No. 48219-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

HOLLIS BLOCKMAN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 14-1-04093-0
The Honorable Stanley Rumbaugh, Judge

OPENING BRIEF OF APPELLANT

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2. Where officers who request permission to enter a residence in order to question its occupants and conduct a warrantless search are required to inform the occupants that they may refuse consent or limit the scope of the search, and where the officer in this case testified that he entered the apartment to question the occupant but also that he always conducts a search of any residence he enters to ensure his safety, did the trial court err when it concluded that the officer was not required to advise the occupant that she could refuse consent to his entry into and search of her apartment? (Assignments of Error 1 & 3)

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III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Hollis Blockman with one count of unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401), within 1,000 feet of a school bus stop (RCW 69.50.435). (CP 35) The trial court denied Blockman's CrR 3.6 motion to suppress, and ruled that his custodial statements were admissible under CrR 3.5. (CP 13-23; TRP2 17-21)[1]

[1] The consecutively paginated pretrial and trial transcripts labeled volumes I thru VII will be referred to as "#RP." The remaining transcripts will be referred to by the date of the proceeding contained therein.

A jury found Blockman guilty as charged. (TRP5 3-4; CP 72-73) The trial court sentenced Blockman to a 57-month term of confinement under the Special Drug Offender Sentencing Alternative. (TRP7 23; CP 104) The court imposed mandatory legal financial obligations and also ordered Blockman to pay $250.00 reimbursement for defense costs. (TRP7 23; CP 102) This appeal follows. (CP 224)

B. SUBSTANTIVE FACTS

1. Facts from CrR 3.6 Hearing

Officer Peter Hayward and his partner responded to a report of a robbery at a Tacoma area apartment. (1RP 24, 36; CP 14) He spoke first to the victim, then went to the apartment where the victim claimed the crime occurred. (1RP 25, 36-37) Patricia Burton answered the door, and said something to the effect of, "I can't believe she called the cops." (1RP 25)

According to Officer Hayward, Burton immediately invited them into her apartment. (1RP 26) Once inside, Officer Hayward told Burton that he was investigating a report of a robbery and told her that he was going to walk through the apartment to see who else was present. (1RP 26, 42-43) Burton told Officer Hayward that there were two people in a bedroom and, according to

Hayward, that she "had nothing to hide" and he could "search the whole apartment." (1RP 26, 41-43) Officer Hayward then conducted what he described as a "protective sweep" of the apartment, to make sure there were no other people who could pose a threat to officer safety. (1RP 26-27)

In one of the bedrooms, Officer Hayward saw a man and a woman sitting on a couch engaged in what he believed was a drug transaction. (1RP 27) The man, Hollis Blockman, was taken into custody. (1RP 30) Officer Hayward returned to the living room and asked Burton's permission to do a more thorough search of her apartment. (1RP 29) Officer Hayward then explained to Burton that she did not have to consent to a search of her apartment and that she could also limit the scope of any permitted search. (1RP 29) Burton gave the officers permission to search the entire apartment. (1RP 29)

2. Facts from Trial

Officer Hayward testified that Blockman and an unidentified woman were sitting facing each other on an L-shaped couch. (2RP 81) Blockman was holding a baggie with one hand and reaching into it with the other hand. (2RP2 81, 82; 3RP 7) The woman was leaning towards Blockman and appeared to be placing a $20 bill

onto the coffee table. (2RP 81; 3RP 7-8) Officer Hayward made his presence known, and Blockman immediately put his hand down and out of view. (2RP 82) Officer Hayward told Blockman to show his hands. (2RP 82) Blockman complied, and Officer Hayward saw that Blockman was still holding the baggie, which appeared to contain crack cocaine. (2RP 82)

The substance in the baggie was subsequently tested and identified as crack cocaine. (3RP 51; 4RP 32) Small rocks of crack sell for about $20.00 apiece. (4RP 34) Blockman was arrested and booked, and during a booking search the officers found $244.00 in cash inside his sock. (3RP 9, 14) The State also presented testimony that a school bus stop is located at an intersection about 666 feet from Burton's apartment. (3RP 15, 18; 4RP 41)

IV. ARGUMENT & AUTHORITIES

A. THE SEARCH OF THE APARTMENT VIOLATED STATE AND FEDERAL PRIVACY PROTECTIONS BECAUSE THE PROTECTIVE SWEEP EXCEPTION DID NOT APPLY AND BECAUSE BURTON'S "CONSENT" WAS NOT INFORMED AND VOLUNTARY.

Article I, section 7 of the Washington Constitution, provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The right to privacy

includes the right to be free from warrantless searches, which are "unreasonable per se." State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996).[2]

Blockman moved to suppress the baggie of cocaine discovered by Officer Hayward during the "protective sweep" of Burton's apartment.[3] (CP 16-23; 2RP 9-13) Blockman argued that the search was not a valid protective sweep, and that Officer Hawyard was obligated to inform Burton of her right to refuse consent or limit the scope of a search (the so called Ferrier warnings) before he conducted any sweep or search. (2RP 9-12)

The trial court denied the motion. The court did not enter any written finding or conclusions, but made the following oral ruling:

> Ferrier prohibits police officers or law enforcement from searching a residence for evidence of a crime when a homeowner might feel a coercive force based on the presence of law enforcement or under circumstances where the resident who is inviting the search is unaware of their right to keep the police from searching, to curtail the scope of the search, to otherwise order that the search be stopped

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[2] Both the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. But article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections. See e.g. State v. Hinton, 179 Wn.2d 862, 868, 319 P.3d 9 (2014).

[3] The parties agreed that Blockman automatically had standing to challenge the search because he was charged with a possessory offense. (2RP 9)

on request, and that is different than a protective sweep. And protective sweeps have always troubled this Court. However, I think that under the current status of Fourth Amendment law and Article I, Section 7 law, in Washington State protective sweeps of residences are an accepted exception to the warrant requirement.

The seminal case is Maryland vs. Buie, B-u-i-e, 494 United States 325. It's a 1990 case. The familiar ruling in Buie states that, "Law enforcement may – " and I'm quoting from the case – "without probable cause or reasonable suspicion look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."

In this case we have a small apartment, a short hallway, and an officer that has been notified there are other people present in a home where a victim alleged that the victim was robbed. So looking through the bedroom door into the bedroom is different than rifling through drawers or looking in locations that no person could hide in. That is, I think, a legitimate scope of a protective sweep.

The requirement is immediate adjacency and the area from which an attack could be immediately launched. Both of those requirements of Buie are met. So we have a cursory inspection here of short duration into an immediately adjacent room, and I think that Buie is satisfied for Fourth Amendment purposes.

…The fact that Ms. Burton told officers there were others present in the apartment certainly does raise a reasonable suspicion to believe that there might be persons present who pose a danger to the officers.

[T]he Washington Courts have adopted the essential reasoning of Buie in State vs. Sadler, which is 147 Wn. App. 97….

[W]hile Article I, Section 7 allows search of a dwelling only when done under the authority of law, that authority is not restricted only to a warrant. The authority of law present here is as described in the

> Buie warrant exception and as adopted by our courts in the cases adopting the Buie rationale or State vs. Sadler and State vs. Smith. So I don't believe there was a search.
>
> Therefore, Ferrier becomes somewhat irrelevant to the analysis. I believe that this was a valid protective sweep. Consequently, based on this record, Officer Hayward saw a drug transaction or what he believed in his experience to be a drug transaction taking place in plain view, and he was entitled thereafter to detain Mr. Blockman.

(TRP2 17-20)[4]

The trial court's ruling is incorrect for several reasons.[5] First, the trial court misunderstood and misapplied the "protective sweep" exception to the warrant requirement. In Maryland v. Buie, the United States Supreme Court held that the Fourth Amendment permits protective sweeps. 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). "**While making a lawful arrest**, officers may conduct a reasonable 'protective sweep' of the premises for security purposes." State v. Hopkins, 113 Wn. App. 954, 959, 55

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[4] A trial court must enter written findings and conclusions following a suppression hearing. CrR 3.6(b). Those findings and conclusions are generally considered necessary for appellate review. State v. Head, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). But the appeal court will nevertheless review the decision when the trial court clearly and comprehensively states the basis of its opinions in its oral ruling. State v. Cruz, 88 Wn. App. 905, 907-09, 946 P.2d 1229 (1997); State v. Smith, 68 Wn. App. 201, 208, 842 P.2d 494 (1992).

[5] The facts relevant to the motion to suppress were largely undisputed. The trial court's legal conclusions, as set forth in its oral ruling, are reviewed de novo. *See* State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

P.3d 691 (2002) (emphasis added) (citing Buie, 494 U.S. at 334-35). The scope of such a sweep is limited to a "cursory visual inspection of places where a person may be hiding." Id. "If the area immediately adjoins **the place of arrest**, the police need not justify their actions by establishing a concern for their safety." Id. (emphasis added). But when a sweep extends beyond the immediate area, "'there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those **on the arrest scene**.'" Id. (emphasis added) (quoting Buie, 494 U.S. at 334). The protective sweep may last "no longer than is necessary to dispel the reasonable suspicion of danger." Buie, 494 U.S. at 335-36.

Here, Officer Hawyard did not arrest anyone, or even indicate an intent to arrest anyone, before the protective sweep. Thus, the threshold requirement of a protective sweep was not met under the circumstances of this case. Rather, Officer Hayward conducted the sweep before the arrest, and it was the cocaine discovered during the sweep that led to Blockman's arrest.

Furthermore, the State presented no testimony to support

the trial court's conclusion that there was a "reasonable suspicion to believe that there might be persons present who pose a danger to the officers." (2RP 19) Officer Hayward responded to the report of what he described as a "strong-arm robbery." (1RP 24) Other than that vague description, there was absolutely no testimony that the alleged victim saw or had reason to believe that there were weapons or dangerous people inside the apartment. There is nothing in the record to show any valid concerns either for officer safety or the safety of others that might have authorized a protective sweep of the apartment.

Officer Hayward testified that he "always do[es] a protective sweep of a location … to make sure that there's no one hiding or anything like that." (1TRP 26-27; 49) But "[a] general desire to make sure that there are no other individuals present is not sufficient to justify an extended protective sweep." State v. Sadler, 147 Wn. App. 97, 126, 193 P.3d 1108 (2008); see also Hopkins, 113 Wn. App. at 960-61.

The sweep was not conducted after a lawful arrest and there were no facts presented at the hearing to support a belief that dangerous individuals were present in Burton's apartment. Accordingly, the State failed to establish that Officer Hayward's

search was justified under the "protective sweep" exception to the warrant requirement.

Consent is another narrowly drawn exception to the warrant requirement. State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998) (citing Hendrickson, 129 Wn.2d at 72). The State has the burden of proving that the defendant's consent to a search was valid by clear and convincing evidence. State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990); Ferrier, 136 Wn.2d at 111. To show that consent to a search is valid, the prosecution must prove that the consent was freely and voluntarily given. See State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003) (citing Bumper v. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L.Ed.2d 797 (1968); State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998)).

In Ferrier, the Washington Supreme Court acknowledged that to some degree it is inherently coercive whenever a police officer requests consent to enter or search a home without a warrant. 136 Wn.2d at 115. The Court noted that the only way to protect the right against warrantless searches of a home is to require police to inform citizens of their right to refuse consent. 136 Wn.2d at 116. "If we were to reach any other conclusion, we would

not be satisfied that a home dweller who consents to a warrantless search possessed the knowledge necessary to make an informed decision. That being the case, the State would be unable to meet its burden of proving that a knowing and voluntary waiver occurred." 136 Wn.2d at 116-17. Accordingly, the Ferrier Court held that "article I, section 7 is violated whenever the authorities fail to inform home dwellers of their right to refuse consent to a warrantless search." 136 Wn.2d at 118.[6]

Ferrier warnings are not required when an officer simply seeks to enter a home merely to question or gain information from an occupant. State v. Khounvichai, 149 Wn.2d 557, 566, 69 P.3d 862 (2003). But Officer Hayward testified that they "always do a protective sweep of a location." (TRP1 26, 46) Thus, Officer Hayward **knew** before he asked permission to enter that he would conduct a sweep of Burton's apartment. His intention was not simply to enter and question Burton; his intention was to enter and question **and** search. Thus, Ferrier warnings were required.

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[6] When police officers request permission to enter a citizen's home to conduct a warrantless search they must, prior to entering the home, inform the person from whom consent is sought that he or she: (1) may lawfully refuse consent to the search; (2) may revoke, at any time, the consent that they give; and (3) may limit the scope of the consent to certain areas of the home. Ferrier, 136 Wn.2d at 118-19. The failure to provide these warnings prior to entering the home vitiates any consent given thereafter. Ferrier, 136 Wn.2d at 118-19.

Even if Officer Hayward's only intention in entering the apartment was to question Burton, his subsequent sweep was still an improper search because Burton's consent was not truly voluntary. The State has the burden of demonstrating the voluntariness of the consent. State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). Whether consent was voluntarily given is generally determined by evaluating "the totality of the circumstances which includes '(1) whether Miranda warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right to consent.'" Bustamante-Davila, 138 Wn.2d at 981-92 (quoting State v. Shoemaker, 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975)).

According to Officer Hayward, Burton repeatedly said she had nothing to hide and that he could search her entire apartment. (TRP1 28, 39-40) However, Officer Hawyard had "**told** her, '**I'm going to take a look** to make sure there's no one else here.'" (TRP1 26; emphasis added) Officer Hayward did not request permission to search, instead he presented the search as something that was absolutely going to happen. Burton therefore would have no reason to believe that she could refuse to allow the

search. Burton's "consent" was obtained only after she was informed of Officer Hayward's intentions and misinformed of his authority. Her "consent" was obtained under circumstances that even the most informed citizen would find coercive. Her response to Officer Hayward's statement that he intended to search—that she had nothing to hide and they could search the entire apartment—simply cannot be seen as voluntary and informed consent.

Under the trial court's and Officer Hayward's interpretation of the State and Federal constitutions, any resident who gives a police officer permission to enter their home in order talk is also unwittingly and unknowingly granting the officer permission to conduct a walk-through search of their home. Neither the Fourth Amendment nor article I, section 7 grant police officers such broad authority. There simply must be an exception to the warrant requirement, or consent given after being fully informed of the right to refuse such consent, before a police officer may invade the private spaces of a person's home. Neither a valid exception nor a valid consent were present in this case, and the sweep search was improper.

When an unconstitutional search occurs, all subsequently

uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). The State failed to show that a valid exception to the warrant requirement applied and the search was therefore unconstitutional. Accordingly, the baggie of cocaine should have been suppressed, and Blockman's conviction must be reversed.

B. BLOCKMAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO ARGUE OBVIOUSLY MERITORIOUS GROUNDS FOR SUPPRESSION AND WHEN HE FAILED TO OBJECT TO THE PROSECUTOR'S MISSTATEMENT OF THE LAW.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings

would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. Trial counsel's representation in this case was deficient and prejudicial in two ways.

1. Trial counsel's failure to argue for suppression on grounds that would have been successful was both deficient and prejudicial.[7]

Trial counsel moved to suppress evidence discovered during a search of Burton's apartment on several grounds. Counsel first argued that Ferrier warnings are required any time an officer enters a home to investigate a crime. (CP 20-21; 2RP 10-11) But Washington case law clearly holds that Ferrier warnings are not required when police seek permission to enter a home simply to

[7] Trial counsel made similar but not identical arguments in support of the motion to suppress below. The argument in this section is therefore included in the event that this Court finds that the grounds argued on appeal are waived because they were not specifically argued below.

question an occupant or investigate the report of a crime.[8] Though counsel did argue that Ferrier warnings should have been given in this case, he did not base that argument on a correct statement of the law.

Next, counsel argued that the protective sweep was a pretext, and that Officer Hayward was actually hoping to find Blockman engaged in drug transactions. (CP 22-23; 2RP 12-13) Officer Hayward testified that he was aware that there may have been a drug transaction conducted in Burton's apartment, but that his intent at the time he entered was to investigate the robbery only. (1RP 47) Nevertheless, whether or not the protective sweep was a pretext is irrelevant because, as noted above, a protective sweep exception only applies when an arrest is made. Trial counsel failed to bring this basic requirement to the attention of the trial court.

As argued in detail above, the search of Burton's apartment violated State and Federal constitutional privacy protections because it was not a valid protective sweep and because Burton did not give her fully informed consent to a search. Trial counsel's failure to present accurate law, and his failure to advance grounds

[8] See e.g. Khounvichai, 149 Wn.2d at 565-67 (specifically rejecting the invitation to apply the Ferrier rule whenever a police officer requests entry into a home to speak to a resident in the course of a criminal investigation).

for suppression that were clearly supported by the facts and the law, fell below professional standards. Counsel's failure was prejudicial because his motion would have been successful had he made the legally and factually correct arguments to the court.

2. Trial counsel's failure to object to the prosecutor's misstatement of the law during closing arguments and failure to request a curative instruction was both deficient and prejudicial.

The State charged Blockman with unlawful possession of a controlled substance with intent to deliver, which requires proof that Blockman "intended to deliver the controlled substance[.]" State v. Davis, 79 Wn. App. 591, 594, 904 P.2d 306 (1995); RCW 69.50.401. The jury was instructed that to convict Blockman of this charge, it must find beyond a reasonable doubt that: (1) "the defendant possessed a controlled substance," and (2) that "the defendant possessed the substance with the intent to deliver[.]" (CP 53) The instructions also defined the term delivery as "the actual or constructive or attempted transfer of a controlled substance from one person to another." (CP 60)

During closing statements, Blockman's counsel argued that the evidence could be easily interpreted as showing that the woman was delivering the controlled substance, not Blockman.

Counsel reminded the jury that the woman was observed leaning forward while holding a $20.00 bill, but that perhaps she was taking the $20.00 bill from Blockman and not giving it to him. Similarly, counsel noted that Blockman was observed reaching into the baggie, but that perhaps he was choosing a rock for himself and not choosing a rock to give the woman. (4RP 74-75, 77)

During rebuttal, the prosecutor made the following statement:

> There are some red herrings that came up here, and the State is not saying that just because you're a male and only drug dealers are males. I'm sure there are very successful female drug dealers out there too. That's not the issue. **The issue is the Defendant was interrupted while conducting a drug transaction**.

(4RP 78, emphasis added) The prosecutor implied that it was irrelevant whether Blockman was the purchaser or the seller, as long as he was involved in a delivery. This was an obvious misstatement of the law, as "a purchaser of controlled substances does not deliver" the controlled substance. State v. Morris, 77 Wn. App. 948, 950, 896 P.2d 81 (1995).

It is improper for a prosecutor to misstate the law to the jury. See State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988); State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213

(1984). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury and deny the defendant a fair trial. Gotcher, 52 Wn. App. at 355; Davenport, 100 Wn.2d at 764. Trial counsel failed to object to this clear misstatement of the law and failed to ask for a curative instruction. This was an issue that was critical to the defense case, and trial counsel's failure to act was deficient.

The failure was also very likely prejudicial. During deliberations, the jury sent a question to the judge asking for the definition of "constructive transfer." (CP 70) The jury was told to re-read the instruction packet. (CP 70) The jury was clearly struggling with the intent to deliver element of the case, and had already been incorrectly told that it did not matter who was purchasing and who was selling the cocaine.

Blockman's defense relied on his argument that the State did not prove that he was the seller and therefore did not intend to transfer the cocaine. But the jury was told by the prosecutor that it did not matter. It is impossible to say that the jury, had it been correctly informed of the law, would have still convicted Blockman of possession with intent to deliver, rather than simple possession. Counsel's failure to object and seek clarification of the law likely

impacted the outcome of the case.

C. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.[9]

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing party." Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of

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[9] Recently, in State v. Sinclair, Division 1 concluded "that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Blockman is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1's interpretation of RAP 14.2.

whether the proponent meets the requirements of being the "substantially prevailing party" on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Blockman's case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Blockman owns no property or assets, has no savings, and has no job and no income. (CP 246-47; 7RP 23) Blockman will be incarcerated for almost five years, and owes at least $1,150.00 in previously ordered LFOs. (CP 102, 104) There was no evidence below, and no evidence on appeal, that Blockman has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Blockman is indigent and entitled to appellate review at public expense. (CP 241-42) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

> The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Blockman's financial situation has improved or is likely to improve. Blockman is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

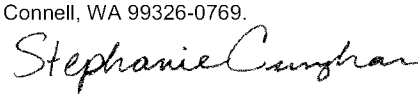
The protective sweep exception to the warrant requirement does not apply to the search in this case because it was not performed pursuant to a valid arrest. Furthermore, Officer Hayward entered the apartment with the intent to both interview the occupant and conduct a search, so Ferrier warnings were required. And Officer Hayward's failure to give the warnings vitiate any consent that Burton may have given. Accordingly, the trial court should have suppressed the evidence discovered during the search, and Blockman's conviction must be reversed. Alternatively, because Blockman was denied his right to effective assistance of counsel, his conviction should be reversed and his case remanded for a new trial. This court should also decline any future request to impose appellate costs.

DATED: April 29, 2016

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Hollis Blockman

CERTIFICATE OF MAILING

I certify that on 04/29/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Hollis Blockman, DOC# 964310, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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CUNNINGHAM LAW OFFICE

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Transmittal Letter

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Case Name: State v. Hollis Blockman
Court of Appeals Case Number: 48219-3

Is this a Personal Restraint Petition? Yes ■ No

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

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Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

Letter

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