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SUPREME COURT NO. 101069-9

NO. 82734-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SEAN ALBERT SPEEDY MOSES,

Petitioner.

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

The Honorable Cassandra Lopez-Shaw, Judge

AMENDED PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Sean Moses seeks review of the Court of Appeals' June 27, 2022 published decision in State v. Moses (Op.), appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Washington's former statute criminalizing drug possession violates due process and is void under State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). Because the statute is void, a warrant authorizing a search based on that statute lacks authority of law to justify an invasion of privacy under article I, section 7. Here, the trial court correctly determined the evidence should be suppressed. Should this Court grant review and reverse the Court of Appeals' contrary published decision?

2. A partially invalid warrant renders a search wholly invalid when any valid portion is relatively insignificant compared to the valid portion. Then, the valid portion is not severable, and suppression is required. Here, the portions of the warrant relating to drug paraphernalia were incidental to the

overarching goal of searching for evidence of a controlled substance. As a factual matter, the trial court determined—in an unchallenged finding—that the police officer sought the warrant to search for evidence of a controlled substance. As a matter of law, the trial court correctly determined the warrant was not severable. Should this Court also determine the warrant was not severable?

C. STATEMENT OF THE CASE

1. Initial contact, affidavit, warrant, and charges

On February 11, 2017, Officer Ingram of the Arlington Police Department responded to a "substance abuse" call. CP 118 ("Affidavit of Probable Cause").

Ingram saw a vehicle parked near a "known drug house." Two men were in the vehicle, passenger Moses and driver Harris. Moses initially gave Ingram a false name. Asked again later, he revealed his true name. CP 118.

Ingram saw a backpack between Moses's legs. When she returned after running the men's names, the backpack had migrated to the back seat. CP 118.

Ingram discovered Moses had a warrant and arrested him. CP 118. Ingram noticed Moses had an open wound. He said the wound was from injecting heroin, which he had used for years. CP 46 (affidavit for search warrant). Harris acknowledged the men were in the area to buy drugs. CP 46.

Ingram ordered them out of the vehicle. Ingram noticed a "tooter," a plastic tube containing burnt drug residue, on Harris's seat. CP 46. Ingram turned her drug-sniffing dog on the vehicle; the dog demonstrated behavior changes. CP 46-47.

Ingram applied for a warrant seeking "[e]vidence of the crime(s) of **RCW 69.50.412 Possession Drug Paraphernalia**[[1]] **RCW 69.50.4013 Possession Controlled Substance (Methamphetamine and Heroin).**" CP 45 (bold face in

[1] The statute prohibited *use* of paraphernalia. Former RCW 69.50.412(1) (2013).

original). Ingram asked for permission to search the vehicle and containers for several items. CP 47. The warrant authorized a search for a slightly narrower list of items:

> Illegal drugs including but not limited to methamphetamine and or heroin, drug paraphernalia including syringes, smoking devices, and other items used to ingest illegal drugs, measuring devices including scales, letters or items showing ownership or occupancy of the vehicle, all locked and unlocked containers, all drug proceeds,[[2]] ledgers showing drug activity.

CP 43.

In the backpack, Ingram found a handgun, a glass pipe with drug residue, a capped syringe, and a scale with residue. CP 40.

In early 2018, the State charged Moses with first degree unlawful firearm possession. CP 122; RCW 9.41.040(1). In 2020, it added a criminal impersonation charge. CP 100; RCW 9A.60.040.

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[2] Despite reference to drug proceeds, the affidavit does not assert anyone was selling drugs. CP 45-46; see Espinoza v. City of Everett, 87 Wn. App. 857, 861, 943 P.2d 387 (1997).

2. **Motion and rulings suppressing evidence**

In April of 2021, Moses moved to suppress the evidence found in the backpack. CP 89-94. Moses argued that, following Blake, 197 Wn.2d 170, the crime of unlawful possession of a controlled substance was void, invalidating the search warrant. CP 92.

The State argued the warrant was valid if the police officer reasonably believed there was a basis for the warrant based on the possession crime. CP 84-88. The State also argued "possession of drug paraphernalia" supported the search in any event. CP 83-84.

A hearing was held May 11, 2021. RP 3-26. The trial court granted Moses's motion to suppress. In written findings, the court summarized the initial stop and the search. CP 53 (Original Findings of Fact 1 and 2). In conclusions of law, the court indicated its ruling broke "new ground" following Blake. CP 54 (Original Conclusion of Law 1). The court noted that, analogously to rules of law that were applied retroactively, Blake

was then being applied to vacate prior convictions even though cases were final. Similarly, the effect of the Blake decision was to render the warrant invalid. CP 54 (Original Conclusions of Law 2 and 3). Addressing warrant severability, the trial court concluded "[t]here is no way to separate probable cause for Possession of Drug Paraphernalia from probable cause for Possession of a Controlled Substance in this case because they are intertwined. *The reason for getting the search warrant in this case was in part, if not wholly, because of the possession statute.*" CP 54 (Original Conclusion of Law 5, emphasis added).

The State filed a motion asking the trial court to reconsider suppression. CP 65-73. The State emphasized that the warrant also authorized a search for "contraband." CP 67-73.

The trial court denied the reconsideration motion and entered additional findings. CP 19-55 (findings and conclusions and appended documents, including affidavit for search warrant

and search warrant). The court's unchallenged[3] Findings of Fact on Reconsideration are generally consistent with the factual scenario set forth above. See CP 20-23 (Findings of Fact on Reconsideration 5 through 17). The court's conclusions of law[4] on reconsideration are as follows:

- The court summarized the parties' arguments. Conclusions of Law on Reconsideration 18-20.
- Ingram believed there was probable cause for the warrant in 2017 and had no way of knowing that Blake would be decided in 2021. Conclusion of Law on Reconsideration 21.
- Relatedly, it was "impossible" to separate probable cause for "Possession of Drug Paraphernalia" from probable cause for "Possession of a Controlled Substance" because the two were "intertwined." Conclusion of Law on Reconsideration 22.
- Moreover, "the reason for getting the search warrant was in part, if not wholly, because of the [drug] possession statute since overturned by Blake. The Court [bases] its finding on evidence of the initial call of activity near a 'drug house'. Officer Ingram,

[3] The State, the appellant below, has never assigned error to any finding of fact or conclusion of law. See Br. of Appellant at 1.

[4] Several items marked "conclusions" are, or incorporate, factual findings.

a K9 Officer, not only had conversations with both occupants of the vehicle [that] she sought to search [related to] possessing drugs, but she applied [canine] Tara to see if the dog indicated the presence of drugs in the vehicle. *This Court finds the predicate for the search of the vehicle was to search for drugs, not paraphernalia."* Conclusion of Law on Reconsideration 22 (emphasis added).

- Blake applied retroactively to invalidate the search. The situation was analogous to In re Personal Restraint of Domingo-Cornelio, 196 Wn.2d 255, 474 P.3d 524 (2020), which determined a previous decision should be applied retroactively. Conclusion of Law on Reconsideration 23.

- Citing several state and federal decisions, the court determined those portions of the warrant authorizing a search based on probable cause for unlawful possession of a controlled substance were not severable. Conclusions of Law on Reconsideration 25-27.

- The trial court also rejected the argument the search was authorized as a search for "contraband." Conclusions of Law on Reconsideration 24, 26, 28.

- Finally, the court determined the relevant evidence, a handgun, was not in "plain view" because the warrant did not authorize the search. Conclusion of Law on Reconsideration 30.

CP 23-28.

3. **Dismissal of charge and State's appeal**

The trial court correspondingly entered an order dismissing the firearm charge. CP 9-10. The State appealed. CP 1-4. The Court of Appeals, Division One, issued a published decision reversing the suppression order. Op. at 14-15.

Moses now asks that this Court grant review on this important state constitutional issue and reverse the Court of Appeals.

D. REASONS REVIEW SHOULD BE GRANTED

1. **This Court should grant review under RAP 13.4(b)(1) and (3).**

Review is appropriate because the decision is at odds with State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010) and prior cases from this Court. RAP 13.4(b)(1). Review is also appropriate under RAP 13.4(b)(3) because the issue represents an important constitutional issue, and this Court's clarification is needed to address the interaction of the rules in Afana and

Michigan v. DeFillippo, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979) in the context of search warrants versus arrests.[5]

2. **Standards of review and legal framework**

No deference is owed to a magistrate's issuance of a search warrant "where the [supporting] affidavit does not provide a substantial basis for determining probable cause." State v. Lyons, 174 Wn.2d 354, 363, 275 P.3d 314 (2012).

In reviewing a trial court's findings and conclusions, this Court considers whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993). But "[u]nchallenged findings of fact are treated as verities on appeal." State v. Buelna Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009).

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[5] Without discussing Afana, Division Three reached a similar result in In re Personal Restraint of Pleasant, 21 Wn. App. 2d 320, 509 P.3d 295 (2022). The petitioner has not sought review.

This Court reviews de novo whether probable cause supports a warrant. State v. Martinez, 2 Wn. App. 2d 55, 66, 408 P.3d 721 (2018). Evidence seized pursuant to a warrant must be suppressed if probable cause does not support the warrant. See State v. Betancourth, 190 Wn.2d 357, 364, 413 P.3d 566 (2018). As for an item in plain view not named in the warrant, a police officer must have a valid justification for the intrusion in the first instance. State v. Lair, 95 Wn.2d 706, 714, 630 P.2d 427 (1981). Otherwise, the item is fruit of the poisonous tree. State v. Magneson, 107 Wn. App. 221, 226, 26 P.3d 986 (2001).

3. **The trial court correctly suppressed the evidence where probable cause for possession of a controlled substance, a void crime, did not supply authority of law to search.**

The trial court correctly determined a void former crime could not support a lawful search warrant.

Article I, section 7 provides: "No person shall be disturbed in [their] private affairs, or [their] home invaded, without authority of law." It provides greater protection of individual

privacy rights than the Fourth Amendment. State v. Winterstein, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009). Whereas the Fourth Amendment prohibits "unreasonable searches and seizures," article I, section 7 prohibits any invasion of an individual's right to privacy without "authority of law." It "'recognizes an individual's right to privacy with no express limitations.'" Winterstein, 167 Wn.2d at 631-32 (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).[6]

Unlike its federal counterpart, Washington's exclusionary rule is "'nearly categorical.'" Afana, 169 Wn.2d at 180 (quoting Winterstein, 167 Wn.2d at 636). The federal exclusionary rule is focused on deterring unlawful government action. Thus, the federal Supreme Court has held the rule should not be applied when police act in "good faith." United States v. Leon, 468 U.S.

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[6] This petition follows the guidance of State v. Mayfield, addressing the provision's "text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." 192 Wn.2d 871, 881, 434 P.3d 58 (2019).

897, 918-20, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). "Good faith" refers to "'objectively reasonable reliance'" on authority or information that *appeared* to justify a search or seizure when it was made. Herring v. United States, 555 U.S. 135, 142, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009) (quoting Leon, 468 U.S. at 922); see White, 97 Wn.2d at 108-10.

In contrast, Washington has declined to adopt a good faith or reasonableness exception to exclusion of evidence where the government lacks authority of law for an intrusion. Afana, 169 Wn.2d at 184. If the government has disturbed a person's private affairs, the question is not whether its agent behaved reasonably, but rather whether they had "authority of law." Id. at 180.

A search of a vehicle "unquestionably" constitutes a disturbance of private affairs. Id. at 176. The next question is, therefore, whether authority of law authorized a search. State v. Villela, 194 Wn.2d 451, 458, 450 P.3d 170 (2019). A valid search warrant would supply such authority. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

Yet a search warrant may issue only upon a determination of probable cause. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists if the supporting affidavit establishes "a reasonable inference that a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." State v. Figueroa Martines, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015) (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)). The items sought must be tied to a specific crime. See State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993).

Meanwhile, "[a] statute or ordinance which is void as being in conflict with . . . the constitution is of no force and effect." City of Seattle v. Grundy, 86 Wn.2d 49, 50, 541 P.2d 994 (1975). In February of 2021, this Court held the crime of unlawful possession of a controlled substance under former RCW 69.50.4013 (2015) violated constitutional due process and was void. Blake, 197 Wn.2d at 195. Where this Court declares a statute void, pending litigation must be decided according to

the principle that the statute is void. See Grundy, 86 Wn.2d at 50 (dismissing prowling conviction, then on appeal, after analogous prowling ordinance declared void).

As such, unlike in a situation where a warrant's factual support later founders,[7] the warrant in this case must be considered as if there was no such crime as possession of a controlled substance. The trial court was tasked with reviewing the warrant for probable cause. And it correctly determined Blake's effect on the warrant was akin to retroactive application, in that, even though the applicable rule had not yet been announced at the time of the underlying incident, the trial court was obliged to consider the statute void in assessing the validity of the government action. See CP 25 (Conclusion of Law on Reconsideration 23). Thus, as a matter of law, the trial court correctly determined that the warrant, based on a void crime,

[7] State v. Chenoweth, 160 Wn.2d 454, 476, 158 P.3d 595 (2007).

lacked the requisite authority of law, and that the ensuing search violated the state constitution. Villela, 194 Wn.2d at 458, 463.

The State has argued, and the Court of Appeals unfortunately agreed, that the evidence shouldn't have been suppressed because the possession statute was at one time considered valid. Thus, according to the Court of Appeals, this case is controlled by DeFillippo, 443 U.S. 31, which held an arrest based on an ordinance was valid even though the ordinance was later declared unconstitutional. See Op. at 6-7. The DeFillippo court looked at whether a reasonable police officer could conclude probable cause existed at the time of the arrest. 443 U.S. at 37. Although DeFillippo discussed the Fourth Amendment, not article I, section 7, this Court subsequently applied the DeFillippo rule to arrests stemming from a partially invalidated statute in State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006) and State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006).

In Afana, however, this Court indicated that the DeFillippo rule was limited and, in that case, could not operate to save an automobile search. Afana, 169 Wn.2d at 184.

DeFillippo held that an arrest made in "'good faith reliance'" on a city ordinance, later declared unconstitutional, was valid. Afana, 169 Wn.2d at 181. As the State argued, the only difference between DeFillippo, Potter, Brockob, on one hand, and Afana's case, on the other, was "the nature of the legal authority relied upon by the officer"—i.e., pre-Arizona v. Gant case law[8] instead of a statute. Thus, according to the State, the

[8] In Afana, a car's passenger was arrested on an outstanding warrant. A police officer searched the car incident to her arrest based on her presence in the car at the time of the traffic stop. Afana, 169 Wn.2d at 174. Before the case was final, the Supreme Court held in Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search[.]" Id. at 351. Consistent with Gant, this Court held the search was not authorized because, although the warrant for the passenger's arrest gave the officer a valid basis for *arrest*, the law no longer authorized a warrantless *search* of the car. Afana, 169 Wn.2d at 178.

DeFillippo rule should apply, as it had in Potter and Brockob. Afana, 169 Wn.2d at 181-82.

This Court rejected the State's argument. By citing cases merely analogous to the situation being considered, the State had not met its burden of demonstrating authority of law supported the search or that an exception to the exclusionary rule applied. Id. at 183-84. Potter and Brockob involved arrests based on misdemeanors, permitted by a misdemeanor arrest statute;[9] the arrests were held to be lawful based on the existence of probable cause even though the underlying misdemeanor statutes were later found unconstitutional. Brockob, 159 Wn.2d at 342; Potter, 156 Wn.2d at 840-43. See Afana, 169 Wn.2d at 184.

This case also does not involve probable cause to arrest. Based on the line drawn by this Court in Afana, someone's prior

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[9] Under former RCW 10.31.100(3)(e) (2000), an officer could arrest a person without a warrant if they had probable cause to believe the person was driving with a suspended license.

belief about authority to search does not fit under the diminutive DeFillippo / Potter / Brockob umbrella.

Admittedly, the tests for probable cause to arrest, and probable cause to search, overlap. But they are not identical. Probable cause for a warrant exists if the supporting affidavit establishes "a reasonable inference that a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." Figueroa Martines, 184 Wn.2d at 90. As stated, this must refer to a specific crime. E.g., Riley, 121 Wn.2d at 28. Probable cause to *arrest* exists when an officer is aware of facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). At the time of arrest, the officer need not have evidence to prove each element of the crime. The officer need only have knowledge of facts such that a reasonable person would believe an offense had been committed. Id. The officer might even subjectively believe a

different crime was committed than the one for which probable cause, in fact, existed. State v. Huff, 64 Wn. App. 641, 646, 826 P.2d 698 (1992). Thus, although the tests are similar, more precision is required for warrants, considering that decisionmakers are judicial officers, not police officers in the field, and considering that warrants must be sufficiently specific.

As Afana made clear, DeFillippo, Potter, and Brockob looked at arrests (and what was known to the officer at the time of the arrest). But the question here is whether authority of law supported the *search*. See Afana, 169 Wn.2d at 184. If it did not, the evidence must be suppressed. Id. at 176-77.

In summary, the Court of Appeals determined the relevant question was whether everyone believed at the time that there was probable cause, with its built-in reasonableness consideration.[10] That made this case more like Potter and Brockob. Op. at 6-12.

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[10] E.g., State v. Mayfield, 192 Wn.2d 871, 888, 434 P.3d 58 (2019) (quoting Afana, 192 Wn.2d at 183).

But this Court should grant review and hold this case is more like Afana because, like Afana, it involves a search. And a search's validity is reviewed—de novo—for whether it was supported by authority of law. Afana, 169 Wn.2d at 176.

Alternatively, assuming this Court believes the Court of Appeals applied Potter, Brockob—and Afana—correctly, this Court should now reject the underlying DeFillippo rule as inconsistent with this Court's article I, section 7 jurisprudence. The DeFillippo rule, like other federal authority, is rooted in evaluation of whether officers' actions are reasonable or in good faith. Herring, 555 U.S. at 142. Under the state constitution, a court's evaluation of authority of law *must* include whether there was probable cause to believe a valid, non-void crime was implicated. Cf. White, 97 Wn.2d at 109 (looking askance at DeFillippo in context of article I, section 7 and indicating result is justifiable only if "one accepts the premise that the exclusionary rule is merely a remedial measure"). This Court should so hold. See In re Stranger Creek, 77 Wn.2d 649, 653,

466 P.2d 508 (1970) (this Court may reject prior rationale if it is incorrect and harmful).

The trial court correctly applied the law at the time of Moses's suppression motion and determined a search warrant based on probable cause for possession of a controlled substance, a non-existent crime, could not supply authority of law.

4. The trial court correctly determined the warrant was not severable.

A search pursuant to an overbroad warrant will only be upheld if the warrant is severable. If it is not, as here, a trial court correctly suppresses all its fruits.

The inclusion of illegally obtained *factual* information in a warrant affidavit does not render the warrant per se invalid, provided that the affidavit contains facts independent of the illegally obtained information sufficient to establish probable cause. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005).

In contrast, the severability doctrine applies where portions of a warrant are *legally* infirm. A warrant may manifest one form of legal infirmity, overbreadth, where it fails to describe with particularity items for which probable cause *does* exist. A warrant is also overbroad if it describes items, particularly or otherwise, for which probable cause *does not* exist. State v. Higgs, 177 Wn. App. 414, 426, 311 P.3d 1266 (2013); State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), aff'd, 152 Wn.2d 499, 98 P.3d 1199 (2004). A warrant is overbroad if some portions of a warrant are supported by probable cause and some portions are not. Higgs, 177 Wn. App. at 426.

Under the severability doctrine, if a meaningful separation cannot be made between the valid and invalid portions, all evidence seized pursuant to the partially overbroad warrant must be suppressed. State v. Perrone, 119 Wn.2d 538, 556-59, 562, 834 P.2d 611 (1992).

"[S]everance is not available when the valid portion of the warrant is 'a relatively insignificant part' of an otherwise invalid

search." Id. at 557 (quoting In re Grand Jury Subpoenas Dated December 10, 926 F.2d 847, 858 (9th Cir. 1991)). Put another way, for the severability doctrine to apply, "there must be a meaningful separation to be made of the language in the warrant." Perrone, 119 Wn.2d at 560. "[T]here must be some logical and reasonable basis for the division of the warrant into parts which may be examined for severability." Id. In Perrone, this Court held the warrant was *not* severable. Id. at 556. Yet, because the question of severability was not close, this Court declined to offer specific guidelines to determine whether severability would apply in another case. Id. at 557-62.

In Maddox, Division Two, fleshing out the standard, held the severability doctrine will save portions of an overbroad warrant only when five requirements are met: (1) The warrant must lawfully have authorized entry into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the portion of the warrant that includes particularly described items, supported by probable

cause, must be *significant* compared to the warrant as a whole; (4) the searching officer must have found and seized the disputed items while executing the valid part of the warrant, i.e., while searching for items supported by probable cause *and* described with particularity; and (5) the officer must not have conducted a general search disregarding the warrant's scope. Maddox, 116 Wn. App. at 807-08; see also Higgs, 177 Wn. App. at 430-31.

In Higgs, a warrant authorized a search of items related to possession of methamphetamine, including packaging, for which there was probable cause. But the warrant also authorized a search for items and records related to methamphetamine distribution, for which probable cause was lacking. Id. at 421, 427. The question became whether the portion of the warrant authorizing a search for methamphetamine was severable from the rest. Id. at 430.

In dispute were the third and fourth requirements, whether the valid items—those described with particularity and for which there was probable cause—were "significant" in the context of

the entire warrant, and whether items were seized while executing the valid portion. As for the third requirement, Higgs noted that probable cause was lacking for most of the paragraphs. Yet despite this, "the primary purpose of this warrant . . . was to search for methamphetamine. And probable cause supported the portion of the warrant authorizing the search for methamphetamine." Higgs, 177 Wn. App. at 432 (citing Maddox, 116 Wn. App. at 800). Thus, the third criterion was satisfied.

Here, the third Maddox criterion is at issue, but the outcome is different—the trial court applied the law correctly. As stated, Officer Ingram applied for a warrant seeking to search for "[e]vidence of the Possession [sic] Drug Paraphernalia [and] Possession Controlled Substance (Methamphetamine and Heroin)." CP 45 (bold face omitted). Neither is considered a lesser offense of the other,[11] but they overlap. Under former

[11] State v. LaPlant, 157 Wn. App. 685, 688, 239 P.3d 366 (2010).

RCW 69.50.4013(1), "[i]t is unlawful . . . to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of [their] professional practice, or except as otherwise authorized by this chapter." The crime, now void, was a felony. Former RCW 69.50.4013(2).

The warrant misidentifies the second offense listed as "possession of drug paraphernalia," although it lists a statutory citation. Indeed, under former RCW 69.50.412(1), "[i]t is unlawful for any person to use drug paraphernalia to . . . inject, ingest, inhale, or otherwise introduce into the human body a controlled substance[.]" The offense is a misdemeanor. Id.

Officer Ingram asked to search the parked vehicle for certain items. CP 47. As indicated, the warrant itself authorized a search of the vehicle for a slightly narrowed list of items. CP 43. But the warrant did not satisfy the third severability criterion. It was not severable, because the search for drug paraphernalia—items used to ingest possessed drugs—was incidental to a search

for evidence of possession of drugs. There are factual and legal components to this determination.

As for the factual component, the trial court examined the warrant application. In Conclusion of Law on Reconsideration 22, the trial court determined, as a matter of fact, that based on the documentation supplied, the officer's reason for obtaining the warrant was to search for drugs, not drug paraphernalia. Although this determination is deemed a conclusion of law, it is a factual finding. That is because "[i]f a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact.[.]" State v. Niedergang, 43 Wn. App. 656, 658, 719 P.2d 576 (1986). As such, it must be reviewed as would a finding of fact. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). Because the State has not assigned error to it, it is a verity on appeal. Buelna Valdez, 167 Wn.2d at 767. The Court of Appeals does not address this unchallenged finding, ignoring Moses's argument to that effect.

Op. at 13-14. But, in any event, the record also supports the determination.

Further, the trial court's determination is consistent with the legal framework for a "drug paraphernalia" offense. A search for drug paraphernalia—the illegality of which requires *use* of the item in question—often coincides with a search for the drug itself. The presence of any controlled substance *residue* on such an object is relevant to a determination of whether an object is drug paraphernalia. RCW 69.50.102(b)(5). But residue may also support a conviction for unlawful possession. See State v. Rowell, 138 Wn. App. 780, 786, 158 P.3d 1248 (2007) (controlled substance "residue sufficient to support a conviction for simple possession").

In summary, trial court correctly determined any search for drug paraphernalia, per se, was a relatively insignificant part of an otherwise invalid search for drugs. The third Maddox criterion was not satisfied. The warrant was, therefore, not severable. If this Court grants review as it should on the

"authority of law" issue, this Court should also address severability, providing this Court additional opportunity for clarification in this related area of law.

E. CONCLUSION

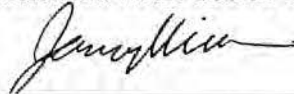
This Court should accept review under RAP 13.4(b)(1) and (3) and affirm the trial court.

I certify this document contains 4,995 words excluding those portions exempt under RAP 18.17.

DATED this 7th day of July, 2022.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



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APPENDIX

FILED
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Division I
State of Washington

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

STATE OF WASHINGTON, Appellant, v. MOSES, SEAN ALBERT SPEEDY, DOB: 04/04/1988, Respondent.	)	No. 82734-1-I PUBLISHED OPINION

BOWMAN, J. — The State appeals a trial court ruling suppressing a handgun seized by police during a search for controlled substances and drug paraphernalia authorized by a warrant. The trial court determined probable cause did not support the search warrant because our Supreme Court later voided the crime of possession of controlled substances in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). The court also found the two crimes were so intertwined that it could not sever the warrant and dismissed the charge of unlawful possession of a firearm. We conclude that probable cause supported the search for controlled substances. Probable cause also supported the search for drug paraphernalia and the warrant was severable. We reverse the order dismissing the charge of unlawful possession of a firearm and remand.

Citations and pin cites are based on the Westlaw online version of the cited material.

FACTS

Arlington Police Department officers contacted Sean Albert Speedy Moses on February 11, 2017 while investigating a suspicious SUV[1] near a known drug house. Officer Molly Ingram first saw Moses sitting in the front passenger seat of the SUV with a backpack on the floor between his feet. Moses told Officer Ingram that his name was "Gregory W. Moses" and that his birthdate was December 22, 1985. She ran a records check and confirmed that was not his true name or birthdate. When Officer Ingram returned to the SUV, she saw that someone had moved the backpack into the back seat. Moses admitted he gave her a false name and Officer Ingram arrested him on an outstanding felony warrant. While handcuffing Moses, Officer Ingram saw an open wound on his forearm that Moses said was from injecting heroin.

Officer Ingram continued questioning Moses and learned that he and the driver of the SUV, Thomas C. Harris, often used drugs and "mostly" smoked heroin. When Harris got out of the SUV, Officer Ingram saw a plastic tube with burnt residue on the driver's seat, a device known as a "tooter." Officer Ingram recognized the device as "drug paraphernalia used to smoke illegal narcotics." She then deployed K-9 Tara, a drug detection canine officer, who alerted to the presence of drugs at both the front passenger and driver's side doors of the SUV. Officer Ingram impounded the vehicle and applied for a warrant to search it.

[1] Sport-utility vehicle.

Officer Ingram submitted an affidavit in support of her request for a warrant. From this, a judge determined that probable cause existed for the crimes of "VUCSA and PDP."[2] The judge issued a warrant authorizing a search of the SUV for:

> Illegal drugs including but not limited to heroin, methamphetamine, drug paraphernalia including tin foil, smoking devices, and other items used to ingest illegal drugs, measuring devices including scales, letters or items showing ownership or occupancy of the vehicle, all locked and unlocked containers, all drug proceeds, ledgers showing drug activity.

While searching the SUV, officers found a loaded Ruger .45-caliber handgun in the backpack Officer Ingram first saw between Moses' feet. Officers also found paperwork belonging to Moses in the backpack. Because Moses had a prior felony conviction, on February 5, 2018, the State charged him with one count of unlawful possession of a firearm in the first degree, committed while on community custody. On February 27, 2020, the State added one count of criminal impersonation in the first degree, also committed while on community custody, because Moses first gave Officer Ingram a false name and birthdate.[3]

In April 2021, the defense moved to suppress the firearm evidence. Moses contended that the warrant lacked probable cause because it authorized a search for evidence of possession of controlled substances under former RCW 69.50.4013, a crime the Washington Supreme Court had recently found

[2] Violation of the Uniform Controlled Substances Act, chapter 69.50 RCW, and possession of drug paraphernalia, RCW 69.50.412. The affidavit stated with specificity that probable cause supported VUCSA under former RCW 69.50.4013 (2017) for unlawful possession of the controlled substances methamphetamine and heroin.

[3] The State did not charge Moses with any VUCSA crime.

unconstitutional in Blake.[4] The State argued the Supreme Court's Blake decision was not germane to the sufficiency of the probable cause determination made back in 2017. Alternatively, the State claimed that standing alone, probable cause to search for evidence of unlawful use or possession of drug paraphernalia supported the warrant.

In an oral ruling, the trial court agreed with Moses that Blake applied retroactively and rendered the crime of possession of a controlled substance unconstitutional and void. And because the State could not prosecute or convict Moses for that offense, the trial court concluded it could not be proper grounds for issuing a search warrant. The court also determined that the crimes of possession of a controlled substance and possession or use of drug paraphernalia were so "intertwined" that it could not sever the warrant's deficient parts. The State asked the trial court to reconsider its ruling, but the court denied the motion in an order setting forth written findings of fact and conclusions of law. The trial court suppressed the firearm evidence and dismissed the charge without prejudice.[5]

The State appeals.

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[4] 197 Wn.2d at 195. Following the Blake decision on February 25, 2021, the legislature amended RCW 69.50.4013(1) to state that only when a person "knowingly" possesses a controlled substance does the possession become unlawful. LAWS OF 2021, ch. 311, § 9.

[5] While the State believed the court erred in suppressing the gun evidence, it agreed the court should dismiss the unlawful possession of a firearm count because it no longer had sufficient admissible evidence to prove that charge. The State also moved to dismiss the charge of criminal impersonation without prejudice so it could "appeal the Court's decision to suppress the firearm in this matter," which the court granted.

ANALYSIS

The State contends the trial court erred in suppressing the handgun officers found while searching the SUV because a lawfully issued warrant supported by probable cause authorized the search. In the alternative, the State argues that probable cause supported searching for evidence of unlawful possession or use of drug paraphernalia, which would have led police to the same firearm evidence. We agree.

We review the issuance of a search warrant for abuse of discretion, but we review probable cause determinations de novo. State v. Remboldt, 64 Wn. App. 505, 509, 827 P.2d 282 (1992); State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007). We evaluate search warrants in a commonsense, practical manner and not in a hypertechnical sense. State v. Higgs, 177 Wn. App. 414, 426, 311 P.3d 1266 (2013).

The Fourth Amendment to the United States Constitution provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Similarly, 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."

Probable cause supports a search warrant where the officer's affidavit sets forth facts sufficient for a reasonable person to conclude the defendant is involved in criminal activity. State v. Huft, 106 Wn.2d 206, 209, 720 P.2d 838 (1986); State v. J-R Distribs. Inc., 111 Wn.2d 764, 774, 765 P.2d 281 (1988). In

examining a probable cause determination, the only information we consider is what was before the issuing judicial officer. Remboldt, 64 Wn. App. at 509. And we generally resolve any doubts over the existence of probable cause in favor of issuing the search warrant. State v. Vickers, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002).

Probable Cause Determination for Crime Later Declared Invalid

Moses contends that our Supreme Court's 2021 decision in Blake, which declared the portion of former RCW 69.50.4013 criminalizing the simple possession of a controlled substance as unconstitutional, usurped the determination of probable cause supporting the warrant to search for evidence of that crime in his 2017 case. But a later determination that a statute is unconstitutional does not necessarily invalidate an earlier finding of probable cause to believe that a person violated the statute. Michigan v. DeFillippo, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). This is true unless the law is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." Id. at 38.[6]

In DeFillippo, police arrested a man for violating a city ordinance criminalizing the refusal to produce evidence of identity when requested by an officer. 443 U.S. at 33-34. During a search incident to the arrest, officers

[6] Moses argues that In re Personal Restraint of Domingo-Cornelio, 196 Wn.2d 255, 474 P.3d 524 (2020), cert. denied sub nom., Washington v. Domingo-Cornelio, 141 S. Ct. 1753, 209 L. Ed. 2d 515 (2021), and City of Seattle v. Grundy, 86 Wn.2d 49, 541 P.2d 994 (1975), show that "Blake's effect on the warrant was akin to retroactive application." But neither case addressed retroactivity in the context of determining probable cause. Domingo-Cornelio addressed juvenile sentencing and concluded the defendant could raise the issue of youth on collateral review as a significant material change in the law. 196 Wn.2d at 263. And Grundy involved an appeal from conviction under a city ordinance declared unconstitutional while the matter was pending review. 86 Wn.2d at 49-50.

discovered illegal drugs. Id. at 34. DeFillippo moved to suppress the drug evidence, challenging the constitutionality of the stop-and-identify ordinance. Id. The appellate court voided the ordinance as unconstitutionally vague and suppressed the drug evidence because "both the arrest and the search were invalid." Id.

The United States Supreme Court reversed, concluding the officers reasonably relied on "a presumptively valid ordinance" when determining whether sufficient facts existed to support probable cause that DeFillippo violated its terms. DeFillippo, 443 U.S. at 40, 37. That the statute later became invalid did not undermine DeFillippo's arrest because a determination of probable cause "does not depend on whether the suspect actually committed a crime." Id. at 36. Instead, probable cause turns on whether a reasonable officer believes a person has committed or is committing a crime; "the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest." Id.

The Court distinguished the lawfulness of a search based on probable cause from one grounded in a rule that authorizes a search under circumstances that would not otherwise satisfy traditional warrant and probable cause requirements and later declared unconstitutional. DeFillippo, 443 U.S. at 39. It pointed to Almeida-Sanchez v. United States, 413 U.S. 266, 268, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973) (quoting 8 U.S.C. § 1357(a)(3)), where the Court determined that a federal regulation authorizing the United States Border Patrol to search any car without probable cause or a warrant within 100 miles of the

border violated the Fourth Amendment because 100 miles was not a " 'reasonable distance' " under the federal statute. Id. The DeFillippo Court also pointed to Berger v. New York, 388 U.S. 41, 54-56, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967), where the Court found unconstitutional an "eavesdrop" statute authorizing searches under warrants that did not particularly describe the places to be searched and the things to be seized. Id.

In both Almeida-Sanchez and Berger, officers relied on statutes for authority to search under circumstances that would not otherwise satisfy traditional probable cause requirements. Because the statutes authorizing the searches were later declared invalid, the searches themselves were also unlawful. DeFillippo, 443 U.S. at 39; see Almeida-Sanchez, 413 U.S. at 273-75; Berger, 388 U.S. at 63-64. Unlike Almeida-Sanchez and Berger, the officers in DeFillippo did not rely on the unconstitutional ordinance to authorize their arrest and subsequent search. DeFillippo, 443 U.S. at 39-40. Instead, the officers relied on traditional probable cause requirements, and the ordinance related to only the officers' reasonable belief that DeFillippo was engaged in criminal activity. Id. And because the officers acted reasonably in presuming that the ordinance was constitutional when examining the " 'facts and circumstances' " supporting DeFillippo's arrest, they had probable cause to support an arrest and subsequent search. Id. at 40.

Washington courts have since applied DeFillippo under article I, section 7 of our constitution. First, in State v. White, 97 Wn.2d 92, 101-02, 640 P.2d 1061 (1982), our Supreme Court determined that the DeFillippo rule compelled

suppression of a confession following an arrest under our state's "stop-and-identify" statute. The court determined not only that the statute suffered from unconstitutional vagueness, but also that we adjudicated an "almost identical" statute as unconstitutional years before White's arrest. White, 97 Wn.2d at 102-03 (citing City of Montlake Terrace v. Stone, 6 Wn. App. 161, 492 P.2d 226 (1971)). As a result, the statute was "flagrantly unconstitutional," and police should have known it could not serve as the basis for a valid arrest. Id. at 103 The exception shaped by the Court in DeFillippo rendered the arrest unlawful. Id.

Later cases like State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), and State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006), also applied the DeFillippo rule. In Potter, two different drivers challenged a search incident to arrest for driving while license suspended (DWLS). 156 Wn.2d at 838-39. The drivers argued officers unlawfully arrested them because a court later struck down some of the statutes that the Department of Licensing relied on to suspend their licenses. Id. at 841. Potter applied DeFillippo to conclude that "[t]he subsequent invalidation of some of the license suspension procedures does not void the probable cause that existed to arrest petitioners for the crime of DWLS." Id. at 842-43.

Brockob addressed a nearly identical question where the defendant moved to vacate the verdict and suppress evidence after our Supreme Court invalidated parts of the statutes suspending a driver's license. 159 Wn.2d at 322-23 (citing City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004)).

Brockob similarly concluded that the licensing information available to the officer at the time of arrest warranted a reasonable belief that the defendant had committed the offense of DWLS. Id. at 342. Because the officers in Potter and Brockob had sufficient probable cause to arrest the drivers, they lawfully obtained the evidence discovered during the ensuing searches. Potter, 156 Wn.2d at 843-44; Brockob, 159 Wn.2d at 342-43.

Moses argues that DeFillippo does not apply here.[7] According to Moses, this case is more like State v. Afana, 169 Wn.2d 169, 184, 179-81, 233 P.3d 879 (2010), where our Supreme Court suppressed evidence obtained from an unlawful search by rejecting the "good faith exception" to the exclusionary rule under the Fourth Amendment in favor of Washington's "nearly categorical" exclusionary rule under article I, section 7.[8] But Moses conflates determining the authority to search with applying the exclusionary rule to unlawfully obtained evidence.

In Afana, an officer searched a car driven by Afana incident to the passenger's arrest under the rule established in New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). 169 Wn.2d at 173-74, 177. The Belton rule authorized the search of a car without a warrant or probable cause following a passenger's arrest. 453 U.S. at 462-63. The Court later narrowed

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[7] Moses also argues that the rule in DeFillippo applies to only arrests. Because the same probable cause requirement applies to both arrests and searches, we reject that argument.

[8] Under the "exclusionary rule," courts must suppress evidence obtained from an unlawful search. See, e.g., State v. Eserjose, 171 Wn.2d 907, 912 n.5, 918, 259 P.3d 172 (2011). Because the federal exclusionary rule aims to deter unlawful police action, the United States Supreme Court directs courts not to apply the rule when police have acted in " 'good faith.' " State v. Betancourth, 190 Wn.2d 357, 367, 413 P.3d 566 (2018) (quoting United States v. Leon, 468 U.S. 897, 918-20, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)).

that rule in Arizona v. Gant, 556 U.S. 332, 343-44, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), to authorize a search only if the passenger is "within reaching distance" of the car at the time of arrest or if probable cause supports the search. Because the search of Afana's car violated the new Gant rule (adopted on state constitutional grounds in State v. Patton, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009)) and the search was not otherwise supported by probable cause, the court determined the officer had no authority to search the car and suppressed the illegally obtained evidence. Afana, 169 Wn.2d at 184.

As the United States Supreme Court did in DeFillippo, our Supreme Court in Afana distinguished searches based on probable cause from those relying on a statute or rule that a court later found invalid. It described the key difference between Afana and the circumstances in DeFillippo, Potter, and Brockob as the "nature of the legal authority relied upon by the officer" instead of "the officer's reliance on that legal authority." Afana, 169 Wn.2d at 182. The court explained that the officer in Afana "relied on pre-Gant case law for the authority to search" incident to arrest, while the officers in DeFillippo, Potter, and Brockob relied on subsequently declared unconstitutional statutes "only to the extent that those statutes contributed to the determination of probable cause, not for the authority to arrest." Id.

Here, unlike the officer in Afana, Officer Ingram relied on the statute criminalizing possession of controlled substances only as much as it contributed to the facts and circumstances supporting probable cause to search. And Officer Ingram's reliance on the statute was reasonable because former RCW

69.50.4013(1) was presumptively valid in February 2017.[9] Unlike in White, our courts did not adjudge former RCW 69.50.4013 invalid until four years after the search of Moses' backpack. Indeed, our Supreme Court declared the statute valid in State v. Cleppe, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), and again in State v. Bradshaw, 152 Wn.2d 528, 539-40, 98 P.3d 1190 (2004). Even the trial court here recognized that Officer Ingram "had [probable cause] to request the warrant" and had "no way to know at that time that the Supreme Court would decide Blake." Because officers searched Moses' backpack pursuant to a lawfully issued warrant supported by probable cause, the exclusionary rule did not apply. The trial court erred in suppressing the firearm evidence.

Severability

The State argues that even if probable cause did not support the search for evidence of possession of controlled substances, the provisions of the warrant authorizing a search for evidence of unlawful possession or use of drug paraphernalia were severable and valid. As a result, the search for drug paraphernalia would have led police to discover the same handgun. Moses argues the trial court correctly concluded the two crimes were so inextricably intertwined that the court could not sever the warrant, leaving it overbroad and invalid. We agree with the State.

A warrant can be overbroad because it either authorizes a search for items for which probable cause exists but fails to describe those items with particularity, or it authorizes a search for items for which probable cause does not

[9] Division Three of our court recently reached the same conclusion in In re Personal Restraint of Pleasant, ___ Wn. App. 2d ___, 509 P.3d 295, 305-06 (2022).

exist. State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), aff'd, 152 Wn.2d 499, 98 P.3d 1199 (2004)). A warrant is also overbroad if probable cause supports some portions of it but not other portions. Id. at 806. But even if a search warrant is overbroad, "[u]nder the severability doctrine, 'infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but does not require suppression of anything seized pursuant to valid parts of the warrant." State v. Perrone, 119 Wn.2d 538, 556, 834 P.2d 611 (1992) (quoting United States v. Fitzgerald, 724 F.2d 633, 637 (8th Cir. 1983), cert. denied, 466 U.S. 950, 104 S. Ct. 2151, 80 L. Ed. 2d 538 (1984)).

To be severable, there must be a "meaningful separation" between the valid and invalid portions of the warrant, discernible from its language. Perrone, 119 Wn.2d at 560. That is, "there must be some logical and reasonable basis" for dividing the warrant into parts that a court can examine independently. Id. We consider five factors in determining whether a court can sever invalid parts of a warrant:

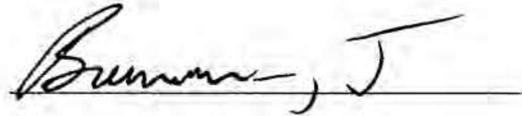
> (1) [T]he warrant must lawfully have authorized entry into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole; (4) the searching officers must have found and seized the disputed items while executing the valid part of the warrant; and (5) the officers must not have conducted a general search, i.e., one in which they "flagrantly disregarded" the warrant's scope.

State v. Temple, 170 Wn. App. 156, 163, 285 P.3d 149 (2012) (citing Maddox, 116 Wn. App. at 807-09).

Here, the provisions of the search warrant relating to the unlawful possession or use of drug paraphernalia are severable from the provisions related to the unlawful possession of drugs because they meet all five Maddox requirements. First, probable cause supported the portion of the warrant authorizing a search for drug paraphernalia and lawfully authorized officers to search Moses' backpack. Second, the warrant described with particularity the items related to unlawful possession of paraphernalia, "including tin foil, smoking devices, and other items used to ingest illegal drugs." Third, the valid portion of the warrant was significant compared to the warrant as a whole. Fourth, officers discovered the handgun in Moses' backpack within the scope of their valid search for drug paraphernalia. And finally, the officers did not engage in a general search. As a result, even if the search warrant lacked probable cause to search for evidence of possession of a controlled substance, the valid portions of the warrant are severable, and officers lawfully seized the handgun.

Because (1) Blake's 2021 determination that former RCW 69.50.4013 was unconstitutional did not invalidate the 2017 finding of probable cause to believe that Moses unlawfully possessed controlled substances and (2) the former statute was not grossly and flagrantly unconstitutional at the time Officer Ingram determined probable cause existed, the trial court erroneously suppressed the firearm evidence. And even if probable cause did not support the search for evidence of unlawful possession of drugs, because probable cause supported the search for evidence of unlawful use or possession of drug paraphernalia and the search warrant was severable, officers would have lawfully found the same

handgun. We reverse the order dismissing the charge of unlawful possession of a firearm and remand.[10]



WE CONCUR:

[10] We do not reach the State's alternative argument that Moses possessed drugs illegally under a different statute, RCW 69.50.505, giving the police probable cause to search for, seize, and forfeit drugs as "contraband."

NIELSEN KOCH & GRANNIS P.L.L.C.

July 07, 2022 - 10:23 AM

Filing Petition for Review

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