NO. 45396-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW CHERRY,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

After Matthew Cherry invoked his right to remain silent, the arresting officer asked him a number of questions, including whether he would let the police search his car. Mr. Cherry said no, but he explained his answer with an admission to having used drugs that day. The officer called a drug detection dog to come to the scene and told Mr. Cherry his car would be impounded. Mr. Cherry relented and let the police search his car.

The trial court improperly ruled that Mr. Cherry's consent was freely and voluntarily obtained, even though it resulted from questions asked and statements made by the police after Mr. Cherry had asserted his right to remain silent. The fruits of the improperly elicited statements and warrantless search should be suppressed. In addition, Mr. Cherry repeatedly told the court he had irreconcilable differences with his attorney but no judge asked him or his attorney to explain the cause of the problem, in violation of his right to conflict-free counsel.

B. ASSIGNMENTS OF ERROR.

1. The police violated Mr. Cherry's right not to be compelled to give testimony or evidence against himself as guaranteed by the Fifth Amendment and article I, section 9.

2. The police unreasonably searched Mr. Cherry's car without the authority of law, contrary to the Fourth Amendment and article I, section 7.

3. A judge who did not preside at the CrR 3.6 hearing lacked authority to sign the written findings formalizing the court's oral ruling.

4. CrR 3.6 Finding of Fact IV is not supported by sufficient evidence.[1]

5. CrR 3.6 Finding of Fact VII, pertaining to whether Mr. Cherry felt coerced to consent to the search of his car, is not supported by sufficient evidence.

6. CrR 3.6 Finding of Fact X is not supported by sufficient evidence.

7. CrR 3.5 Finding of Fact IV is not supported by sufficient evidence.

8. CrR 3.5 Finding of Fact V is not supported by sufficient evidence.

9. CrR 3.5 Finding of Fact VIII is not supported by sufficient evidence.

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[1] The written findings of fact and conclusions of law from the CrR 3.5 and CrR 3.6 hearings are attached as Appendix A and B.

10. To the extent CrR 3.6 Conclusion of Law II is construed as a finding of fact, it is not supported by sufficient evidence.

11. To the extent CrR 3.5 Conclusion of Law II is construed as a finding of fact, it is not supported by sufficient evidence.

12. Mr. Cherry was denied his right to meaningful assistance of counsel by the court's refusal to inquire into his repeated complaints of irreconcilable differences with his assigned attorney, in violation of the Sixth Amendment and article I, section 22.

13. The court lacked authority to impose legal financial obligations when it acknowledged Mr. Cherry's inability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When a person invokes the right to remain silent after being arrested, the police must scrupulously honor the request and may not engage in conduct that prompts a response of potentially incriminating information. Mr. Cherry told the arresting officer he did not want to make any further statements after he received *Miranda* warnings, but the officer continued asking him questions, including whether he would consent to a police search of his car. Did the police violate Mr. Cherry's Fifth Amendment right to remain silent and article I, section 9's more

protective prohibition against compelling a person to give evidence against himself?

2. A person's consent to let the police conduct a warrantless search of his car must be given freely and voluntarily. After Mr. Cherry was arrested for having a suspended driver's license, he ceded to the police request to search his car despite initially refusing to consent, asserting his right to remain silent, being told that a drug detection dog was coming because the police suspected he had drugs in the car, and learning that his car would be impounded by the police. Did the State prove that Mr. Cherry's consent to a car search was freely and voluntarily obtained in these circumstances?

3. A judge lacks authority to sign written findings of fact from a hearing at which the judge did not preside. The CrR 3.6 hearing was held several months before trial and the trial judge deferred to the prior judge's CrR 3.6 findings when considering the issues at the later CrR 3.5 hearing. Did the trial judge lack authority to sign CrR 3.6 written findings of fact and conclusions of law when that judge did not hear the testimony or enter the rulings at issue?

4. When an accused person informs the court of a substantial impairment in his relationship with his counsel, the court must consider

whether there is an irreconcilable conflict after conducting a private and in-depth inquiry. Mr. Cherry repeatedly informed the court that there were irreconcilable differences between himself and his attorney, but the court asked no further questions other than ascertaining from counsel whether he felt able to proceed. Did the court improperly refuse to inquire into Mr. Cherry's complaints about his ability to consult with his trial attorney?

5. As a matter of due process and by controlling statute, a court may not punish a person by assessing fees when it knows the person is unable to pay them. Did the court improperly order Mr. Cherry to pay thousands of dollars in nonmandatory legal financial obligations?

D. STATEMENT OF THE CASE.

Bremerton police officer Steven Forbragd saw Matthew Cherry driving down the street and signaled for him to stop because he knew Mr. Cherry's driver's license was suspended for an unpaid ticket. 7/31/13RP 6-7. Mr. Cherry parked his car at the side of the road a few blocks after the officer signaled for him to stop. *Id.* at 8. He wanted his car to be in a safe spot so that he would not run the risk of having it towed. *Id.* at 19.

Officer Forbragd immediately arrested Mr. Cherry for driving with a suspended license in the third degree. *Id.* at 8. He handcuffed Mr. Cherry and put him in the rear of his police car. *Id.* Mr. Cherry admitted his license was suspended. 9/10/13RP 31. Officer Forbragd read Mr. Cherry his *Miranda* rights and Mr. Cherry said he did not want to make any further statements. 7/31/13RP 7-8, 10. Officer Forbragd asked him who had been in his car and Mr. Cherry told him the passengers' names. *Id.* at 9.

Officer Forbragd spoke with Mr. Cherry's two car passengers. Neither had a valid driver's license and the officer told both they needed to leave. 7/31/13RP 9. One passenger was angry over being stopped and forced to leave the car. *Id.* at 10.

A few minutes later, Officer Forbragd asked Mr. Cherry to give him permission to search his car. 7/31/13RP 11-12. Mr. Cherry said no, and told the officer there were not any drugs in the car because he had already used the drugs he had earlier in the day. *Id.* at 12. He said "he really didn't want us to search it." 9/10/13RP 33.

Officer Forbragd told Mr. Cherry he "had called out a drug detection dog to the scene" and they waited for the dog to come. 7/31/13RP 12. He also told Mr. Cherry that they would impound his

car. *Id.* at 13. Officer Forbragd believed there were drugs in the car because he knew Mr. Cherry and his passengers from other incidents and intended to search the car if he could get permission, even though he did not see any drugs in the car. *Id.* at 23.

Mr. Cherry begged Officer Forbragd not to tow the car. 7/31/13RP 19. He explained that the fees would be onerous. *Id.* Officer Forbragd understood that Mr. Cherry did not want the car towed but insisted he did not promise to cancel the tow truck if Mr. Cherry consented to the car's search. *Id.*

Officer Dale Roessel was at home, off-duty, when he was summoned to bring a drug detection dog to the scene. 7/31/13RP 31-32. Mr. Cherry asked him not to impound the car, but Officer Roessel denied telling Mr. Cherry that his cooperation would affect the impound decision. *Id.* at 36-37. However, he acknowledged that generally if someone is cooperative with the drug detection dog, he would not impound the car. *Id.* at 41.

While they were waiting for the drug detection dog, Mr. Cherry agreed to let Officer Forbragd search his car. *Id.* at 12. Afterward, the officers canceled the tow truck and left the car on the street. *Id.* at 20.

The dog did not "alert" when walking around the exterior of the car. 7/31/13RP 40. Although he alerted when inside the passenger compartment, there was no contraband inside the car. 9/11/13RP 107. Mr. Cherry then agreed that the police could look in his locked trunk. *Id.* at 37. Inside a backpack in the trunk, the police found a "meth pipe" in a cigarette pack. *Id.* at 38. Mr. Cherry admitted it was his pipe, used for smoking methamphetamine. *Id.* at 17.

While being booked into the jail, Officer William Izer thought Mr. Cherry might be hiding something and ordered a strip search. 9/11/13 RP 113. Mr. Cherry took off all his clothes. *Id.* at 114. As Officer Izer examined Mr. Cherry's body, Mr. Cherry suddenly turned away, raising his arms like he was putting something toward his mouth. *Id.* at 115. Officer Izer immediately grabbed Mr. Cherry's arms. *Id.* at 116. He found a small back pouch that had nothing inside. *Id.* at 117-18. Mr. Cherry said he did not want to get a drug charge. *Id.* at 93.

The State charged Mr. Cherry with unlawful possession of a controlled substance based on the residue in the pipe and tampering with evidence for his actions during the strip search. CP 33. Before his trial, Mr. Cherry repeatedly asked the court to appoint a different attorney, complaining that he had irreconcilable differences with his

lawyer Craig Kibbe. 6/25/13RP 4; 7/10/13RP 3; 8/26/3RP 1-2; 9/1013RP 20. Each judge refused without asking about the nature of the problem, relying on the fact that the first judge had denied the request. 6/25/13RP 5; 7/10/13RP 3; 8/26/13RP 3; 9/10/13RP 20.

Before his trial, the court held separate CrR 3.5 and CrR 3.6 hearings, finding the search of Mr. Cherry's car was consensual and his statements were admissible as either the product of a voluntary *Miranda* waiver or not elicited by police interrogation. CP 75-76, 79. Mr. Cherry was convicted after a jury trial and received a standard range sentence. CP 72, 85. Pertinent facts are discussed in further detail in the relevant argument section below.

E. ARGUMENT.

1. **Once Mr. Cherry invoked his right to remain silent, the police violated his state and federal constitutional rights by asking him more questions.**

a. *Mr. Cherry invoked his right to remain silent but the police did not honor it.*

Police officers must advise arrested suspects of the right to remain silent if they want to use the suspects' subsequent responses to questioning as evidence against them. *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); U.S. Const. amend. 5;

Wash. Const., art. I, § 9. An arrested person's right to cut off questioning is a "critical safeguard" of the privilege against self-incrimination. *Michigan v. Mosley,* 423 U.S. 96, 103, 96 S.Ct. 321,46 L.Ed.2d 313 (1975) (citing *Miranda,* 384 U.S. at 474).

Once a custodially detained suspect asserts his right to silence, "the interrogation must cease." *Mosley,* 423 U.S. at 101 (citing *Miranda,* 384 U.S. at 473-74). If an individual's right to cut off questioning is not "scrupulously honored," statements obtained after the suspect invoked his right to silence may not be used against him and must be suppressed at trial. *Mosley,* 423 U.S. at 104.

An accused person must invoke his Fifth Amendment right to remain silent unambiguously. *Berghuis v. Thompkins*, 560 U.S. 370, 381, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010). However, a suspect "need not speak with the discrimination of an Oxford don." *Davis v. United States,* 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). So long as the accused has made "some statement that can reasonably be construed to be an expression of a desire for [silence]," questioning must end. *Id.* A suspect's statement "that he did not want to talk," would "invoke[] his right to cut off questioning." *Thompkins,* 560 U.S. at 382.

The right to remain silent may be invoked by conduct, such as remaining silent when faced with questions, or by comment indicating a desire to not speak further to the police. *State v. Hodges*, 118 Wn.App. 668, 673, 77 P.3d 375 (2003). Here, Mr. Cherry said he did not want to make any further statements after he received *Miranda* warnings. 7/31/13RP 10. Mr. Cherry's remark indicated his intent to remain silent. *See Thompkins*, 560 U.S. at 382. The arresting officer understood that he was invoking his right to cut off questioning and he asked no further questions at that time. 7/31/13RP 19; 9/10/13RP 31. Yet the police did not honor his request as required by the Fifth Amendment and article I, section 9. 7/31/13RP 11; 9/10/13RP 33.

To scrupulously honor a person's invocation of his right to remain silent, the police may not encourage the suspect to make further comments, subtly or directly. *See Mosley*, 423 U.S. at 100. A subsequent voluntary waiver may occur only if: (1) the police scrupulously honor the request to cut off questioning; (2) the police have not "engaged in further words or actions amounting to interrogation"; (3) the police have not used other "tactics tending to coerce the suspect to change his mind"; and (4) "the subsequent waiver

was knowing and voluntary." *State v. Wheeler*, 108 Wn.2d 230, 238-39, 737 P.2d 1005 (1987).

Interrogation is not limited to express questioning; it also includes "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 164 L.Ed.2d 297 (1980). Whether such words or actions were used by police depends "primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.*

None of the necessary conditions that would permit the police to elicit further information from Mr. Cherry were met in the case at bar.

b. *Mr. Cherry's statements were made in response to deliberate police action after he invoked his right to remain silent.*

Because Mr. Cherry invoked his right to silence, police officers were required to "scrupulously honor" it by ceasing questioning immediately. *State v. Walker*, 129 Wn.App. 258, 273-74, 118 P.3d 935 (2005) (quoting *Mosley*, 423 U.S. at 104; *Miranda*, 384 U.S. at 474). "Any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Miranda*, 384 U.S. at 474. The arresting officer asked Mr. Cherry direct questions

following his request to cut off questioning and also engaged him in conversation that would be reasonably likely to elicit statements from Mr. Cherry. Consequently, Mr. Cherry's later statements to the police were not validly obtained.

After Mr. Cherry told Officer Forbragd that he did not want to talk further in response to receiving *Miranda* warnings, Officer Forbragd asked Mr. Cherry to confirm the names of the passengers in his car. 7/31/13RP 8-9, 10. He asked if a licensed driver could take the car. *Id.* at 14. He also said to Mr. Cherry, "I was going to impound his car." 7/31/13RP 13.

Shortly after Mr. Cherry said he did not want to make further statements to the police, Officer Forbragd "asked" Mr. Cherry whether he would consent to the police searching his car. 7/31/13RP 11. Mr. Cherry remained handcuffed and seated in the patrol car. *Id.* at 8-9. Mr. Cherry said no to this question, but he further responded by saying, "[t]here are no drugs in there anyway. I used them all earlier." *Id.* at 12. These statements given in answer to the officer's question seeking consent to search the car were admitted at trial as part of the prosecution's case-in-chief. 9/11/13RP 83.

In addition to stating that the police would impound the car, Officer Forbragd told Mr. Cherry that he had called for "a drug narcotics dog" to come to the scene based on Mr. Cherry's "history" and "the statements he made that he had already used drugs that day." 7/31/13RP 12. While waiting for the drug detection dog, Mr. Cherry begged the officer not to impound his car. 7/31/13RP 19. He explained he had tried to park the car in a safe spot and he would not be able to afford towing costs. *Id.* The officer refused. *Id.* Mr. Cherry then agreed that the police could search his car. *Id.* at 12-13. During the search, Mr. Cherry made further statements to Officer Forbragd prompted by seeing the police search his car. 7/31/13RP 16-18; 9/10/13RP 33-34.

Mr. Cherry's responses to the questions and statements of the officer do not constitute a waiver of his previously requested right to remain silent. In *Wheeler*, the court explained that while routine booking questions may be asked even when the suspect invokes his right to remain silent, this exception is narrow. 108 Wn.2d at 238. It is a "limited exception" permitting "background, biographical questions necessary to complete booking." *Id.*

The police may not veer from the script of official booking questions to elicit information relevant to the investigation. *Id.* In

Wheeler, during booking at the police station, an officer asked the defendant if he knew another suspect in the case, which was not part of the regular booking questions. *Id.* at 239. This question constituted interrogation in violation of the Fifth Amendment right that Mr. Wheeler had asserted. *Id.* The officer was not free to take advantage of the booking process as a means for eliciting information about the incident after Mr. Wheeler invoked his right to remain silent. *Id*

Here, the police were trying to investigate additional crimes beyond the suspended license offense for which Mr. Cherry was arrested. 7/31/13RP 8. Officer Forbragd admitted that he intended to search Mr. Cherry's car from the outset, even though he was arresting Mr. Cherry for driving with a suspended license. 7/31/13RP 23. By telling Mr. Cherry that a drug detection dog was on its way, the officer would reasonably expect to generate a reaction from Mr. Cherry. A person would also feel compelled to explain why he did not want the police to search his car. Mr. Cherry felt compelled to explain that he had used the drugs the officer suspected he possessed. 7/31/13RP 12; 9/10/13RP 33. Neither this statement nor his statement regarding consent to search the car should have been asked and the fruits of the illegality would not have been obtained but for the illegal questioning.

c. *Article I, section 9 expressly bars the police from failing to honor Mr. Cherry's invocation of his right to remain silent.*

By continuing to question Mr. Cherry and engage him in conversation about searching his car, the police violated not only the established protections of Fifth Amendment, but the more protective requirements of article I, section 9 of the Washington Constitution. Examining the independent requirements of the state constitution under *State v. Gunwall*, 106 Wn.2d 54, 65, 720 P.2d 284 (1986), demonstrates that the police violated Mr. Cherry's right to refuse to give evidence against himself.

i. *There are significant differences in the text of article I, section 9 and the Fifth Amendment.*

Article I, section 9 of the Washington Constitution provides, "No person shall be compelled in any criminal case to *give evidence* against himself." (emphasis added). By contrast, the Fifth Amendment provides that no person "shall be compelled in any criminal case to *be a witness* against himself." (emphasis added).

By using the word "witness," the Fifth Amendment focuses on the right not to testify against oneself at trial. *See Michigan v. Tucker*, 417 U.S. 433, 440, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *Cf. Crawford*

v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (defining "witness" as person who "bears testimony").

The framers of the Washington Constitution rejected a proposed version of article I, section 9 that would merely protect the right not "to testify against" oneself. *Journal of the Washington State Constitutional Convention, 1889*, at 498 (B. Rosenow ed. 1962). They favored the broader "give evidence" standard. *Id.* They also changed the structure of the constitutional provision from the Fifth Amendment, placing the double jeopardy clause after the right to be free from giving evidence against oneself, further demonstrating an intent to emphasize the right to remain silent. Art. I, § 9. The provision's language expressly provides strong protection against self-incrimination at the investigatory stage of the criminal process.

In Massachusetts, the state constitution uses similar language as Washington's, providing that no person shall be compelled to "furnish evidence against himself." Mass. Const. art. 12. Its Supreme Court has construed this state constitutional provision as more protective than the Fifth Amendment in the context of determining whether a person has invoked the right to cut of police questions. *Commonwealth v. Clarke*, 960 N.E.2d 306, 319-20 (Mass. 2012). Similarly, the text of article I,

section 9 and its structural difference from the Fifth Amendment demonstrate the intent to confer stronger protection against self-incrimination in Washington. *See Gunwall*, 106 Wn.2d at 65.

ii. *Constitutional law and pre-existing state history favor stronger individual protections under article I, § 9.*

The third and fourth *Gunwall* factors, constitutional and common law history and pre-existing state law, demonstrate that article I, section 9 provides stronger protection than the Fifth Amendment. The delegates of the Constitutional Convention rejected language similar to the Fifth Amendment and instead used broader terms providing more protection to a person's right to be free from being compelled to provide evidence against himself. *See Rosenow*, *supra*.

Before *Thompkins*, this state's case law provided greater protection then the United States Supreme Court has endorsed. *See State v. Robtoy*, 98 Wn.2d 30, 39, 653 P.2d 284 (1982). In *Robtoy*, the Court held that when a request for counsel is equivocal, the only questions that may follow this request is to clarify the person's intent to invoke his rights. *Id.* at 39. As explained in *Robtoy*,

> Whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. *Further questioning thereafter*

> *must be limited to clarifying that request* until it *is* clarified.

Id. at 39 (emphasis in original). The *Robtoy* rule was more protective than the approaches some other state and federal courts used at that time. *See Smith v. Illinois*, 469 U.S. 91, 96 n.3, 105 S.Ct. 490, 83 L.Ed.3d 488 (1984).

Although *Robtoy* addressed an equivocal request for counsel following *Miranda* warnings, there is "no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel." *Thompkins*, 560 U.S. at 381. Although the Supreme Court noted that *Robtoy* conflicted with precedent from the United States Supreme Court, it has not reached the state constitutional issue. *See State v. Radcliffe*, 164 Wn.2d 900, 907, 194 P.3d 250 (2008). *Robtoy* was the law in Washington for decades and that it provided stronger protection than that which was ultimately afforded by the United States Supreme Court under the Fifth Amendment weighs in favor of a broader interpretation of the rights protected by article I, section 9.

iii. *Structural differences and matters of particular state concern necessarily favor broader protection for individual rights.*

The structural differences between the state and federal constitutions always supports an independent constitutional analysis under *Gunwall* because the federal constitution is a grant of power from the states, while the state constitution represents a limitation on the State's power. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). While individual rights were made part of the federal constitution as later amendments, our state constitution begins with the Declaration of Rights accorded to individuals.

State law enforcement measures are also a matter of state or local concern. *Id.* In *Miranda*, the court "encourage[d]" states to search for "increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." 384 U.S. at 467. The fundamental fairness of trials held in Washington is a matter of particular state concern. *State v. Bartholomew*, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984). Fundamental fairness dictates that when a suspect invokes his rights during custodial interrogation, police must limit further questions to clarifying the request, not trying to access additional information or receiving further permission to invade

the person's private affairs. *See Robtoy*, 98 Wn.2d at 39; *see also State v. Snapp*, 174 Wn.2d 177, 189-90, 275 P.3d 289 (2012) (explaining more extensive protections of private affairs under state constitution than federal counterpart).

In sum, an evaluation of the *Gunwall* factors shows article I, section 9 provides broader protection against being compelled to give evidence against oneself than the Fifth Amendment. The framers of the Washington Constitution purposefully chose language that is different from the Fifth Amendment, the structure of the state constitution emphasizes individual rights, and prior caselaw in this state protected individuals who asserted their rights ambiguously from continued questioning. This Court should hold that under article I, section 9, if a suspect asserts his right to refrain from giving further evidence against himself, further questioning may only pertain to clarifying an ambiguity, not attempting to gather evidence in another fashion.

Mr. Cherry's invocation of his right to cut off questioning was not ambiguous and it was not scrupulously honored. In *Robtoy*, the Court admonished, "we will not permit interrogating officers to use the guise of clarification as a subterfuge for eliciting a waiver of the previously asserted right to counsel." 98 Wn.2d at 39-40. The same is

true of a previously asserted right to silence. By direct questioning and through statements likely to elicit an incriminating response, Mr. Cherry was compelled to give evidence against himself even though he had told the police he did not want to give further statements. The court misconstrued the violation of his constitutional rights that led to his statements to the police and his agreement that the police could search his car.

d. *Mr. Cherry's consent to search his car was the product of illegal police conduct.*

Article I, section 7 and the Fourth Amendment prohibit warrantless searches, and while validly obtained consent is an exception to the warrant requirement, the prosecution bears the burden of proving "the consent was freely and voluntarily given." *State v. O'Neill,* 148 Wn.2d 564, 588, 62 P.3d 489 (2003); U.S. Const. amend. 4; Const. art. I, § 7. Any exception to the warrant requirement is "jealously and carefully drawn." *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

Voluntary consent is measured by the totality of circumstances, including factors such as whether *Miranda* warnings were given, the level of education and intelligence of the individual, and whether he or

she has been advised of the right to consent. *O'Neill,* 148 Wn.2d at 588-89. Voluntary consent can be given in a custodial situation, but "any restraint is a factor to consider." *Id.* at 589.

In *O'Neill,* the court concluded that the consent to the search was invalid due to the officers' repeated requests for consent. *Id.* at 591. Unlike the case at bar, the defendant in *O'Neill* had not been arrested and was not in custody when the police asked to search his car. But similarly to Mr. Cherry, the defendant in *O'Neill* initially refused to let the officer search his car yet changed him mind after continued discussion. *Id.* at 572.

O'Neill also cited a Florida case where the court held that consent to a search is not voluntary when "the consent only occurred after the defendant was advised that the K–9 unit would be called to conduct a sniff check." *Id.* at 590 (citing *Rouse v. State*, 643 So.2d 696, 698 (Fla. Dist. Ct. App. 1994). Similarly to Mr. Cherry, the defendant in *Rouse* was stopped for a traffic infraction but the police suspected he possessed drugs, although they had not seen any. 643 So.2d at 697. The defendant initially refused to submit to a search, but changed his mind when told a drug detection dog was coming. *Id.* The court ruled the defendant's consent was not the product of a voluntary waiver. *Id.*

Numerous factors weigh against the court's ruling that Mr. Cherry gave consent freely and voluntarily. He had been arrested, handcuffed, and placed in the police car, which the *O'Neill* Court said indicates consent was not voluntarily obtained. 148 Wn.2d at 589. By continuing to question Mr. Cherry even after he said he did not want to talk further, and making plain that a drug detection dog would search the car even after Mr. Cherry refused to consent to the search, the officer demonstrated a disregard for Mr. Cherry's invocation of his rights that undermines the voluntariness of his later change of position that let the police search his car. 7/31/13RP 7/31/13RP 12-13, 19.

The trial court found the police did not explicitly demand consent to search the car in exchange for not impounding it. CP 78-79. But the police admitted that they would "generally" agree not to impound a car if the suspect cooperated with the search and it was "a given" that people do not like to have their cars impounded. 7/31/13RP 40-41. Even if the police did not offer an express quid pro quo to garner Mr. Cherry's consent, the inescapable fact is that the police "called off" the tow and did not impound the car due to Mr. Cherry's cooperation after they conducted the search. 7/31/13RP 26-27.

Mr. Cherry's belated agreement that the police could search his car came after the police violated his right to remain silent under the Fifth Amendment and article I, section 9. The police were not even permitted to question Mr. Cherry about whether he would consent to the search when he had already said he did not want to make further statements. He also told the police he did not want them to search his car. 7/31/13RP 12. The police called for a drug detection dog even though he was being arrested for driving with a suspended license and the arresting officer told Mr. Cherry that he suspected there were drigs in the car and wanted to search it. 7/31/13RP 12. It was reasonable for Mr. Cherry to feel he had little choice other than to give consent to the search, which means that his consent was not freely and voluntarily obtained. *O'Neill*, 148 Wn.2d at 588.

e. *The fruits of the police illegality must be suppressed and his convictions reversed due to the State's reliance on improperly obtained evidence.*

The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." *Winterstein*, 167 Wn.2d at 632; *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a

direct result of an unlawful invasion"). The evidence recovered from this search supplied the sole basis of the prosecution for unlawful possession of a controlled substance and led to the subsequent charge of tampering with evidence when he appeared to swallow an item while being booked at the jail. CP 44.

Additionally, his statements about his possession and use of methamphetamine should not have been admitted at trial. The prosecution bears the burden of proving that evidence obtained in violation of *Miranda* was harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 292-97, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Chapman v. California*, 386 US. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State must show that the admission of Mr. Cherry's statements and the evidence gathered as a result of those improperly elicited statements did not contribute to the conviction. *Fulminante*, 499 U.S. at 296 (citing *Chapman*, 386 U.S. at 26).

The State cannot meet this high burden here, when his statements about his possession and use of a methamphetamine pipe found in a backpack in his car were essential to the case against him. 9/11/13RP 83, 85, 87. In closing argument, the State emphasized Mr. Cherry's initial refusal to permit the search and his accompanying claim

that he had already smoked the methamphetamine he had. 9/11/13RP 157. His admissions proved that the pipe belonged to him, and these admissions arose only after the police violated his right to remain silent by continuing to question him and make statements that elicited responses. Reversal is required because the State's case rested on evidence and statements that should have been suppressed.

2. **The court's findings of fact are invalid because they were not signed by the hearing judge and contain numerous inaccuracies.**

a. *The CrR 3.6 written findings are invalid because they were not entered by the judge who heard testimony and ruled on the motion.*

A judge who did not hear testimony in a fact-finding hearing lacks authority to enter written findings based on that testimony. *State v. Bryant*, 65 Wn.App. 547, 549, 829 P.2d 209 (1992); RCW 2.28.030(2);[2] *see also DGHI Enters v. Pacific Citites, Inc.*, 137 Wn.2d

[2] RCW 2.28.030 provides, in pertinent part:

A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:

. . .

(2) When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision.

. . .

933, 977 P.2d 1231 (1999) (proposed written findings, although "substantially correct" could not be adopted and entered by a second judge where original judge died prior to signing). This rule is true "even where the prior judge has entered an oral decision." *Bryant*, 65 Wn.App. at 549. "Only the judge who has heard evidence has the authority to find facts." Id. at 550.

In *Bryant*, Judge Terrance Carroll imposed a manifest injustice disposition on a juvenile defendant. *Id.* at 548. Later, a court commissioner signed findings of fact and conclusions of law to support the manifest injustice disposition, although there was no indication the commissioner heard, or considered, the evidence produced at the disposition hearing. *Id.* at 548, 551. Whether or not the commissioner considered such evidence, the commissioner lacked authority to sign the findings and conclusions relating to the disposition. *Id.* The *Bryant* Court struck the findings and conclusions and remanded the case for entry of findings or for a new dispositional hearing. *Id.*

In the cases specified in subdivisions (3) and (4), the disqualification may be waived by the parties, and except in the supreme court and the court of appeals shall be deemed to be waived unless an application for a change of the place of trial be made as provided by law.

Judge Steven Dixon presided at the CrR 3.6 fact-finding hearing, where he heard testimony and made oral findings on July 31, 2014. After that hearing, the prosecutor apologized for failing to draft written findings. 9/10/13RP 6, 54. At Mr. Cherry's sentencing hearing, the prosecutor asked Judge Laurie to sign the written findings from the CrR 3.6 hearing instead of Judge Dixon, because Judge Dixon was not available. 9/13/13RP 2. Judge Laurie noted that Judge Dixon "is gone for at least two weeks" and agreed to sign the findings without defense objection. *Id.*

Judge Laurie was not present during the CrR 3.6 fact-finding hearing and had not taken part in the decision-making for the CrR 3.6 issues. Judge Dixon's ruling occurred before Judge Laurie's involvement in the case and she deferred to Judge Dixon's ruling when entering her own rulings in a later hearing held for purposes of CrR 3.5. 7/31/13RP 54, 59-60. The CrR 3.6 written findings state that the matter had "come on regularly for a hearing before the undersigned Judge" even though the undersigned judge had not participated in the hearing. CP 77.

Judge Laurie was "*without authority* to sign the findings and conclusions under any procedure" involving Mr. Cherry's motion to

suppress physical evidence when she did not take part in deciding the substantive issues at stake. *Bryant,* 65 Wn.App. at 551 (emphasis added). This defect cannot be waived. RCW 2.28.030(2). The judge exceeded her authority by signing the CrR 3.6 written findings of fact and conclusions of law that underlied Mr. Cherry's conviction. This error requires the case be remanded and the findings of fact stricken. *Id.*

b. *The CrR 3.5 and CrR 3.6 written findings contain claims that are not supported by the evidence from the hearings.*

The findings of fact entered after the separately held CrR 3.5 and CrR 3.6 hearings are largely duplicative. Both are flawed because they do not accurately reflect the evidence presented at the hearings.

CrR 3.6 Finding of Fact IV and CrR 3.5 Findings of Fact IV and V fail to mention the discussion that occurred between the officer and accused after Mr. Cherry invoked his right to remain silent (as recognized in Finding of Fact II), and said "no" to the officer's question about whether he would agree to have his car searched (as recognized in Finding of Fact III), and yet later agreed that the police could search his car. CP 74, 78. Officer Forbragd admitted that he continued speaking generally to Mr. Cherry even though Mr. Cherry had invoked his right to remain silent. 7/31/13RP 9, 12-13; 9/10/13RP 33-35, 38. He

questioned Mr. Cherry about the passengers in the car, he asked for consent to search the car, he told him a drug detection dog was coming and said he was going to impound the car. *Id.* Mr. Cherry begged the officer not to impound the car. 7/31/13RP 19. This conversation is essential to evaluating whether the police scrupulously honored Mr. Cherry's request to remain silent and whether his consent to search the car was voluntarily obtained.

Similarly, CrR 3.6 Finding of Fact VII concludes that the officers "never threatened" Mr. Cherry that his car "would be towed if he did not give consent to search the vehicle." CP 79. This finding omits mention of the coercive atmosphere. It does not mention what Officer Roessel acknowledged – that it is "a given" that people do not want their cars impounded and that the police are generally willing to not impound a car if a person cooperates with a search. 7/31/13RP 40-41. By failing to mention Mr. Cherry's expressed desire to avoid impound and the officer's admission that impound is less likely to occur if a person consents to a search, the court's finding is misleading.

CrR 3.6 Finding of Fact X contains information that was never offered at the CrR 3.6 hearing. CP 79. There was no testimony that Mr. Cherry "was booked for several offenses" when taken to the jail,

contrary to this finding of fact. *Id.* There was no testimony about the specific number of total offenses contained in Mr. Cherry's criminal history, as this finding of fact asserts. 7/31/13RP 48-51. Similarly, there was no testimony about a field test performed by Officer Forbragd on the pipe the police found when they searched the trunk of Mr. Cherry's car. CP 79. CrR 3.6 Finding of Fact X should be stricken because it is not supported by substantial evidence offered to the court at the CrR 3.6 hearing.

The CrR 3.5 findings of fact also contain assertions that were not presented to the court at the CrR 3.5 hearing. CP 74-75. Officer Roessel did not testify at the CrR 3.5 hearing. Officer Forbragd did not discuss what Officer Roessel said or did. At the CrR 3.6 hearing, he admitted he did not hear what Officer Roessel said to Mr. Cherry. 7/31/13RP 15. Yet CrR 3.5 Findings of Fact V and VIII details Officer Roessel's statements from before, during, and after the search. CP 74-75. There was no evidence what Officer Roessel said to Mr. Cherry or Mr. Cherry said in response before searching the car. CP 74. There was no testimony about the backpack search, Officer Roessel's discussion of canceling the tow, or what Officer Roessel said about impounding the car. CP 75. These findings of fact are not supported by evidence offered

at the CrR 3.5. *Id.* Officer Roessel's conversations were not and may not be used to bolster the court's findings and conclusions.

These unsupported findings of fact should be stricken and may not be used to justify the court's ruling.

3. The court impermissibly ignored Mr. Cherry's repeated complaints about his irreconcilable breakdown in his relationship with counsel.

a. *The right to counsel includes the right to a lawyer who does not have a conflict of interest.*

A trial court may not permit a criminal defendant to be represented by an attorney with whom there is an irreconcilable conflict of interest. *In Re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (court must adequately inquire into extent of conflict); *see also United States v. Nguyen*, 262 F.3d 998, 1003 (9th Cir. 2002) ("For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'").

A criminal defendant must be able to communicate with his lawyer during key phases of trial preparation, to "provide needed information to his lawyer and to participate in the making of decisions on his own behalf." *Riggins v. Nevada*, 504 U.S. 127, 144, 112 S. Ct.

1810, 118 L. Ed. 2d 479 (1992). "[A] defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer." *Id.* While accused persons are not guaranteed the best rapport with their attorneys, they are guaranteed representation by "an effective advocate" with whom they have no irreconiable conflicts and can communicate. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

To determine whether there is an irreconcilable conflict between attorney and client requiring substitution of counsel, the Washington Supreme Court applies a three-part test. *Stenson*, 142 Wn.2d at 724 (adopting the test set forth in *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). The factors include "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." *Id.*

A court errs by focusing on the attorney's competence when an accused person complains about the attorney-client relationship. *Nguyen*, 262 F.3d at 1003 ("Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense."). Instead, the court must inquire into the nature of the problem between the lawyer and client. *Id.* at 1002.

In *Nguyen*, the defendant complained at the start of trial that his attorney was rude and almost never talked to him. *Id.* at 1001. The defense attorney responded by telling the court he met with the defendant several times and he was prepared for trial. *Id.* The trial court did not further inquire into the defendant's complaints. *Id.* During trial, defense counsel told the court that his client would no longer speak with him. *Id.* The court informed the defendant that his lawyer was representing him adequately and it would not provide him with a different attorney. *Id.*

The *Nguyen* Court found the trial court abused its discretion and deprived Mr. Nguyen of his right to counsel on two grounds: denying his request for more time to obtain a new attorney and refusing to substitute counsel. *Id.* at 1002. Even though the defendant did not ask for new counsel until the start of trial, the trial court erred by failing to determine the length of possible delay that would result from new counsel. *Id.* at 1004. The timeliness inquiry balances "the resulting inconvenience and delay against the defendant's important constitutional right to counsel of his choice." *Moore*, 159 F.3d at 1161 (internal citation omitted). "The mere fact that the jury pool was ready for selection or even that the jury was ready for trial does not

automatically outweigh Nguyen's Sixth Amendment right." *Nguyen*, 262 F.3d at 1004.

Additionally, the court inadequately inquired into the defendant's complaints. *Id.* at 1003. The court should have asked about the nature of the problem with the present attorney by questioning the defendant and attorney "privately and in depth." *Id.* at 1004; *see also United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777-78 (9th Cir . 2002) ("in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions."). By limiting its inquiry into whether the attorney and client had met to discuss the case and whether the attorney was prepared to proceed, the court did not sufficiently seek information about the nature of the problem. *Nguyen*, 262 F.3d at 1005; *see also Adelzo-Gonzalez*, 268 F.3d at 778 (trial court must "probe more deeply into the nature of the relationship" between defendant and counsel beyond assessing attorney's preparedness); *Moore*, 159 F.3d at 1160 (giving "both parties a chance to speak and ma[king] limited inquires to clarify" does not mean court adequately understood "the extent of the breakdown.").

b. *The court refused to ask about the nature of the attorney-client conflict despite Mr. Cherry's repeated requests.*

Mr. Cherry timely informed the court that he had an irreconcilable breakdown in communication with counsel. Almost three months before his trial, Mr. Cherry asked for another attorney, complaining that his lawyer was acting more like a "warm body" than an advocate. 6/25/13RP 4-5. The court conducted no inquiry and asked no probing questions. It merely told Mr. Cherry he had "no right to choose" his attorney, Mr. Kibbe had been "chosen" and it would not change counsel unless Mr. Kibbe was unable to represent him. *Id.* at 5. The judge asked no questions of Mr. Kibbe. *Id.*

Two months before his trial, Mr. Cherry again told the judge there were "irreconcilable differences between me and my attorney that I need to address the court about." 7/10/13RP 3. The court stated that this issue had already been "taken up" at the hearing two weeks earlier, although a different judge presided. *Id.* As Mr. Cherry started to tell the court the reasons that he had irreconcilable differences with his attorney, the court stopped him. *Id.* The judge told him not to say anything about what he and his attorney had talked about. *Id.* Instead, the judge asked Mr. Kibbe if he believed he needed to be removed from

the case. *Id.* When Mr. Kibbe said, "no," the judge said, "Mr. Kibbe remains on the case." *Id.* The court affirmatively stopped Mr. Cherry from trying to explain the basis for his request for another attorney at that hearing. *Id.*

On August 26, 2013, two weeks before the trial started, Mr. Cherry offered the court a letter complaining about Mr. Kibbe's work on the case and asking for a new lawyer. 8/26/13RP 2. Mr. Kibbe suggested that the court should disregard the letter because he believed he could represent Mr. Cherry and the request for a new lawyer had already been denied. *Id.* The court looked at the letter and said it would not "change" the decision to have Mr. Kibbe represent Mr. Cherry. *Id.* at 3.

In this letter, Mr. Cherry said that his lawyer had violated the attorney-client privilege and he could only explain this information to the court "off the record." CP 31. The letter also complained about the attorney's refusal to investigate, interview the expert witness, and refusal to seek evidence that would dispute the State's claim that the pipe contained drug residue. *Id.* The letter further stated that there were "irreconcilable differences" that persisted despite efforts to resolve them. CP 32. It included the number of the grievance filed against Mr.

Kibbe with the state bar association. *Id.* The court did not ask Mr. Cherry to explain any of the assertions in the letter, including his request to speak off the record about an attorney-client privilege violation.

As the trial began, Mr. Cherry asked to address the State's motion that would preclude him from offering a defense that he possessed drug paraphernalia and not a controlled substance. 9/10/13RP 14-16, 19. The court told Mr. Cherry he was not permitted to speak and must direct his questions to his attorney. *Id.* at 19. Mr. Cherry told the court that he had filed a bar complaint against Mr. Kibbe, the bar association was conducting an investigation and he had not wanted Mr. Kibbe as his lawyer for a long time. *Id.* at 20.

The court noted that the file reflected a number of requests for a new attorney by Mr. Cherry and other judges had denied those requests. 9/10/13RP 20. The court stated, "I'm not going to revisit" those rulings today. *Id.* It conducted no inquiry.

Throughout these numerous hearings, no judge took the time to question Mr. Cherry and Mr. Kibbe about the cause of the attorney-client conflict. The only question a judge ever asked was whether Mr. Kibbe believed he could represent Mr. Cherry, which does not

constitute an adequate inquiry. Each successive judge relied on the fact that a prior judge had rejected Mr. Cherry's motion for a new attorney without regard for the fact that none of the judges conducted the required inquiry and none based their decisions on adequate information.

c. *The court's failure to even inquire into Mr. Cherry's repeated complaints about his lawyer violated his right to effective assistance of counsel.*

A court's unreasonable or erroneous refusal to substitute counsel is presumptively prejudicial and requires reversal. *Nguyen*, 262 F.3d at 1005. The timeliness of Mr. Cherry's request is plain. *See e.g.*, *Nguyen*, 262 F.3d at 1003 (timely when made the day trial set to begin); *Moore*, at 1159, 1161 (timely when made two and a half weeks before trial).

"For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'" *Nguyen*, 262 F.3d at 1004 (citing *Moore*, 159 F.3d at 1160). The court did not conduct this required inquiry into the breakdown of communication, leaving Mr. Cherry with representation by counsel with whom he lacked trust, confidence, or the ability to communicate. The court's unreasonable refusal to consider Mr.

Cherry's requests or even ask for an explanation of his complaints denied Mr. Cherry his right to the effective assistance of counsel.

4. The court impermissibly imposed discretionary court costs even though it understood Mr. Cherry was unable to pay these fees

When a court requires an indigent defendant to reimburse the state for authorized costs, it must also expressly find the defendant has the financial ability to pay the costs imposed. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3).[3] Imposing costs without finding the accused has the ability to pay would violate equal protection by imposing extra punishment on a defendant due to his poverty. *Fuller*, 417 U.S. at 48 n.9 ("an order to repay can be entered only when a convicted person is financially able").

A challenge to the court's authority to impose legal financial obligations may be raised for the first time on appeal as part of the

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[3] RCW 10;01.160(3) provides:
The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

court's review of erroneous sentences. *State v. Hunter*, 102 Wn.App. 630, 634, 9 P.3d 872 (2000).

Here, the court imposed $3735 in discretionary legal financial penalties, in addition to $500 mandatory victim penalty assessment and $100 DNA collection fee. CP 90. It imposed an interest rate of 12%. *Id.* Yet the court acknowledged Mr. Cherry was not likely to be able to pay this sum of money at the sentencing hearing. 9/13/13RP 17. Even though the court conceded Mr. Cherry lacked the financial means to pay the many thousands of dollars he owed, the judgment and sentence contained the boilerplate finding "that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 90.

It violates due process to impose such fees when a person is unable to pay. *Fuller*, 417 U.S. at 48 n.9. It is also is contrary to the mandatory requirements of RCW 10.01.160(3).

Most of these financial penalties are discretionary, which the court did not acknowledge. 9/13/13RP 17. The judgment and sentence lists the $2000 fine for drug crimes as "mandatory," but the controlling statute explains that the fine shall be suspended or deferred when the person is indigent. RCW 69.50.430. The $1135 sum required for the

cost of having an attorney appointed based on Mr. Cherry's indigence was not a predicated on evidence of the actual cost of counsel and was a cost incurred because of Mr. Cherry's acknowledged indigence. The $500 ordered as a "contribution" to the Bremerton Police Department and the $100 "contribution" to the Kitsap County Expert Witness Fund are also not mandatory obligations that should not be imposed upon an indigent person. CP 90.

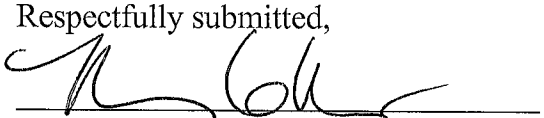
The nonmandatory legal financial obligations should be stricken because it violates due process and is contrary to the court's statutory authority to impose substantial costs on a person who it understood was unable to afford to pay.

F. CONCLUSION.

Mr. Cherry's convictions should be reversed.The fruits of the improper questioning should be suppressed and the legal financial obligations stricken.

DATED this 28th day of March 2014.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. MATTHEW CHRISTOPHER CHERRY, Age: 30; DOB: 08/17/1983, Defendant.	No. 13-1-00548-2 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR HEARING ON CrR 3.5

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a hearing on CrR 3.5; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following–

FINDINGS OF FACT

I.

That on April 27, 2013, Officer Forbragd observed the defendant driving a vehicle. He knew the defendant had a suspended license, so initiated a traffic stop. The defendant continued to drive and ignored the officer's attempts to stop him. A back seat passenger turned around in the seat and shrugged at the officer. Eventually, the defendant stopped his vehicle.

II.

That the defendant told the officer he knew he was suspended and should not have been

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driving. This was not in response to any questions by the Officer. Officer Forbragd than read the defendant his Miranda warnings after which, the defendant stated that he did not want to add any comments. Officer Forbragd then placed the defendant in the back of the patrol vehicle and began to call a tow truck. In addition, Officer Forbragd assisted two other officers who were attempting to get the passengers to leave the scene.

III.

That Officer Forbragd called Officer Roessel to the traffic stop so that he could bring his K9 partner, Dusty to assist in the investigation. Officer Forbragd went back to the vehicle and asked the defendant for consent to search the vehicle. The defendant responded that he didn't want them to search his vehicle and that he had smoked all the drugs earlier in the day. He then laughed.

IV.

That while Officer Forbragd was waiting for Officer Roessel to respond, the defendant changed his mind and told the Officer that he would give his permission for the Officer to search the vehicle. He again indicated that there was nothing left in the vehicle. This was not in response to another request by the Officer to search the vehicle.

V.

That Officer Roessel arrived on the scene and spoke with the defendant briefly to confirm that the defendant was giving his permission to search the vehicle. The defendant stated that he did give his consent for the search. The defendant was specifically told that he could refuse consent to search the vehicle.

VI.

That while Officer Roessel was searching the defendant's vehicle, Officer Forbragd stayed inside the patrol car with the defendant in a place where the defendant could watch the search in case the defendant chose to revoke his consent. The defendant never revoked his consent and gave further consent to search the trunk of the vehicle.

VII.

That the defendant made the comment, not in response to questioning, that there may be a pipe in the vehicle. He stated that the pipe did not belong to him. Officer Forbragd asked the defendant if he wished to talk to the Officer. The defendant stated that everything he says usually gets used against him but that he would like to talk to the Officer.

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VIII.

That Officer Roessel search the trunk and located a backpack with a photograph. The defendant admitted that the photograph was of his daughter. A methamphetamine pipe was also located in the same backpack. At first the defendant claimed that the backpack was not his but then admitted the backpack and the methamphetamine pipe both belonged to him. The Officers on scene determined that the vehicle was far enough off of the road way to leave at the scene and canceled the tow. The Officers never threatened the defendant that the vehicle would be towed if he did not give consent to search the vehicle.

IX.

That the defendant was transported to the jail where the defendant was booked for several counts. While the defendant was being searched during the book process by Officer Izer, Officer Izer determined that the defendant needed to be strip searched. The defendant was taken to another area where Officer Izer continued to give the defendant commands. During the strip search, it was discovered that the defendant was hiding an object in between his legs and he was not cooperative with Officer Izer's request to hand over the item. The defendant turned away from the Officer and put his hands towards his mouth. Officer Izer could not see what the defendant was doing. He was taken to the ground and the black case was eventually recovered and given to Officer Forbragd. The defendant then gave several statements regarding the black case as well as the methamphetamine pipe previously discovered. The defendant never requested an attorney.

CONCLUSIONS OF LAW

I.

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II.

That the defendant made a knowing, intelligent and voluntary waiver of his Miranda warnings when he chose to speak with Officer Forbragd. In addition his statements made initially to Officer Forbragd regarding his license status and his statement made in response to the Officer's request to search the vehicle were not made as a result of interrogation by the defendant but were volunteered remarks. The defendant later stated that he would agree to speak with the

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Officers. The defendant never asked for a lawyer. All statements were made in compliance with 3.5 and Miranda procedures.

III.

That this court finds the defendant's testimony regarding his statements being coerced by the fact that his vehicle was going to be towed to not be credible. Officer Forbragd testimony that no threats or promises were used to induce statements was credible.

SO ORDERED this 13 day of September, 2013.

JUDGE

PRESENTED BY–

STATE OF WASHINGTON

COREEN E. SCHNEPF, WSBA NO. 37966
Deputy Prosecuting Attorney

APPROVED FOR ENTRY–

Kibbe, WSBA NO. 31692
Attorney for Defendant

Prosecutor's File Number–13-113271-66

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APPENDIX B

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. MATTHEW CHRISTOPHER CHERRY, Age: 30; DOB: 08/17/1983, Defendant.	No. 13-1-00548-2 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR HEARING ON CrR 3.6

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a hearing on CrR 3.6; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following--

FINDINGS OF FACT

I.

That on April 27, 2013, Officer Forbragd observed the defendant driving a vehicle. He knew the defendant had a suspended license, so initiated a traffic stop. The defendant continued to drive and ignored the officer's attempts to stop him. A back seat passenger turned around in the seat and shrugged at the officer. Eventually, the defendant stopped his vehicle.

II.

That the defendant told the officer he knew he was suspended and should not have been

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driving. This was not in response to any questions by the Officer. Officer Forbragd than read the defendant his Miranda warnings after which, the defendant stated that he did not want to add any comments. Officer Forbragd then placed the defendant in the back of the patrol vehicle and began to call a tow truck. In addition, Officer Forbragd assisted two other officers who were attempting to get the passengers to leave the scene.

III.

That Officer Forbragd called Officer Roessel to the traffic stop so that he could bring his K9 partner, Dusty to assist in the investigation. Officer Forbragd went back to the vehicle and asked the defendant for consent to search the vehicle. The defendant responded that he didn't want them to search his vehicle and that he had smoked all the drugs earlier in the day. He then laughed.

IV.

That the defendant had contact with this same Officer a couple of days prior and in that contact, the Officer had asked to come in to his hotel room and search for drugs, which the defendant refused and slammed the door shut on the Officers

V.

That while Officer Forbragd was waiting for Officer Roessel to respond, the defendant changed his mind and told the Officer that he would give his permission for the Officer to search the vehicle. He again indicated that there was nothing left in the vehicle. This was not in response to another request by the Officer to search the vehicle.

VI.

That Officer Roessel arrived on the scene and spoke with the defendant briefly to confirm that the defendant was giving his permission to search the vehicle. The defendant stated that he did give his consent for the search. The defendant was specifically told that he could refuse consent to search the vehicle.

VII.

That while Officer Roessel was searching the defendant's vehicle, Officer Forbragd stayed inside the patrol car with the defendant in a place where the defendant could watch the search in case the defendant chose to revoke his consent. The defendant never revoked his consent and gave further consent to search the trunk of the vehicle.

VIII.

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That the defendant made the comment, not in response to questioning, that there may be a pipe in the vehicle. He stated that the pipe did not belong to him. Officer Forbragd asked the defendant if he wished to talk to the Officer. The defendant stated that everything he says usually gets used against him but that he would like to talk to the Officer.

IX.

That Officer Roessel search the trunk and located a backpack with a photograph. The defendant admitted that the photograph was of his daughter. A methamphetamine pipe was also located in the same backpack. At first the defendant claimed that the backpack was not his but then admitted the backpack and the methamphetamine pipe both belonged to him. The Officers on scene determined that the vehicle was far enough off of the road way to leave at the scene and canceled the tow. The Officers never threatened the defendant that the vehicle would be towed if he did not give consent to search the vehicle.

X.

That the defendant was transported to the jail where the defendant was booked for several counts. Officer Forbragd later tested the pipe which did test positive for methamphetamine. The defendant has 53 prior misdemeanor convictions and 4 felony convictions.

CONCLUSIONS OF LAW

I.

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II.

That the defendant's consent to let the Officers search the defendant's vehicle was voluntary. The defendant had been read his Miranda rights, he had been told he had the right to refuse a search and he had previously demonstrated that he was able to tell the Officers they could not search. There was no indication that the consent was in any way tied to the tow of the defendant's vehicle. The Court finds the Officers testimony to credible.

SO ORDERED this _____ day of September, 2013.

_____

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JUDGE

PRESENTED BY–

STATE OF WASHINGTON

COREEN E. SCHNEPF, WSBA NO. 37966
Deputy Prosecuting Attorney

APPROVED FOR ENTRY–

Kitabe, WSBA NO. 31692
Attorney for Defendant

Prosecutor's File Number–13-113271-66

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

STATE OF WASHINGTON, Respondent, v. MATTHEW CHERRY, Appellant.	)))))))))	NO. 45396-7-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JEREMY MORRIS, DPA [kcpa@co.kitsap.wa.us] KITSAP COUNTY PROSECUTING ATTORNEY 614 DIVISION ST. PORT ORCHARD, WA 98366-4681	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL
[X] MATTHEW CHERRY KITSAP COUNTY JAIL 614 DIVISION ST MS #33 PORT ORCHARD, WA 98366	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF MARCH, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
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WASHINGTON APPELLATE PROJECT

March 28, 2014 - 4:10 PM

Transmittal Letter

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Case Name: STATE V. MATTHEW CHERRY

Court of Appeals Case Number: 45396-7

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