

NO. 45396-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW CHRISTOPHER CHERRY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 13-1-00548-2

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BRIEF OF RESPONDENT

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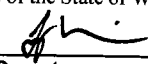
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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED July 25, 2014, Port Orchard, WA   
**Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court abused its discretion in denying the Defendant's claim that his consent was involuntary when it is well settled that a request for consent is not "interrogation" and the record otherwise supported the trial court's conclusion that the Defendant voluntarily consented to the search of his car?

2. Whether, although the Defendant is correct that the written findings of fact and conclusion of law from the CrR 3.6 hearing are invalid as they were not signed by the judge who presided over that hearing, this error is harmless as Judge Dixon's oral findings in the record are sufficient to allow appellate review?

3. Whether the trial court abused its discretion in denying the Defendant's requests for a new attorney when the Defendant's complaints did not demonstrate a complete breakdown in communications and when defense counsel assured the trial court that he was able to continue working with the Defendant and that there was no reason requiring his removal from the case?

4. Whether the Defendant's claim that the trial court erred in imposing legal financial obligations is without merit when the trial court's order was consistent with Washington Law, and when the Defendant

waived the right to raise this issue on appeal by failing to raise an objection in the trial court?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The Defendant, Matthew Cherry, was charged by an amended information filed in Kitsap County Superior Court with one count of possession of a controlled substance (methamphetamine) and one count of tampering with physical evidence. CP 34. A jury found the Defendant guilty of the charged offenses and the trial court then imposed a standard range sentence. CP 72, 84-85. This appeal followed.

### **B. FACTS**

The charges in the present case were initiated after officers found a pipe containing methamphetamine during a consent search of the Defendant's car after the Defendant was pulled over and arrested for driving without a license. CP 5-7. The facts related to the tampering charge occurred later when the Defendant was being booked into the jail and he struggled with officers and apparently ate a small baggie containing a white substance because he did not want to get a "felony drug charge." CP 7-8.

### CrR 3.6 Hearing

Prior to trial the Defendant filed a CrR 3.6 motion to suppress arguing that his consent to search his car was not voluntary because he only consented because the officers threatened to have his car impounded if he did not consent to a search of the car. CP 11-12.

A hearing on the Defendant's motion was held on July 31, 2013 before Judge Dixon. At the hearing the State first called Officer Steven Forbragd of the Bremerton Police Department. RP (7/31) 3-4. Officer Forbragd explained that he was on patrol on April 27 when he saw the Defendant driving a car in Bremerton. RP (7/31) 5. Officer Forbragd knew the Defendant from previous contacts and was aware that the Defendant's driver's license was suspended, as he had just checked this fact during a previous contact with the Defendant on April 25. RP (7/31) 5-6. Officer Forbragd then pulled behind the Defendant and activated his emergency lights (and later his siren) in order to perform a traffic stop on the Defendant's car. RP (7/31) 7. The Defendant did not pull over immediately, but instead continued driving approximately four blocks before finally pulling over. *Id.* The Defendant then immediately got out of his car and walked back towards Officer Forbragd. RP (7/31) 8. The Defendant was arrested, handcuffed, and placed into the back of Officer Forbragd's patrol car where he was advised of his *Miranda* rights. RP



(7/31) 8-9. The Defendant stated he did not want to make any statements.  
RP (7/31) 10.

Several passengers were in the Defendant's car at the time of the arrest, and Officer Forbragd testified that when he arrests someone from a car he usually will ask them if they have a licensed driver that can either take the car or come to the scene and pick up the car. RP (7/31) 13. When he asked the Defendant this question he said that nobody with a license that he knew of could come and get the car and that the neither one of the passengers had a license. RP (7/31) 13. Officer Forbragd asked the Defendant who the passengers were and he contacted the passengers to confirm if either of them had a license. RP (7/31) 9. One of the passengers was allowed to take several bags from the car and left the area. RP (7/31) 10. As no licensed driver was located, however, Officer Forbragd informed the Defendant that the car would be impounded. RP (7/31) 13-14.

After the passengers had left the scene Officer Forbragd asked if the Defendant would consent to a search of the car. RP (7/31) 11. Officer Forbragd also advised the Defendant that he did not have to consent to the search, and the Defendant responded that he didn't really want the officers to search the car. RP (7/31) 11-12. The Defendant added that there were

no drugs in the car anyway as he had used them all earlier. RP (7/31) 11.  
The Defendant then laughed. RP (7/31) 12.

Based on the Defendant's history and the statements he had made about using drugs that day, Officer Forbragd called for an officer to bring a drug dog to the scene. RP (7/31) 12. Officer Forbragd then informed the Defendant that he had called for a dog. RP (7/31) 12.

While they were waiting for Officer Roessel and his K-9 to arrive at the scene the Defendant stated (without any prompting from Officer Forbragd) that he could search the car and that there was nothing in it. RP (7/31) 12. Officer Forbragd then asked the Defendant to confirm that he was now giving his consent for a search of the car, and the Defendant confirmed that this was the case. RP (7/31) 12. Officer Forbragd again informed the Defendant that he did not have to consent to the search. RP (7/31) 13. He also explained to the Defendant that he would keep the patrol car's window rolled down and that he would stay with the Defendant during the search so that the Defendant could revoke the consent at any time. RP (7/31) 13.

At the CrR 3.6 hearing Officer Forbragd was asked if he had ever told the Defendant that his car would not be impounded if he consented to a search. RP (7/31) 19. Officer Forbragd said that no such deal was made

and that he did not make deals like this because it could be construed as coercion. RP (7/31) 19.

When Officer Roessel arrived at the scene he spoke to the Defendant and again confirmed that he was consenting to a search of the car. RP (7/31) 14-15, 34. Officer Roessel also informed the Defendant that he did not have to consent and that he could limit or revoke the consent at any time. RP (7/31) 35. The Defendant asked Officer Roessel if the car was going to be impounded and if his consenting to a search would change anything. RP (7/31) 35. Officer Roessel told the Defendant that his consenting to the search would not factor into the decision on whether to impound the car, and that he could not bargain or compel a person to consent. RP (7/31) 36. A search was then conducted and a meth pipe was ultimately found in the car. RP (7/31) 17, 38.

The Defendant also testified at the CrR 3.6 hearing, and he claimed that he was never told that he could refuse to consent to the search. RP (7/31) 44. The Defendant further claimed that he had at first refused to consent, but later consented because the officers had said that his car would not be impounded if he consented. RP (7/31) 44-45.

At the conclusion of the hearing the trial court ruled and found the officers to be more credible than the Defendant. RP (7/31) 65. The trial court specifically found that there had been “no threat to impound the

vehicle if [the Defendant] did not consent” and that the Defendant had freely and voluntarily consented to the search. RP (7/31) 66.

#### CrR 3.5 Hearing

A CrR 3.5 hearing was held on September 10 in front of Judge Laurie. RP (9/10) 28. At the hearing Officer Forbragd again testified about the traffic stop and the arrest of the Defendant. He also explained that after being advised of his rights the Defendant said that he “did not want to add any statements.” RP (9/10) 29-31. Officer Forbragd also testified that when he asked the Defendant if he would consent to a search of the car the Defendant said that he did not want to consent a search. RP (9/10) 33. The Defendant then volunteered that that there were no drugs in the car anyway, as he had used them earlier. RP (9/10) 33-34, 39.

Later, after the Defendant had changed his mind and consented to a search, the officers began the search of the car. RP (9/10) 33. During the search of the car the Defendant made a comment that he had smoked a bowl of meth earlier in the day with his girlfriend and that there might be a meth pipe in the car. RP (9/10) 33, 35-36, 40. This comment was not made in response to any questioning from the officer. RP (9/10) 35. At that point Officer Forbragd asked the Defendant if he was willing to talk, as he had previously said he did not want to add any comments. RP (9/10) 33-35. The Defendant then said he was willing to talk. RP (9/10) 36. The

Defendant never asked for an attorney (or even mentioned the word “attorney”) nor did he ever again express a desire to invoke his right to remain silent. RP (9/10) 36.<sup>1</sup>

The Defendant also testified at the CrR 3.5 hearing and he gave a version of events that was significantly different than the one provided in the testimony of Officer Forbragd. Specifically, the Defendant claimed that after he had invoked his rights the officers kept on asking him about drugs and told him that if he didn’t talk to them then “bye-bye to my car.” RP (9/10) 49. He further claimed that the officers “kept drilling” him with questions “over and over again” about what was in the car. RP (9/10) 50. The Defendant also stated that he did eventually say that he agreed to talk to the officers, but that he only did so because he was so distressed about the officers impounding his car. RP (9/10) 52. The Defendant explained that after the officers said they were going to impound his car he told them, “Okay. As long as you don’t impound my vehicle, I’ll say – I’ll talk to you.” RP (9/10) 51. The Defendant also claimed that he asked about a lawyer. RP (9/10) 52. The Defendant did acknowledge that he had 13 convictions for crimes of dishonesty. RP (9/10) 53.

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<sup>1</sup> The CrR 3.5 hearing also addressed a later statement the Defendant made at the jail, but the Defendant acknowledged that this statement was admissible. RP (9/10) 37, 44-45, 58.

At the conclusion of the CrR 3.5 hearing the trial court gave an oral ruling and noted that the Defendant had initially invoked his right to remain silent. RP (9/10) 59. Similarly, when the officers later asked for consent to search the car the Defendant initially refused. RP (9/10) 59. The court further noted that the Defendant later changed his mind, but claimed that he did so only because law enforcement threatened to impound his car. Id. The court noted that Judge Dixon had already ruled on the voluntariness of the consent at the CrR 3.6 hearing. Judge Laurie, then stated that,

I will find consistent with but independent of Judge Dixon's rulings that I also find the defendant's belief that there was a threat causing him duress to be less than credible.

RP (9/10) 60. Judge Laurie also found that the statements the Defendant made during the search (about using methamphetamine with his girlfriend) were volunteered statements, and that when the Defendant made these statements the officer "quite properly" inquired as to whether the Defendant had changed his mind and was now willing to talk to the officers, and the Defendant indicated he was willing to talk. RP (9/10) 60. Judge Laurie then concluded that,

In sum, all of the statements made by Mr. Cherry are admissible. They were either volunteered and not in response to questions, or they were done in a knowing and intelligent waiver of his rights that he had been advised of.

RP (9/10) 60. Judge Laurie later entered written findings of fact and conclusion of law with respect to the CrR 3.5 hearing. CP 73.

Defendant's Motions for New Counsel

Several times prior to trial the Defendant asked the court to appoint him new counsel. For instance, at an omnibus hearing on June 25, 2013 the Defendant informed the trial court that he would like his defense counsel to “respectfully withdraw” because the Defendant did not feel like his counsel was representing him fully. RP (6/25) 4-5. The trial court informed the Defendant that he was not entitled to counsel of his choice and that the court was not going to appoint new counsel “absent evidence that he’s not able to represent you.” RP (6/25) 5.

At a hearing on July 10 the Defendant again spoke to the trial court about his defense counsel and mentioned that he had “irreconcilable differences” with his attorney. RP (7/10) 3. The trial court then asked defense counsel if there was “any reason why you believe as an officer of the court that you need to be removed from this case?” RP (7/10) 3. Defense counsel indicated there were no such reasons, and the trial court therefore did not appoint new counsel. RP (7/10) 3.

On August 26<sup>th</sup> the Defendant gave the court a letter indicating that he was dissatisfied with his defense counsel and that he felt there were

irreconcilable differences and a breakdown in communications. CP 31-32. The court reviewed the letter and then asked defense counsel if he believed he was still able to continue working with the Defendant. RP (8/26) 3. Defense counsel stated that he believed he was able to work with the Defendant. RP (8/26) 3. The court then stated that it did not believe that a change of counsel was appropriate or required and the court thus denied the Defendant's request for new counsel. RP (8/26) 3.

#### Trial

At trial, Officer Forbragd again testified about the traffic stop and arrest and explained that when he asked the Defendant for consent to search the car the Defendant initially refused, but the Defendant then stated that there were no drugs in the car because he had used them earlier. RP (9/11) 83. The Defendant's later statement that he had smoked methamphetamine earlier in the day was also admitted. RP (9/11) 85. The evidence also included the fact that a pipe was found in a backpack and that the backpack contained a photograph of the Defendant's daughter. RP (9/11) 87. Although the Defendant initially stated that the backpack belonged to someone else, the Defendant later admitted that he was not being honest and that it was his meth pipe. RP (9/11) 87. The pipe was later tested by a forensic scientist with the Washington State Patrol Crime Laboratory, who found that the pipe contained methamphetamine. RP (9/11) 128, 138.



### III. ARGUMENT

**A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S CLAIM THAT HIS CONSENT WAS INVOLUNTARY BECAUSE IT IS WELL SETTLED THAT A REQUEST FOR CONSENT IS NOT "INTERROGATION" AND THE RECORD OTHERWISE SUPPORTED THE TRIAL COURT'S CONCLUSION THAT THE DEFENDANT VOLUNTARILY CONSENTED TO THE SEARCH OF HIS CAR.**

The Defendant argues that his consent to search his car was the product of illegal police conduct. App.'s Br. at 9-24. This claim is without merit because the trial court did not abuse its discretion in finding that the police did not violate the Defendant's right to remain silent and that the Defendant voluntarily consented to the search of his car.

Admission of evidence is within the sound discretion of the trial court and will not be disturbed on review absent a showing of abuse of discretion. *State v. Stubsjoen*, 48 Wn.App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). Abuse occurs when the ruling of the trial court is manifestly unreasonable or discretion was exercised on untenable grounds. *State v. Elmore*, 139 Wn.2d 250, 285, 985 P.2d 289 (1999), *cert. denied*, 121 S.Ct. 98 (2000); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Asking for consent to search is not “interrogation.”

In *Miranda v. Arizona*, the United States Supreme Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the “inherently compelling pressures” of custodial interrogation. *Maryland v. Shatzer*, 559 U.S. 98, 103, 130 S.Ct. 1213 (2010), citing *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). To counteract the coercive pressure, *Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. *Shatzer*, 559 U.S. at 103-04. After the warnings are given, if the suspect indicates that he wishes to remain silent then the interrogation must cease. *Id.*

The Supreme Court later defined interrogation for *Miranda* purposes in *Rhode Island v. Innis*, 446 U.S. 291, 300–01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). In *Innis* the Court stated that “the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” *Innis*, 446 U.S. 291, 300–01, 100 S.Ct. 1682. While express questioning is self-explanatory, the “functional equivalent” branch of interrogation refers to “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* at 301.

In short, a question posed while a suspect is in police custody only amounts to interrogation for *Miranda* purposes if it is reasonably likely to elicit an incriminating response. Numerous courts have addressed the issue of whether a request for consent to search constitutes “interrogation” and have held that such a request does not constitute interrogation. The Fifth Circuit, for example, has held that “[t]he failure of officials to give *Miranda* warnings before asking for consent does not prohibit the use of a defendant's in-custody statements granting consent to a search.” *United States v. Stevens*, 487 F.3d 232, 242–43 (5th Cir.2007). This conclusion was based in part on the fact that a law enforcement officer's request that a suspect consent to a search is not likely to elicit an incriminating response. *Id.* at 243. As a result, the request for consent was not “interrogation” and *Miranda* did not apply. See also *United States v. McCurdy*, 40 F.3d 1111, 1118 (10th Cir.1994) (“An officer's request to search a defendant's automobile does not constitute interrogation invoking a defendant's *Miranda* rights.”); *United States v. Smith*, 3 F.3d 1088, 1098 (7th Cir.1993) (“[A] consent to search is not a self incriminating statement and, therefore, a request to search does not amount to interrogation.”). Numerous other courts have explained that giving consent to a search is not an incriminating statement under the Fifth Amendment because the consent is not evidence of a testimonial or communicative nature. *See*

*United States v. Lewis*, 921 F.2d 1294, 1303 (D.C.Cir.1990); *United States v. Faruolo*, 506 F.2d 490, 495 (2d Cir.1974); *Smith v. Wainwright*, 581 F.2d 1149, 1152 (5th Cir.1978); *United States v. Glenna*, 878 F.2d 967, 971 (7th Cir.1989); *Cody v. Solem*, 755 F.2d 1323, 1330 (8th Cir.1985); *United States v. Lemon*, 550 F.2d 467, 472 (9th Cir.1977); *United States v. Rodriguez–Garcia*, 983 F.2d 1563, 1568 (10th Cir.1993); *United States v. Hidalgo*, 7 F.3d 1566, 1568 (11th Cir.1993).

Washington courts have reached the same conclusion. In *State v. Rodriguez*, 20 Wn.App. 876, 880, 582 P.2d 904 (1978), for instance, the Court of Appeals explained that “The fact that a consent to search might lead to incriminating evidence does not make it testimonial or communicative in the Fifth Amendment sense.”

Similarly in *State v. Silvernail*, 25 Wn.App. 185, 191, 605 P.2d 1279, *cert. denied*, 449 U.S. 843, 101 S.Ct. 124, 66 L.Ed.2d 51 (1980), officers had requested that a defendant turn over his keys and consent to a search of his trunk. The defendant did so but also made “unexpected voluntary admissions,” and on appeal he argued that the officers request was “police questioning” that was designed to elicit a testimonial response and that *Miranda* warnings were thus necessary. *Id* at 191. The Court of Appeals disagreed and held that the request “was not designed to elicit a

testimonial response” and thus the defendant's unexpected voluntary admissions “were not the product of police questioning.” *Id* at 191.

In a later case the Washington Supreme Court held that a request to physically hand over incriminating evidence can be testimonial in nature (thus requiring *Miranda* warnings). *State v. Wethered*, 110 Wash.2d 466, 471, 755 P.2d 797 (1988). The Supreme Court, however, was careful to note that,

Our holding does not change the law with respect to situations involving consent to search. In *State v. Rodriguez*, 20 Wash.App. 876, 880, 582 P.2d 904 (1978) and *State v. Silvernail*, 25 Wash.App. 185, 191, 605 P.2d 1279, *cert. denied*, 449 U.S. 843, 101 S.Ct. 124, 66 L.Ed.2d 51 (1980), the Court of Appeals distinguished *Dennis* because in those cases the police did not ask for the contraband, but instead requested permission to search or for keys to a car trunk. Granting permission to search is consistent with innocence, whereas producing contraband from a hiding place is essentially an admission of guilt. Here, the officer did not ask for permission to search but asked *Wethered* to hand him contraband where doing so was an admission of knowledge of the contraband and thus incriminated *Wethered*.

*Wethered*, 110 Wash.2d at 471. *Rodriguez* and *Silvernail* thus remain the law in Washington.

In the present case the Defendant argues that because he had invoked his right to remain silent the “police were not even permitted to question [him] about whether he would consent to a search,” and that a request for consent could compel a person to feel that he must explain why

he did not want the police to search his car. App.'s Br. at 15, 25. The Defendant, however, cites no cases in support of these claims. Furthermore, as outlined above, the Defendant's claims are contrary to well-established law that holds a request for consent is not "interrogation" for *Miranda* purposes, and thus a request for consent to search does not implicate a suspect's Fifth Amendment rights. The Defendant's claim in this regard, therefore, should be denied.<sup>2</sup>

The trial court did not abuse its discretion in finding that the Defendant voluntarily consented to the search of his car.

To show that valid consent to a search has been given, the prosecution must prove that the consent was freely and voluntarily given. *State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003), citing *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998); *State v. Shoemaker*, 85 Wn.2d 207, 210, 533 P.2d 123 (1975). Whether consent was voluntary or instead the product of duress or coercion, express or

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<sup>2</sup> The Defendant in the present appeal also appears to argue that the police were prohibited from asking the Defendant for the names of the passengers. App.'s Br. at 13. The record, however, shows that Officer Forbragd was merely attempting to find a licensed driver who could take the car. The Defendant has failed to explain why such a request would constitute a question that was reasonably likely to elicit an incriminating response. As the question was merely an attempt to identify the passengers so that they might be allowed to take the Defendant's car, there is simply no support for the claim that this question amounted to interrogation or violated the Defendant's Fifth Amendment protections. In addition, even if this Court were to assume for the sake of argument that the question was improper, the question did not lead to any evidence and thus there simply were no fruits of this tree, even if one were to assume that it was poisonous.

implied, is a question of fact to be determined from the totality of the circumstances. *O'Neill*, 148 Wn.2d at 588, citing *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999), *State v. Jensen*, 44 Wn.App. 485, 488, 723 P.2d 443 (1986); *Shoemaker*, 85 Wn.2d at 211–12. Factors which may be considered in determining whether one has voluntarily consented include whether *Miranda* warnings were given, the degree of education and intelligence of the individual, and whether he or she had been advised of the right to consent. *O'Neill*, 148 Wn.2d at 588, citing *Bustamante-Davila*, 138 Wn.2d at 981–82; *Shoemaker*, 85 Wn.2d at 212. The various relevant factors are weighed against one another and no one factor is determinative. *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990); *Shoemaker*, 85 Wn.2d at 212.

In the present case the Defendant argues that his consent was not voluntary because he claims his consent was “the product of illegal police conduct.” App.’s Br. at 22. Specifically, the Defendant argues that: (1) because he had invoked his right to remain silent “the police were not even permitted to question [him] about whether he would consent to the search”; and (2) that he had little choice but to consent to the search because the police had informed him that they had called for a drug detection dog and would be impounding his car. App.’s Br. at 24-25. These claims are without merit for several reasons.

First, as discussed above it was not improper for the police to ask the Defendant for consent even though he had previously invoked his right to remain silent, as a request for consent is not interrogation.

Secondly, the record does not show that the Defendant had little choice but to consent to the search. The Defendant's claim in this respect appears to be based on the line of cases that hold that a defendant's consent is not truly voluntary when it only comes after the police have informed a defendant that they will be conducting the search with or without consent. *See, e.g., Bumper*, 391 U.S. at 548, 88 S.Ct. 1788.

In *Bumper* the Court held that because a warrant requires a suspect to submit to a search, police may not claim that the suspect consented by allowing a search authorized by a warrant if a court later finds the warrant invalid. *Bumper* 391 U.S. at 546, 88 S.Ct. 1788. In *Bumper* officers arrived at a person's home and announced that they had a search warrant to search the residence. The homeowner (the defendant's grandmother) then responded, "Go ahead." *Id* at 546. At trial, however, the State decided to rely on consent (rather than the warrant) to justify the search. The Supreme Court, however, held that a search cannot be justified as lawful on the basis of consent when that consent has been given only after the official conducting the search has asserted that he possesses a warrant.



*Id* at 549.<sup>3</sup> This holding, of course, merely acknowledges that when the police announce they have a warrant that an ordinary person would understand that they have no ability to prevent the search and thus their “consent” to allow the officers to execute the warrant is not voluntary. *Bumper*, 391 U.S. at 549 n.14.

Extending this logic, the Washington Court of Appeals has held that police also may not rely on consent that is obtained only after officers have misrepresented their authority to obtain a warrant and informed a homeowner that they had grounds for (and could obtain) a warrant when no such grounds actually existed. *State v. Apodaca*, 67 Wn.App. 736, 739–40, 839 P. 2d 352 (1992) (“Valid consent may be given following a threat to obtain a warrant. Threats to obtain a search warrant may, however, invalidate consent subsequently given if grounds for obtaining the warrant did not exist.”), *overruled on other grounds by State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995).

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<sup>3</sup> It was unclear from the facts in *Bumper* whether the officers actually had a warrant. The Supreme Court noted that at oral argument someone had mentioned that there had in fact been a warrant, but the Court noted that the warrant (if it existed) was never part of the record and the State had not relied on it below. *Bumper*, 391 U.S. at 590 n.15. The Court thus noted that,

A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all. *Bumper*, 391 U.S. at 545-50.

The Washington Supreme Court, however, has explained that conduct of this type (such as was found in *Bumper* and *Apodaca*) is distinguishable from a case where an officer simply states that he or she will request a warrant if consent is not given. For instance, in *State v. Smith*, 115 Wn.2d 775, 801 P.2d 975 (1990) officers arrested the defendant and then asked him for consent to search the trunk of his vehicle. When the defendant asked what would happen if he refused to consent, the police officer replied that the vehicle would be impounded and a search warrant would be sought. *Smith*, 115 Wn.2d at 790. The Defendant then consented to the search. On appeal the defendant argued that his consent was involuntary, citing *Bumper*. *Id* at 789-90. The Supreme Court rejected this claim, finding that

*Bumper* is distinguishable, however, because when asking to search the house of the defendant's grandmother, the police officer in *Bumper* claimed he had a search warrant when in fact he did not. In the instant case, Smith was never told that the officers had a search warrant. Smith was told that the officers would request a search warrant if Smith did not consent to the search. Nothing in the record supports the allegations that Smith was coerced into consenting to the search.

*Smith*, 115 Wn.2d at 790.

In light of the cases outlined above, the Defendant has failed to show that the trial court abused its discretion in finding that the evidence

found during the search below was admissible.<sup>4</sup> To the contrary, the trial court correctly found that Defendant consented to the search of his car and that the police did not violate the Defendant's rights by asking for his consent (even though he had previously invoked his right to remain silent) as such a request does not constitute interrogation. In addition, the record does not demonstrate coercion as the officers did not misstate their authority in any way. In short, the Defendant has failed to show that the trial court abused in discretion in denying the motion to suppress.

**B. ALTHOUGH THE DEFENDANT IS CORRECT THAT THE WRITTEN FINDINGS OF FACT AND CONCLUSION OF LAW FROM THE CRR 3.6 HEARING ARE INVALID AS THEY WERE NOT SIGNED BY THE JUDGE WHO PRESIDED OVER THAT HEARING, THIS ERROR IS HARMLESS AS JUDGE DIXON'S ORAL FINDINGS IN THE RECORD ARE SUFFICIENT TO ALLOW APPELLATE REVIEW.**

The Defendant next claims that the written CrR 3.6 findings of fact are invalid because they were not signed by the judge that presided over

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<sup>4</sup> The Defendant's brief also contains a *Gunwall* analysis and a claim that Article 1, section 9 provides greater protection than the Fifth Amendment in the present context. App.'s Br at 16-22. The Defendant ultimately concludes that the police in the present case asked the Defendant "statements likely to elicit an incriminating response" and that the Washington constitution should somehow be construed to provide even greater protections against such conduct than the Fifth Amendment. App.'s Br. at 21-22. This argument, however, misses the point. A request for consent is not a question that is reasonably likely to elicit an incriminating response, as outlined above. The Defendant has failed to claim that the Washington constitution requires a different conclusion, not does any of the Defendant's discussion of the text or history of the Washington Constitution provide any support for his conclusion that a request for consent violated the

the CrR 3.6 hearing. App.'s Br. at 27. The State concedes that the written findings of fact and conclusion of law from the CrR 3.6 that were signed by Judge Laurie are invalid, as they were not signed by the judge (Judge Dixon) who presided over that hearing. This error, however, is harmless as Judge Dixon's oral findings in the record are sufficient to allow appellate review.

The Defendant correctly notes that Judge Dixon presided over the July 31, 2013 CrR 3.6 hearing. For reasons that are not entirely clear, Judge Dixon was apparently not available at the time the written findings were prepared. CP 77-80; RP (9/13) 2. The State explained to Judge Laurie that the Findings of Fact were "agreed" and asked if she would sign them. RP (9/13) 2. Judge Laurie asked defense counsel if he had any objection to her signing the written findings, and defense counsel stated that he had no objection. RP (9/13) 2. .

With respect to the CrR 3.5 hearing, Judge Laurie personally presided over that hearing and signed the written findings of fact for that hearing, thus there are no issues with respect to the validity of the CrR 3.5 findings. CP 73.

On appeal the Defendant argues that Judge Laurie did not have the authority to sign the written CrR 3.6 findings of fact and conclusions of

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Defendant's constitutional rights.

law. App.'s Br. at 27. The Defendant's argument appears to be correct as the rule appears to be that a judge does not have authority to sign findings and conclusions if he or she did not preside over the relevant hearing. *See* RCW 2.28.030(2); *see also, DGHI Enters v. Pacific Cities, Inc.*, 137 Wn.2d 933, 977 P.2d 1231 (1999). The Findings of fact, therefore, are invalid and there are no valid written findings of fact for the CrR 3.6 hearing.

It is, of course, error for a trial court to failure to reduce its CrR 3.6 findings and conclusions to writing. Any such error, however, is harmless if the trial court's oral findings in the record are sufficient to allow appellate review. *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994). Here, the trial court rendered detailed oral findings of fact and conclusions of law which are sufficient to allow this court to address the issues the Defendant raises on appeal. The error, therefore, was harmless.

Specifically, the trial court issued an oral ruling and said that he found the officers to be more credible than the Defendant. RP (7/31) 65. The trial court also specifically found that there had been "no threat to impound the vehicle if [the Defendant] did not consent" and that the Defendant had freely and voluntarily consented to the search. RP (7/31) 66. This was the only issue raised by defense counsel below at the CrR

3.6 hearing, and thus the trial court's findings are sufficient. Any error with respect to the written findings, therefore, was harmless.

**C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S REQUESTS FOR A NEW ATTORNEY BECAUSE THE DEFENDANT'S COMPLAINTS DID NOT DEMONSTRATE A COMPLETE BREAKDOWN IN COMMUNICATIONS AND BECAUSE DEFENSE COUNSEL ASSURED THE TRIAL COURT THAT HE WAS ABLE TO CONTINUE WORKING WITH THE DEFENDANT AND THAT THERE WAS NO REASON REQUIRING HIS REMOVAL FROM THE CASE.**

The Defendant next claims that the trial court impermissibly ignored his repeated complaints about his defense counsel. App.'s Br. at 33. This claim is without merit because the record shows that the trial court did not abuse in discretion in refusing to appoint new counsel as the Defendants complaints (and the defense counsel's statements about the alleged breakdown) did not demonstrate that there was a complete breakdown in communications between the Defendant and his trial counsel.

Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997) (*Stenson I*). Under an abuse of

discretion standard, the reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would take and is thus “manifestly unreasonable,” (2) rests on facts unsupported in the record and is thus based on “untenable grounds,” or (3) was reached by applying the wrong legal standard and is thus made “for untenable reasons.” *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

A defendant does not have an absolute right under the Sixth Amendment to his choice of a particular advocate. *State v. Schaller*, 143 Wn.App. 258, 267, 177 P.3d 1139 (2007). To justify appointment of new counsel, a defendant “must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) quoting *Stenson I*, 132 Wn.2d at 734.

Furthermore, a defendant does not become entitled to new counsel merely by claiming a conflict is irreconcilable. To determine whether the trial court erred and an irreconcilable conflict existed, this court is to consider: (1) the extent of the conflict, (2) the adequacy of the trial court's inquiry, and (3) the timeliness of the motion. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001) (*Stenson II*).

Although the Defendant in the present case mentioned the words “irreconcilable differences,” there is nothing in his oral or written statements that demonstrates a complete breakdown in communication between the attorney and the Defendant. Rather, the Defendant’s complaints demonstrated little more than disagreements on trial strategy and the Defendant’s dissatisfaction with the work he felt his counsel was putting in. See, e.g., CP 31-32, RP (6/25) 4-5.<sup>5</sup>

Furthermore, the trial court did not completely ignore the Defendant’s complaints. Rather, on two occasions (in response to the Defendant’s complaints) the trial court specifically asked defense counsel about whether there were any reasons that defense counsel could not continue as a counsel for the Defendant or any reasons that required his removal from the case. See, RP (7/10) 3, RP (8/26) 3. Both times defense counsel indicated there was no reason that he needed to be removed from the case or that there was no reason that he could not continue to work for the Defendant. As the Defendant’s complaints did not demonstrate a complete breakdown in communications, and as defense counsel indicated that there was no reason that he could not continue to work with the Defendant (despite the Defendant’s stated dissatisfaction with him), the

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<sup>5</sup> Notably, on appeal the Defendant has not raised an ineffective assistance of counsel claim, nor has he otherwise pointed to any actions by his defense counsel that would suggest that he failed to adequately prepare for the trial or that the record demonstrates



trial court did not abuse its discretion in denying the Defendant's motion for substitute counsel.

**D. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN IMPOSING LEGAL FINANCIAL OBLIGATIONS IS WITHOUT MERIT BECAUSE THE TRIAL COURT'S ORDER WAS CONSISTENT WITH WASHINGTON LAW. IN ADDITION, THE DEFENDANT WAIVED THE RIGHT TO RAISE THIS ISSUE ON APPEAL BY FAILING TO RAISE AN OBJECTION IN THE TRIAL COURT.**

The Defendant next claims that the trial court erred by imposing legal financial obligations even though the court "understood Mr. Cherry was unable to pay these fees." App.'s Br. at 41. Specifically, the Defendant claims that the trial court conceded that he "lacked the financial means to pay the many thousands of dollars that he owed" yet the trial court still imposed legal financial obligations. App.'s Br. at 42. This claim is without merit because the record shows no error and because the Defendant's specific claims misconstrue the actual record. Furthermore, the Defendant failed to preserve this issue for appeal.

In the present case the trial court's Judgment and Sentence contains a finding that "the Defendant has the ability or likely future ability to pay legal financial obligations." CP 90. The Defendant did not

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that there was a complete breakdown in communications that somehow hampered the

object to the entry of this finding. The trial court then went on to impose several legal financial obligations. CP 90. Again, the Defendant did not object.

This Court has recently held that a reviewing court need not address (or allow a defendant to raise) a claim regarding his ability to pay his legal financial obligations for the first time on appeal. *State v. Blazina*, 174 Wn.App. 906, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *citing* RAP 2.5. *See also, State v. Kuster*, 175 Wn.App. 420, 425, 306 P.3d 1022 (2013); *State v. Duncan*, \_\_\_ Wn.App. \_\_\_, 327 P.3d 699, 702-05, 2014 WL 1225910 (Div. 3, March 25, 2014) This court, therefore, should similarly reject the Appellant's argument concerning his legal financial obligations in the present case, as the Defendant failed to raise this issue below

The Defendant also claims that the trial court conceded that that he "lacked the financial means to pay the many thousands of dollars that he owed." App.'s Br. at 42, citing RP (9/13) 17. The trial court's actual statement, however, was as follows:

I am also going to impose the standard conditions and fines that [the prosecutor] identified. You have probably got tens of thousands of dollars of LFO's that you owe, and I'm adding another almost 3,000, 4,000 dollars to that today. You are going to have to start, as part of your

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presentation of the Defendant's case at trial.

program, to chip away at those and set up a payment plan with the clerk's office.

RP (9/13) 17. This portion of the record does not demonstrate that the trial court was conceding that the Defendant would not have a future ability to pay his legal financial obligations. Rather it merely shows that trial court recognized that because of his criminal history the Defendant had likely accumulated numerous LFO's and that he needed to start paying on those obligations. At best, this demonstrates a concession that the Defendant did not have an *immediate* ability to completely pay off his LFO's. That concession, however, would be completely irrelevant as there is no requirement that a court must limit the LFO's to those fines that a defendant has the *present* ability to payoff completely.

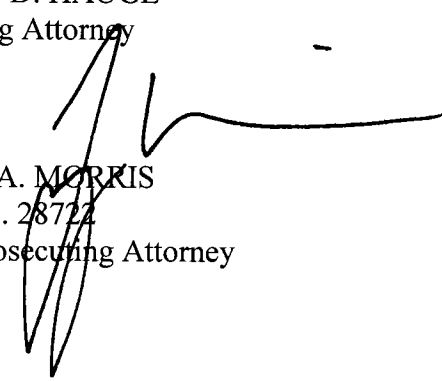
In short, the record does not show that the trial court erred in finding that the Defendant would likely have a future ability to pay his legal financial obligations. To the contrary, the record showed that the Defendant would be released from custody shortly after sentencing due to the credit he would receive for time already served. RP (9/13) 16. In addition, the Defendant indicated that he had a support group in place and even had an offer of free housing as long as he stayed clean and sober. RP (9/13) 13-14. Given these facts, there was no reason for the trial court to conclude that the Defendant would be unable to make future payments on his legal financial obligations.

**IV. CONCLUSION**

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED July 25, 2014.

Respectfully submitted,  
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**KITSAP COUNTY PROSECUTOR**

**July 25, 2014 - 1:38 PM**

**Transmittal Letter**

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