No. 46645-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHANE AHEARN,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Mr. Ahearn was driving through fog on a highway at approximately 3:00 a.m. when a state trooper observed him travel outside the lane boundaries and later make a right turn without signaling or coming to a complete stop at a red light. Upon stopping Mr. Ahearn and approaching the car, the trooper observed Mr. Ahearn was sweating profusely, but was polite and cooperative. Mr. Ahearn agreed to perform field sobriety tests and, after the tests showed Mr. Ahearn was not under the influence of alcohol, the trooper speculated Mr. Ahearn was under the influence of a stimulant. The trooper determined he had probable cause to arrest Mr. Ahearn based on the observations he had made during the testing, including that Mr. Ahearn was shivering and seemed to be speaking and walking more quickly than typical. After placing Mr. Ahearn under arrest the trooper found methamphetamine in Mr. Ahearn's car.

The trial court denied Mr. Ahearn's motion to suppress and found him guilty after a stipulated facts bench trial for driving under the influence and possession of methamphetamine. Upon finding Mr. Ahearn guilty, the trial court entered no written findings or conclusions.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it found the trooper had probable cause to arrest Mr. Ahearn.

2. The trial court erred when it entered finding of fact XVII for the CrR 3.6 hearing.

3. The trial court erred when it entered finding of fact IXX for the CrR 3.6 hearing.

4. The trial court erred when it entered finding of fact XXIV for the CrR 3.6 hearing.

5. To the extent it is deemed to be a finding of fact, the trial court erred when it entered conclusion of law III for the CrR 3.6 hearing.

6. The trial court failed to enter written findings of fact and conclusions of law following a stipulated facts bench trial for possession of methamphetamine and driving under the influence.

7. The conviction for driving under the influence violates due process because the evidence was insufficient to allow any rational trier of fact to find the elements beyond a reasonable doubt.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. An arrest made without probable cause violates the Fourth Amendment and article I, section 7. Probable cause exists only where the totality of the circumstances known to the officer at the time of the arrest would warrant a reasonably cautious person to believe an offense is being committed. Where the evidence showed Mr. Ahearn was not under the influence of alcohol and any evidence that he was under the influence of a stimulant was limited and explained by the circumstances, were Mr. Ahearn's rights violated when the trooper arrested him for driving under the influence?

2. CrR 6.1(d) requires that, following a bench trial, the judge enter written findings of fact and conclusions of law. The purpose of requiring written findings and conclusions is to enable an appellate court to review the questions raised on appeal. Where the court failed to enter any written findings or conclusions is vacation of the judgment and sentence and remand required?

3. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State prove each element of an offense beyond a reasonable doubt. If a rational trier of fact could not find all of the elements of the crime charged beyond a reasonable doubt

the evidence is insufficient. Was there insufficient evidence to support Mr. Ahearn's conviction for driving under the influence where the evidence did not show Mr. Ahearn had ingested alcohol or drugs or that his ability to drive was appreciably lessened by alcohol or drugs?

D. STATEMENT OF THE CASE

Shane Ahearn was driving on Route 303 early one morning when a trooper with the Washington State Patrol, Kyle Dahl, noticed Mr. Ahearn's car. 7/21/14 RP 16. According to Trooper Dahl, he observed Mr. Ahearn's vehicle weaving within its lane and then cross the white fog line twice and skip line once. 7/21/14 RP 16; Ex. 1 at 1. The second time Mr. Ahearn crossed the fog line, the trooper estimated Mr. Ahearn remained over the line for approximately one hundred yards. 7/21/14 RP 19. While the trooper was unable to recall whether there was fog on the road that night, Mr. Ahearn remembered the fog affecting his visibility. 7/21/14 RP 145, 186. There were no rumble strips to alert drivers when they strayed from the lane boundaries, and no other cars on the road. 7/21/14 RP 16, 19.

Trooper Dahl decided to stop the car based on his observations of Mr. Ahearn's driving, but was initially unable to activate his lights

because electrical cords obstructed the light switch.[1] 7/21/14 RP 19-20. Mr. Ahearn saw Trooper Dahl's vehicle gain on him quickly at a high rate of speed but, because of the fog, was unable to discern whether it was a state patrol vehicle. 7/21/14 RP 147. After he drove out of the fog, Mr. Ahearn saw it was a state trooper behind him but was unsure what he should do because the vehicle repeatedly gained on his car, as if to pass him, but then fell back again. 7/21/14 RP 150. This was distracting and made Mr. Ahearn nervous, so he decided to take the next exit and get out of the trooper's way. 7/21/14 RP 151.

As Mr. Ahearn's vehicle came to the end of the ramp at a red light, Trooper Dahl did not observe the car come to a full stop or see a turn signal activated before the car turned right. 7/21/14 RP 21; Ex. 1 at 2. At the bottom of the exit ramp, Trooper Dahl was finally able to free his light switch and activate his lights. 7/21/14 RP 20. Trooper Dahl did not observe Mr. Ahearn immediately apply his brakes in response to the lights, but Mr. Ahern soon pulled over and stopped on the right shoulder. 7/21/14 RP 22.

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[1] As Trooper Dahl's vehicle got closer to Mr. Ahearn's car, the trooper also saw white light escaping from a taillight that had been broken and repaired with tape. 7/21/14 RP 17, 148. However, the trooper did not cite this as a basis for stopping Mr. Ahearn's car. 7/21/14 RP 20.

Mr. Ahearn did not expect the trooper to approach the passenger window, and initially rolled a rear window down rather than the front passenger window before finding the correct control. 7/21/14 RP 153. He provided his license, registration, and proof of insurance to the trooper without incident. 7/21/14 RP 86. Trooper Dahl noticed Mr. Ahearn sweating "quite profusely." 7/21/14 RP 24. Mr. Ahearn, who is homeless and lives in his car, had recently showered in a public facility and was wearing a thermal t-shirt designed to retain body heat. 7/21/14 RP 143-44. Trooper Dahl felt Mr. Ahearn's eyes were bloodshot and his speech rapid, but there were no odors of intoxicants in the vehicle. 7/21/14 RP 26-27.

Trooper Dahl directed Mr. Ahearn to get out of the vehicle and asked Mr. Ahearn if he would like to put on a jacket. 7/21/14 RP 28. Mr. Ahearn felt he should do what the trooper wanted, so he grabbed a sweatshirt and insulated flannel and put them on over his thermal t-shirt. 7/21/14 RP 156. Because his car was parked on a slope and he failed to step away from the open driver's side door before putting the additional layers on, the door closed on him repeatedly while he buttoned his flannel. 7/21/14 RP 156-57.

The trooper asked Mr. Ahearn if he would be willing to perform field sobriety tests. 7/21/14 RP 30. Mr. Ahearn readily agreed because he knew he was not impaired and wanted to demonstrate this to the trooper. 7/21/14 RP 157. Trooper Dahl had been employed with the Washington State Patrol for approximately three years and a commissioned trooper for approximately one and a half years. 7/21/14 RP 8. As part of his training, he spent two weeks learning about field sobriety tests and how to identify impaired drivers and completed a 16-week course focused on drug-impaired driving. 7/21/14 RP 10. During this training he was taught to identify and differentiate between types of intoxication "[a] little bit." 7/21/14 RP 11.

When Mr. Ahearn walked around the car toward the front of the vehicle he stumbled for a second but caught himself before falling. 7/21/14 RP 31. Trooper Dahl administered four tests: (1) the horizontal gaze nystagmus; (2) the walk-and-turn; (3) the one legged stand; and (4) the Romberg balance. Ex. 1 at 2-3. Aside from the walk-and-turn test, which was performed on too steep of a grade to provide reliable information, the results of the tests suggested Mr. Ahearn was not under the influence of alcohol. 7/21/14 RP 54, 131. A portable

breathalyzer test revealed Mr. Ahearn's blood alcohol level to be 0.00. 7/21/14 RP 53.

Trooper Dahl did not believe he had probable cause to arrest Mr. Ahearn prior to performing the field sobriety tests. 7/21/14 RP 92. During the testing the trooper observed Mr. Ahearn exhibiting "body tremors" and swaying. 7/21/14 RP 47, 49. Mr. Ahern briefly counted out loud after being told to count silently during the Romberg balance test, and counted "one, two, three" instead of "one one-thousand, two one-thousand, three one-thousand" as directed during the one legged stand. 7/21/14 RP 47, 51. During the walk-and-turn test, which was performed on a "moderate grade," rather than a level surface, Mr. Ahearn had trouble keeping his balance, raised his arms, and did not make every step touch heel to toe. 7/21/14 RP 42; Ex. 1. He also took his steps very quickly. Ex. 1 at 3.

Mr. Ahearn also continued to speak at a rapid pace, but remained cooperative and polite throughout his interaction with the trooper. 7/21/14 RP 27, 66. Based on these observations, Trooper Dahl placed Mr. Ahearn under arrest for driving under the influence. 7/21/14 RP 92.

Mr. Ahearn refused to consent to having his blood drawn, and the trooper was unable to get in contact with a deputy prosecutor in order to seek a warrant. 7/21/14 RP 59, 66. Trooper Dahl could not recall whether he offered Mr. Ahearn the opportunity to be evaluated by a drug recognition expert, who performs an examination more akin to a "mini-physical." 7/21/14 RP 91-92, 140.

After arresting Mr. Ahearn, Trooper Dahl performed a search of Mr. Ahearn's car and found two syringes in the center console, one of which was filled with a clear liquid substance that tested positive for methamphetamine. 7/21/14 RP 64. However, because he was homeless, Mr. Ahearn was forced to carry all of his possessions in his car, not just those he was using while driving. 7/21/14 RP 16; Ex. 1 at 1.

Mr. Ahearn filed a motion to suppress arguing, in part, that the officer lacked probable cause for his arrest. CP 21. The trial court denied Mr. Ahearn's motion after an evidentiary hearing. CP 123. At a stipulated facts trial the court found Mr. Ahearn guilty of possession of methamphetamine and driving under the influence but made no findings of facts or conclusions of law. CP 112. The court sentenced Mr. Ahearn to 16 months incarceration. CP 131; 109, 129.

E. ARGUMENT

1. The trooper did not have probable cause to place Mr. Ahearn under arrest and all evidence obtained subsequent to that arrest must be suppressed.

a. An officer has probable cause to arrest only when the facts and circumstances known to him at the time would warrant a reasonably cautious person to believe an offense is being committed.

An arrest is a "seizure" and violates the Fourth Amendment and article I, section 7, when made without probable cause. *Staats v. Brown*, 139 Wn.2d 757, 771, 991 P.2d 615 (2000) (citing *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)); *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) ("Article I, section 7 provides greater protection of a person's right to privacy than the Fourth Amendment"). Although probable cause to arrest does not require facts that would establish guilt beyond a reasonable doubt, it requires "more than 'a bare suspicion of criminal activity.'" *State v. Gillenwater*, 96 Wn. App. 667, 670, 980 P.2d 318 (1999).

The standard is objective: probable cause to arrest exists only "where the totality of the facts and circumstances known to the officers at the time of arrest would warrant a reasonably cautious person to believe an offense is being committed." *Id.*; *see also State v. Ruem*, 179 Wn.2d 195, 202, 313 P.3d 1156 (2013) ("Probable cause requires

more than suspicion or conjecture. It requires facts and circumstances that would convince a reasonably cautious person."). Such facts must be "viewed in a practical, non-technical matter." *Gillenwater*, 96 Wn. App. at 671.

A police officer's determination of probable cause is reviewed as a mixed question of law and fact. *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 846, 43 P.3d 43 (2002). Factual matters are reviewed for substantial evidence while the trial court's legal conclusion finding probable cause is reviewed de novo. *Id.*; *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996).

b. <u>The trooper did not have probable cause to arrest Mr. Ahearn.</u>

i. *The trooper's observations prior to the stop*

The totality of the facts and circumstances known to Officer Dahl at the time of arrest would not have warranted a reasonably cautious person to believe Mr. Ahearn was driving under the influence. *See Gillenwater*, 96 Wn. App. at 670. Trooper Dahl's initial observations of Mr. Ahearn were simply that he crossed over the fog and skip lines. 7/21/14 RP 16; Ex. 1 at 1. The trooper did not contradict Mr. Ahearn's memory that visibility was poor due to fog on the road, and this Court has held that "'brief incursions' – not

necessarily a single incursion – 'will happen' and do not violate the lane travel statute." 7/21/14 RP 145, 186; *State v. Jones*, __ Wn. App. __, 2015 WL 1540421, at *2 (No. 70620-9-I, April 6, 2015); *State v. Prado*, 145 Wn. App. 646, 649, 186 P.3d 1186 (2008). Such brief incursions over the line would not have given Trooper Dahl the authority to stop Mr. Ahearn.

The officer then observed Mr. Ahearn turn right at a red light without signaling or coming to a complete stop. 7/21/14 RP 21; Ex. 1 at 2. Although this constituted a traffic violation, it did not indicate the driver was impaired given there were no other cars on the road and it was after 3:00 a.m. 7/21/14 RP 16; Ex. 1 at 1. Although Mr. Ahearn did not immediately pull over, he stopped shortly after the trooper turned on his lights and came to a stop out of the roadway. 7/21/14 RP 22.

ii. *The trooper's initial interactions with Mr. Ahearn*

The trooper's observations during his interaction with Mr. Ahearn in the car also did not suggest Mr. Ahearn was impaired. Mr. Ahearn was sweaty and his eyes were bloodshot and watery, but it was 3:00 a.m. and Mr. Ahearn had been up all night, had recently showered, and was wearing clothing designed to retain body heat. 7/21/14 RP

143-44; Ex. 1 at 1. While he initially rolled down a back passenger window rather than the front passenger window using the controls in the driver's side door, he quickly corrected his mistake and provided his license, registration, and proof of insurance to the trooper without incident. 7/21/14 RP 86, 153.

Mr. Ahearn's speech was rapid, but there was no odor of intoxicants emanating from the vehicle or Mr. Ahearn's person. 7/21/14 RP 26-27. Trooper Dahl observed nothing in the car that suggested Mr. Ahearn had been recently drinking or using other substances. *See Gillenwater*, 96 Wn. App. at 321 (beer visible in the car combined with a strong odor of alcohol on the defendant is enough for probable cause). After the trooper instructed Mr. Ahearn to step out of the car, Mr. Ahearn allowed the door to close on him while he buttoned his jacket and stumbled, but quickly steadied himself, while walking around to the front of the car. 7/21/14 RP 157.

iii. *The trooper's observations during the field sobriety tests*

The trooper acknowledged he did not have probable cause to arrest Mr. Ahearn prior to performing the field sobriety tests. 7/21/14 RP 92. This changed, he contended, after observing Mr. Ahearn complete the testing. 7/21/14 RP 92. The trooper first performed the

horizontal gaze nystagmus test. 7/21/14 RP 31; Ex. 1 at 2. There were no indications of nystagmus, suggesting Mr. Ahearn was not under the influence of a depressant, such as alcohol. 7/21/14 RP 34; Ex. 1 at 2. While an expert testified at the suppression hearing that no studies have shown field sobriety tests are effective in evaluating whether an individual is under the influence of drugs, Trooper Dahl could not recall whether he had offered Mr. Ahearn the opportunity to be evaluated by a drug recognition expert, as would be his typical practice in this type of circumstance. 7/21/14 RP 74, 104. Instead, he continued to evaluate Mr. Ahearn using the standardized field sobriety tests.

The trial court erred when it found the trooper testified Mr. Ahearn performed "poorly" on the remaining three tests. CP 125 (Finding of Fact XVII). In fact, the trooper failed to properly administer the walk-and-turn test, negating any ability to determine how well Mr. Ahearn performed. 7/21/14 RP 21, 109, 131. Although the walk-and-turn test "should be conducted on a reasonably dry, hard, level, nonslippery surface," Trooper Dahl instructed Mr. Ahearn to perform the test on a moderate grade, estimated by the trooper as approximately the grade of a wheelchair ramp. Ex. 4 at 11; 7/21/14 RP

80. On a hill, and apparently walking more quickly than the average person, Mr. Ahearn had difficulty maintaining his balance at the start of the test, failed to make every step touch heel to toe, and performed the turn incorrectly. 7/21/14 RP 42; Ex. 1. However, despite the sloped surface and his rapid pace, Mr. Ahearn never stopped walking, never stepped off the imaginary line, and completed the correct number of steps. Ex. 1.

Mr. Ahearn performed well on the remaining two tests. While performing the one-leg stand, the trooper observed "there was a little sway" to Mr. Ahearn, which he described as "almost like a pendulum, just kind of in a circle." 7/21/14 RP 48. The trooper testified Mr. Ahearn also counted "one, two, three" instead of "one one-thousand, two one-thousand, three one-thousand" as directed. 7/21/14 RP 47. However, Mr. Ahearn otherwise completed the test as instructed. During the 30-second test, he did not use his arms for balance, hop, or put his foot down. Ex. 1. Two or more "clues" on this test indicate impairment. Ex. 4 at VIII-13. The trooper observed only one clue. Ex. 1 (Sobriety Tests).

Finally, during the Romberg balance test, Mr. Ahearn closed his eyes and tilted his head back as instructed. 7/21/14 RP 50. He initially

counted out loud but immediately stopped upon being given a reminder. 7/21/14 RP 51. Trooper Dahl testified Mr. Ahearn exhibited "body tremors" during this test, which he described as a "severe shiver." 7/21/14 RP 92. Despite noting Mr. Ahearn was sweating "profusely" in the car, and that it was a cool night in February, the trooper stated he did not believe the cold air on Mr. Ahearn was causing him to shiver, but did acknowledge "the cold could very well have contributed" to it. 7/21/14 RP 92. However, Mr. Ahearn had no difficulty estimating when a 30-second period had passed within the acceptable range, indicating that even if his speech and pace appeared faster than average, his brain had an accurate sense of the passage of time. 7/21/14 RP 51, 131.

Throughout this testing, and his interactions with Trooper Dahl, Mr. Ahearn remained cooperative and polite. 7/21/14 RP 66.

iv. *A reasonably cautious person would not have concluded Mr. Ahearn had committed a crime.*

Based on Mr. Ahearn's performance on the tests, Trooper Dahl decided he had probable cause to arrest because he believed Mr. Ahearn's driving was impaired by a stimulant. 7/21/14 RP 54. "[T]here is no 'mechanical rule' for establishing probable cause." *Staudenmaier*, 110 Wn. App. at 848. This Court looks to the facts of

each case to determine whether probable cause existed. *Id.* Here, the evidence before the trooper would not have caused a reasonably cautious person to conclude Mr. Ahearn had been driving under the influence. *See Ruem*, 179 Wn.2d at 202.

Trooper Dahl speculated Mr. Ahearn was under the influence of a stimulant after ruling out alcohol, but any evidence of this was limited. None of the testing the trooper performed was designed to evaluate whether Mr. Ahearn was under the influence of a stimulant and the trooper failed to record whether he offered Mr. Ahearn the opportunity to undergo an evaluation by a drug recognition expert, despite acknowledging that such testing would be appropriate in these circumstances. 7/21/14 RP 92, 104. Because the State bears the burden of proof at a suppression hearing, the State's failure to offer evidence that the trooper offered this evaluation must be construed in Mr. Ahearn's favor. *See State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

Instead, the trooper relied solely on the observations he made, namely that Mr. Ahearn appeared overheated, shivered in the night air, spoke quickly, had bloodshot and watery eyes, fumbled with the controls to lower a passenger side window from the driver's side,

allowed the driver's side door to close on him when he stepped out of the car, briefly stumbled when walking to the front of the car, walked at a fast pace during the walk-and-turn test, and swayed a little while standing on one leg. Ex. 1 and 1-4.

All of the trooper's concerns were explained just as easily by the fact it was 3:00 a.m., Mr. Ahearn had been awake all night and was not appropriately dressed for the weather, and was uncomfortable in the trooper's presence. 7/21/14 RP 142-43, 151, 156. The Fourth Amendment and article I, section 7, required the trooper to exercise reasonable caution before placing Mr. Ahearn under arrest. *Ruem*, 179 Wn.2d at 202. Instead, he jumped to the conclusion once he ruled out that Mr. Ahearn was under the influence of alcohol. The trial court erred when it found Trooper Dahl had probable cause to arrest Mr. Ahearn. CP 126-27 (Findings of Fact IXX, XXIV, Conclusion of Law III).

c. <u>The methamphetamine discovered as a fruit of the unlawful arrest must be suppressed.</u>

The trial court found that after Mr. Ahearn was handcuffed and placed in the patrol car, he consented to a search of his vehicle. CP 127. Trooper Dahl performed the search and found two syringes in the center console. 7/21/14 RP 64. One syringe was empty and the other

was filled with a clear liquid substance that tested positive for methamphetamine. 7/21/14 RP 64.

"Evidence is inadmissible as 'fruit of the poisonous tree' where it has been gathered by exploitation of the original illegality." *State v. Putman*, 65 Wn. App. 606, 612, 829 P.2d 787 (1992); *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."). Because Trooper Dahl would not have requested, and been granted, permission to search Mr. Ahearn's vehicle without the unlawful arrest, the fruits of that search must be suppressed. *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002) ("The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means."). This Court should reverse and suppress all evidence obtained subsequent to Mr. Ahearn's arrest, including evidence of the methamphetamine in the car.

2. The trial court's failure to enter written findings of fact and conclusions of law violated CrR 6.1(d)

After the trial court denied Mr. Ahearn's motion to suppress, he elected to proceed with a bench trial and stipulate to the facts. CP 109; 9/3/14 RP 47. Upon accepting the stipulation, the court reviewed the

Verdict on Submission of Stipulated Facts prepared by the State and Trooper Dahl's report and found Mr. Ahearn guilty beyond a reasonable doubt of possession of methamphetamine and driving under the influence of "a controlled substance." 9/3/14 RP 53. The trial judge signed a form to that effect but made no findings for fact or conclusions of law. CP 112.

The trial court's omission is not permitted by the CrR 6.1(d), which requires the court to enter findings of fact and conclusions of law:

> In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

"The purpose of CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal." *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (citing *City of Bremerton v. Fisk*, 4 Wn. App. 961, 962, 486 P.2d 294 (1974)). The court's findings must address each element of the crime separately and indicate the factual basis for each element and conclusion of law. *State v. Banks,* 149 Wn.2d 38, 43, 65 P.3d 1198 (2003); *Head*, 136 Wn.2d at 623 (citing *State v. Wilks*, 70

Wn.2d 626, 628, 424 P.2d 663 (1967)). While the findings need not include all the evidence in the record, they must include the evidence that established the existence or nonexistence of determinative factual matters. *State v. Alvarez*, 128 Wn.2d 1, 18, 904 P.2d 754 (1995).

The trial court completely disregarded the requirements of CrR 6.1(d). In both its oral ruling and its written "verdict," it simply found Mr. Ahearn guilty of the alleged crimes. 9/3/14 RP 53; CP 112. It failed to separately address each element and provide the factual basis for each conclusion of law. It did not discuss the evidence, and neglected to engage in any analysis of how the facts satisfied the elements beyond a reasonable doubt. The basic assertion that the trial court was finding Mr. Ahearn guilty, without any written findings and conclusions, was wholly insufficient to establish the record necessary for appellate review.

Failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires vacation of the judgment and sentence and remand for entry of findings and conclusions. *Head*, 136 Wn.2d at 625-26. Either party may then appeal those findings and conclusions in the usual course. *Id.* at 626.

3. Mr. Ahearn's conviction for driving under the influence violates due process because there is insufficient evidence for any rational trier of fact to find the elements beyond a reasonable doubt.[2]

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

A challenge to the sufficiency of evidence presented at a bench trial requires an appellate court to review the trial court's findings of fact and conclusions of law. *State v. Madarash*, 166 Wn. App. 500, 509, 66 P.3d 682 (2003). The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d

[2] In a case tried without a jury, an appellate court cannot determine whether the evidence is sufficient to support a conviction without the required written findings of fact and conclusions of law. *State v. Denison*, 78 Wn. App. 566, 570, 897 P.2d 437 (1995). However, in the alternative to the assignment of error regarding non-compliance with CrR 6.1(d), Mr. Ahearn challenges the sufficiency of the evidence upon which his driving under the influence conviction was based.

1234 (1999). First, the trial court's findings of fact must be supported by substantial evidence in the record. *Id.* If the findings are supported by substantial evidence, then the appellate court must decide whether those findings of fact support the trial court's conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).

As discussed above, Mr. Ahearn is unable to assign error to any specific findings because the trial court failed to make any oral or written findings of fact. Because of the limitations imposed by the court's failure to make a record, Mr. Ahearn challenges the conclusion of law that the elements of driving under the influence were supported by sufficient evidence. A trial court's conclusions of law are reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

In order to convict Mr. Ahearn of driving under the influence the State was required to prove Mr. Ahearn's ability to drive that morning was lessened by an appreciable degree due to the consumption of drugs or alcohol. CP 2; RCW 46.61.502; *State v. Hansen*, 15 Wn. App. 95, 97, 546 P.2d 1242 (1976). When the sufficiency of the evidence is challenged, the Court must determine whether, after viewing the evidence most favorable to the State, any rational trier of

fact could have found the element beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

a. <u>There was insufficient evidence to find Mr. Ahearn was under the influence of or affected by intoxicating liquor, marijuana, or any drug.</u>

In order to convict Mr. Ahearn of driving under the influence the State was required to prove beyond a reasonable doubt that he actually ingested alcohol or a drug. RCW 46.61.502. The State did not meet this burden. The trooper noted Mr. Ahearn was sweating in the car and began to have "body tremors," or shiver, upon exposure to the cool night air. Ex. 1 at 1. His eyes appeared bloodshot and watery and the trooper believed his speech and pace during the walk-and-turn test was faster than normal. Ex. 1 at 1-3.

However, there was no odor of an intoxicant emanating from the vehicle or Mr. Ahearn's person, and his performance on the field sobriety tests and portable breathalyzer test demonstrated he was not under the influence of alcohol. Ex. 1 at 2-3. Although the trooper suspected Mr. Ahearn was under the influence of a drug, he did not confirm his suspicions though a blood test or examination by a drug recognition expert. Ex. 1 at 3.

While the trooper later found a syringe with methamphetamine and an empty syringe in the center console, there was no evidence Mr. Ahearn had recently injected himself with methamphetamine. Ex. 1 at 3. Because Mr. Ahearn is homeless, the empty syringe in the car did not suggest recent use or use while driving, but simply that it was one of the possessions he carried in his car the way others store items in their homes. Ex. 1 at 2. In contrast, Mr. Ahearn's polite and cooperative demeanor throughout his interactions with the trooper suggested he was not under the influence of a mind-altering substance. Ex. 1 (DUI Interview).

In addition, the State needed to prove not only that Mr. Ahearn had consumed alcohol or a drug, but that this substance lessened his ability to drive by an appreciable degree. *Hansen*, 15 Wn. App. at 97. This Court has found the State failed to meet this burden with far more evidence than what the State presented in Mr. Ahearn's case. In *Gillenwater*, both the car and the defendant exuded a strong odor of alcohol and the trooper observed a cooler full of beer behind the driver's seat and three empty beer cans on the floorboard. 96 Wn. App. at 669. On these facts alone, this Court found the State did not prove the defendant had consumed enough alcohol to affect his driving. *Id.* at

669 n.1, 671 (finding that this evidence was insufficient for a conviction, but noting that the additional evidence at trial showed the defendant was incoherent, still smelled strongly of alcohol an hour after his arrest, and a blood draw revealed a blood alcohol level of 0.18). Here, there was far less evidence suggesting both that Mr. Ahearn had ingested a mind-altering substance and that he had consumed enough of it to affect his driving.

While law enforcement did not observe the defendant in *Gillenwater* driving before his car was struck by another vehicle, the observations made by Trooper Dahl did not show Mr. Ahearn was impaired. As discussed above, brief lane incursions do not violate the law. *Jones*, 2015 WL 70620-9-I at *2; *Prado*, 145 Wn. App. at 649. Turning right at a red light without signaling or coming to a complete stop, while traffic violations, do not suggest the driver is impaired when done on empty roads at approximately 3:00 a.m. Ex. 1 at 1-2. Thus, based on the stipulated facts presented to the trial court, the State failed to prove beyond a reasonable doubt that Mr. Ahearn committed the offense of driving under the influence.

b. Mr. Ahearn's conviction for driving under the influence must be reversed.

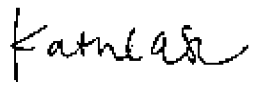
If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. *Green*, 94 Wn.2d at 221; *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ("[t]he double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence") (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)). Because the State failed to prove that Mr. Ahearn drove under the influence of an intoxicating substance his conviction must be reversed.

F. CONCLUSION

This Court should reverse the trial court's CrR 3.6 order and suppress all evidence obtained subsequent to Mr. Ahearn's arrest, including the methamphetamine in the car, because the trooper did not have probable cause to arrest Mr. Ahearn. In the alternative, this Court should vacate the judgment and sentence and remand for the court to enter written findings of fact and conclusions of law. Alternatively, this Court should reverse Mr. Ahearn's conviction for driving under the influence for insufficient evidence and dismiss the charge with prejudice.

DATED this 17th of April, 2015.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. SHANE AHEARN, Appellant.	)))))))))	NO. 46645-7-II

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