the rules of appellate procedure if there is no prejudice to the other party and only minimal inconvenience to the court, the procedural violation here was not minor and resulted in prejudice to Cox because he remained under conditions of release. But the *Olson* court was commenting on the State's failure to append the suppression order it was attempting to appeal to its notice of appeal and was not commenting on the proper way to appeal an order suppressing evidence and preserve time for trial. And Cox does not assert that the State failed to append the correct document to its notice of appeal or that the notice of appeal was somehow not adequate to allow for acceptance of review.

Because Cox fails to show a time-for-trial violation, we now turn to the State's appeal.

II. SUPPRESSION ORDER

The State argues that the trial court erred when it (1) found that Ponton "stated in the affidavit for the warrant, in unqualified terms, that Mr. Cox admitted there was a firearm in the vehicle,"[6] (2) concluded that Ponton made these statements with reckless disregard for the truth, and (3) concluded that Judge Wood relied on the alleged false statements to find probable cause.[7] Br. of Appellant at 15-16. Even presuming that Ponton stated in the warrant affidavit that Cox admitted there was a firearm in the vehicle and that this statement was made in reckless disregard

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[6] This argument relates to the trial court's findings of fact 8 and 9, and portions of the trial court's conclusions of law, to which the State assigns error. Br. of Appellant at 1-4 (Assignments of Error 1-6). Throughout the conclusions of law, the trial court stated that Ponton told Judge Wood that Cox said he had a gun in his car at least two times. These statements are more properly characterized as factual findings, so we consider them as such here. *State v. Marcum*, 24 Wn. App. 441, 445, 601 P.2d 975 (1979) (findings of fact mischaracterized as conclusions of law are treated as findings of fact).

Cox asserts that the State did not assign error to finding of fact 7, so the trial court's finding that Ponton told Judge Wood that Cox said he had a gun in his car is a verity on appeal. Br. of Resp't at 6. But finding of fact 7 addresses why Ponton believed that Cox had a gun in his car and, although it mentions the trial court's belief that Ponton said that Cox had a gun in his car, is not an express finding that Ponton actually said this. Findings 8 and 9, and portions of the conclusions of law contain the finding of fact at issue here. Thus, we do not consider the State's failure to assign error to finding of fact 7 as a verity establishing that Ponton said that Cox had a gun in his car.

[7] Cox asserts that the State is also challenging the portion of finding of fact 11 in which the trial court found that there was a gun "possibly in [Cox's] possession or at his apartment." Br. of Resp't at 9. Although the State assigns error to finding of fact 11, it does not argue that this portion of the finding was incorrect. *See* Br. of Appellant at 4 (Assignment of Error 7). Additionally, Cox concedes that this potential error was not critical to Judge Wood's decision. Thus, we do not address this portion of finding of fact 11.

for the truth, we hold that the remaining statements supported Judge Wood's decision to issue the warrant and, therefore, the trial court erred when it concluded that the search warrant was invalid.[8]

If a trial court determines that a search warrant affidavit contains deliberate material falsehoods or that there were deliberate material omissions and that these falsehoods or omissions were made in reckless disregard for the truth, then the trial court must excise any material falsehoods and insert any material omissions, and then determine whether the altered affidavit is sufficient to establish probable cause. *State v. Clark*, 143 Wn.2d 731, 753, 24 P.3d 1006 (2001) (citing *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992)); *see also State v. Chenoweth*, 160 Wn.2d 454, 469, 158 P.3d 595 (2007). Here, even if we presume that (1) Ponton stated that Cox had admitted he had a gun in his car and (2) Ponton made this false statement with reckless disregard for the truth, and after the offending information is excised, the search warrant application established probable cause.

> Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.

State v. Maddox, 152 Wn. 2d 499, 505, 98 P.3d 1199 (2004) (citations omitted). Here, the remaining facts would have shown that Cox had stated there were 9 mm magazines in the vehicle and that there was possibly a firearm in the vehicle under the front seat. Based on the presence of

[8] Cox appears to also argue that there was a material omission in Ponton's statement to Judge Woods because Ponton failed to tell Judge Woods that Cox had initially stated he sold all of his guns. Br. of Resp't at 8. But the trial court did not find that this was a material omission and Cox has not filed a cross appeal, so we do not address this argument.

the magazines and Cox's admission it was possible there was a firearm in the vehicle, Judge Wood could have reasonably inferred that there was a probability that a gun in Cox's vehicle, which, given Cox's prior felony conviction, was a crime. Because the facts supported probable cause even with the challenged statements excised, the superior court erred when it granted the *Franks* motion and suppressed the firearm.

Accordingly, we reverse the trial court's ruling granting Cox's *Franks* motion and suppressing the firearm evidence and remand for further proceedings.

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.

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, P.J.

J.
LEE, J.