

NO. 46645-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SHANE AHEARN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 14-1-00253-8

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BRIEF OF RESPONDENT

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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.

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## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the totality of the circumstances known to Trooper Dahl, including Ahearn's weaving within and without his traffic lane, profuse sweating, lack of coordination, swaying and tremors, rapid and broken speech, and poor performance on field sobriety tests, supported a finding of probable cause for DUI?

2. Whether, even if Ahearn's DUI arrest were unlawful, the taint was dissipated as to the methamphetamine obtained from the post-arrest consensual search of Ahearn's car where there was no other police impropriety or motive, the consent was specifically found voluntary, Ahearn was given both *Miranda* and *Ferrier* warnings before he consented, and was brought near the car so he could limit or terminate the search while it was occurring?

3. Whether this Court should remand for entry of findings of fact and conclusions of law for the stipulated-facts bench trial?  
[CONCESSION OF ERROR]

4. Whether, even though the evidence is more than sufficient, this Court should decline to consider Ahearn's sufficiency of the evidence claim until after the trial court has entered findings?

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

### **A. PROCEDURAL HISTORY**

Shane Ahearn was charged by information filed in Kitsap County Superior Court with possession of methamphetamine and misdemeanor driving under the influence. CP 1.

Ahearn moved to suppress the evidence, CP 13, 24, 107, to which the State responded. CP 51, 103. After a contested hearing, RP (7/21), the trial court denied the motion. RP (7/25) 9-12; CP 123.

Ahearn proceeded to trial on stipulated facts, and was found guilty. CP 109, 112; RP (9/3) 55.

### **B. FACTS**

#### ***1. CrR 3.6 Hearing***

The arresting trooper, Kyle Dahl, a defense expert, Thomas Missel, and Ahearn testified at the hearing. At the conclusion of the hearing, the trial court specifically found that Dahl was more credible, and adopted his testimony as to all disputed factual issues. RP (7/25) 2.

Dahl had over 1200 hours of training before he was commissioned as a State Patrol trooper. RP (7/21) 9. Two weeks of that time was devoted to DUI issues, including training by certified instructors on the NHTSA standard field sobriety tests, including administration of the tests and spotting of impaired drivers. RP (7/21) 10. After leaving the academy, Dahl also took a 16-hour course in Advanced Roadside

Impaired Driving Enforcement (ARIDE), which focused on drug-impaired driving. RP (7/21) 10. The training was conducted by certified drug recognition experts. RP (7/21) 57. He had made around 75 arrests of alcohol-impaired drivers in his career. RP (7/21) 11. He had also arrested 30 to 40 drivers for being impaired by drugs. RP (7/21) 11.

Dahl's training allowed him to distinguish between the influence of depressants (such as alcohol) and stimulants. RP (7/21) 12. The training did not allow him to distinguish between stimulants such as cocaine versus methamphetamine. RP (7/21) 12.

The three certified NHTSA tests were horizontal gaze nystagmus (HGN), walk and turn, and one leg-stand. RP (7/21) 12. These tests had been the subject of a number of validation studies by NHTSA. RP (7/21) 13. There are other tests also used by officers in the field. RP (7/21) 13.

The NHTSA training provided a standardized method of conducting the tests. RP (7/21) 13. A major deviation from the standard could invalidate the test. RP (7/21) 14. A "major deviation" would be giving improper instructions, or not giving the HGN stimulus in a smooth manner. RP (7/21) 14.

During training, they practiced each of the tests at least 200 times, and were graded on their performance. RP (7/21) 14. They also had to take a refresher training course on the field sobriety tests every two to



three years. RP (7/21) 15.

On February 2, 2014, at about 3:00 a.m., Dahl noticed Ahearn driving northbound on Highway 303. RP (7/21) 16. The roads were dry; there was no fog. RP (7/21) 71. Dahl was behind Ahearn, who was weaving within his lane and then began to leave his lane and cross the white fog line and then the “skip line,” which separated the left and right lanes. RP (7/21) 17. He continuously weaved for about a mile, in a “snake-like manner.” RP (7/21) 19. He crossed the fog line multiple times. RP (7/21) 18. One of the times he crossed the fog line he stayed over it for about a hundred yards. RP (7/21) 19. Dahl would have attempted to stop Ahearn at that point, but had difficulty with his emergency lights. RP (7/21) 20.

As they reached the bottom of the exit ramp at Silverdale Way, Ahearn made a right turn without signaling or coming to a full stop. RP (7/21) 21. Dahl was able at that time to activate his lights. RP (7/21) 20. Ahearn did not immediately stop or otherwise react to the emergency lights. RP (7/21) 20, 22. Ahearn’s lack of reaction, particularly given the darkness at that hour, added to Dahl’s suspicions that Ahearn was impaired. Eventually Ahearn pulled slowly to the right shoulder. RP (7/21) 22.

Dahl approached Ahearn, and noted that he was sweating

profusely. RP (7/21) 24. It was February and quite cool out. RP (7/21) 24. Dahl observed that usually on a cool night, when a driver opened the window, he would immediately feel the heat from the car heater. RP (7/21) 24-25. He did not feel any heat coming from Ahearn's car. RP (7/21) 25. The first question Dahl asked was whether Ahearn was okay, because of how much he was sweating. RP (7/21) 25. It did not seem normal, considering the temperature. RP (7/21) 25.

Ahearn said he was okay, but his speech was very fast and rapid and broken. RP (7/21) 24-25. By "broken" speech Dahl meant that "you're trying to get words out but it's almost like your brain can't catch up with what your mouth is trying to say . So you're talking ahead of what you're actually thinking, and so it kind of – there's pauses and breaks. Words aren't complete." RP (7/21) 96.

His speech pattern seemed to be more than the usual nervousness Dahl had observed people exhibit when they were stopped by the police. RP (7/21) 27. Ahearn spoke very rapidly throughout the entire contact. RP (7/21) 27. Ahearn denied that he had taken any medications or drank any alcohol. RP (7/21) 24.

Dahl wanted to do FSTs, but first went back to his car to run a license check. RP (7/21) 26. When he returned, Ahearn was still sweating profusely—indeed his shirt was wet with sweat. RP (7/21) 26. His eyes

were also bloodshot. RP (7/21) 26.

Dahl asked Ahearn to step out of the car, but because of the weather, told him he could put his jacket on first. RP (7/21) 28. Ahearn grabbed his jacket and got out. RP (7/21) 28. He tried to put it on, the car door kept closing on him. RP (7/21) 28. It happened three times. RP (7/21) 28. Ahearn also had difficulty trying to button the jacket. RP (7/21) 29.

Dahl asked Ahearn if he would talk to him at the front of the car. RP (7/21) 30. Ahearn agreed and as he was walking to the front of the car, he stumbled and had to place his hand on the hood to regain his balance and catch himself from falling. RP (7/21) 31. There was nothing on the ground that he could have tripped on. RP (7/21) 30. He was wearing tennis shoes. RP (7/21) 31.

Dahl then asked Ahearn if he wanted to perform voluntary field sobriety tests. RP (7/21) 30. Ahearn agreed. RP (7/21) 31. The first test was the HGN. RP (7/21) 31. The HGN test did not indicate that Ahearn was under the influence of alcohol. RP (7/21) 34. A potable breath test also showed negative for alcohol. RP (7/21) 53.

Dahl next asked Ahearn to perform the walk-and-turn test. RP (7/21) 39. He instructed Ahearn to imagine a straight line in front of him. He then asked him to place his left foot on the line, and then place his

right foot on the line immediately in front of it with the heel of the right foot touching the toe of the left. RP (7/21) 39. He then asked Ahearn to hold that position and not do anything until he told him to begin the test. RP (7/21) 39. He then told him when the test started to take nine steps and showed him how to turn. RP (7/21) 39. Dahl only took three steps in the demonstration, and specifically pointed that out to Ahearn and explained that Ahearn needed to take nine. RP (7/21) 39-40. After the demonstration, Dahl asked if Ahearn had any questions. RP (7/21) 40. He did not. RP (7/21) 40. Dahl then told him to begin. RP (7/21) 40. The instructions and demonstration were according to the NHTSA manual. RP (7/21) 45.

Even before the test began, Ahearn was unable to hold the position on the imaginary line. RP (7/21) 40. He had to step to the right to catch his balance. RP (7/21) 40. Ahearn missed the heel-to-toe on several of the first nine steps, performed the turn incorrectly, and then missed several heel-to-toes on the way back. RP (7/21) 41.

For the turn, Ahearn was instructed to keep his forward foot on the line, and take a series of small steps with the other foot. RP (7/21) 44. Ahearn kept his rear foot in place and made the steps with the front one. RP (7/21) 44.

There are clues to watch for during this test: the person cannot

keep his balance during the instructions, steps off the line, uses arms for balance, misses heel-to-toe, incorrectly performs the turn, and a few others. RP (7/21) 41. Dahl concluded that Ahearn performed poorly on the test. RP (7/21) 42.

Although the grade was moderate, what Dahl characterized as “just above slight,” it was not so steep that a person would have to adjust his balance to be able to stand. RP (7/21) 42. Dahl began the test with Ahearn facing uphill. RP (7/21) 43. Dahl was trained that while a non-level grade could lessen the weight given to the test, it could still be considered. RP (7/21) 46. The problem with Ahearn’s turn would not have been affected by the grade; he simply did not follow the instructions. RP (7/21) 44.

The next test was the one leg stand. RP (7/21) 46. In this test, Ahearn was told to balance on the leg of his choice and to raise the other foot about six inches, maintaining the foot parallel to the ground. RP (7/21) 46. He was then instructed to count by one-thousands (one-one-thousand, two-one-thousand, three-one-thousand, etc.) until Dahl told him to stop. RP (7/21) 46. The standard time period was 30 seconds. RP (7/21) 46.

Ahearn swayed during the test, which was a standardized clue. RP (7/21) 47. He also counted incorrectly (one, two, three, etc.). RP (7/21)

47.

The final test was the Romberg balance test. RP (7/21) 50. Although not one of the standard NHTSA tests, Dahl was taught it in his ARIDE training. RP (7/21) 50. It is used to help determine impairment from a cause other than alcohol. RP (7/21) 50.

Dahl instructed Ahearn to close his eyes and tilt his head back, basically to look straight up with his eyes closed. RP (7/21) 50. When Dahl said “begin,” Ahearn was to count estimate 30 seconds in his mind and then tilt his head forward, open his eyes, and say “stop” when he thought 30 seconds had passed. RP (7/21) 51.

Ahearn stopped at 34 seconds, which was pretty close. RP (7/21) 51. However, he again failed to follow the instructions, and began counting out loud. RP (7/21) 51. He also had violent body tremors and swayed in a circular motion during the test. RP (7/21) 52.

Additionally, Ahearn had body tremors throughout the contact. RP (7/21) 48. It was almost like a severe shiver, his muscles were tensing and contracting and relaxing he did not have any control over it. RP (7/21) 49. With the amount of sweat coming off him, Dahl did not think it was ordinary shivering from the cold. RP (7/21) 49. He also had a bit of sway when he was standing. RP (7/21) 48.

Based on the test clues and all the other circumstances since Dahl had first observed Ahearn driving, he believed that Ahearn was impaired by a stimulant. RP (7/21) 54. Depressants make people slower and groggier. RP (7/21) 54. People who have taken a stimulant are “peppier”: they talk faster, they cannot sit still, they have a lot they want to do, and they “have almost like a fire burning inside of them.” RP (7/21) 54. The stimulant makes their body temperature rise, and they can sweat like Ahearn did. RP (7/21) 54. Ahearn’s other behavior was also consistent with stimulant use. RP (7/21) 54. Ahearn had “fast and broken” speech. RP (7/21) 54. He walked faster than normal in the walk-and-turn test. RP (7/21) 54.

Dahl decided to arrest Ahearn for DUI. RP (7/21) 59. After being advised of his rights, Ahearn declined a blood draw, but did consent to the search of the car. RP (7/21) 59. Before searching the car, Dahl also gave Ahearn *Ferrier*<sup>1</sup> warnings: “you have the right to refuse, restrict, or revoke my search at any time.” RP (7/21) 60, 63. Another officer had arrived at the scene by then, and stood by the car with Ahearn during the search so he could see what Dahl was doing. RP (7/21) 63. Ahearn never restricted or revoked his consent to search. RP (7/21) 64.

In the glove box, Dahl found a lock-pick set. RP (7/21) 64. In the

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<sup>1</sup> *State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998).

center console were two syringes, one of which contained liquid methamphetamine. RP (7/21) 64.

The car was then impounded. RP (7/21) 65. Ahearn was transported to the WSP Bremerton district office, where Dahl attempted to contact a prosecutor to obtain a warrant for a blood draw. RP (7/21) 66. He was unable to contact the prosecutor, and neither warrant nor blood draw were obtained. RP (7/21) 66.

During the trip to the office, Ahearn continued to sweat profusely. RP (7/21) 68. It was not warm in the car. RP (7/21) 68. Dahl's vest and jacket kept him warm, so he did not usually turn up the heat in his car. RP (7/21) 68, 72. By the time they arrived at the office, the entire rear of the car had fogged up and there was a considerable amount of condensation on the windows. RP (7/21) 68.

Ahearn presented the testimony of a private investigator who had also taken the NHTSA FST and ARIDE courses. RP (7/21) 100. Although he had not actually visited the scene, he opined that the grade was steep enough to render the walk-and-turn test invalid. RP (7/21) 112, 122. He nevertheless noted that one could still make observations, and that the test was not worthless, by any stretch of the imagination. It's still an observation." RP (7/21) 112, 120. Nor did he have any issue with the administration of the one-leg stand. RP (7/21) 131.



Ahearn himself also testified. As noted, the trial court rejected any of his testimony that conflicted with Dahl's, which it found more credible.

**2. *Stipulated Facts***

For the purposes of a bench trial, Ahearn stipulated:

1. To the facts contained in Dahl's report;
2. That the substance recovered from his console was methamphetamine;
3. That "standardized field sobriety tests are a valuable tool in drug related DUI investigations and provide observational information for law enforcement;" and
4. That "Dahl is a skilled DUI investigator."

CP 111-12.

In his report, Dahl first saw Ahearn weaving within his lane at 3:15 in the morning. Ahearn then crossed the fog line by approximately two tire widths, traveled back across the lane and crossed the center skip line separating the right and left lane by one-quarter of the vehicle width. After that he continued to weave within the lane and again crossed the fog line by approximately half the vehicle width and continued to drive over the fog line for approximately 100 yards. Ahearn then reentered the lane and began weaving within its lane again. CP 114.

After exiting the freeway, Ahearn failed to stop at the stop sign at the bottom of the ramp and failed to use his turn signal before turning. He then failed to immediately respond to the trooper's emergency lights, and continued driving for a quarter of a mile while passing several likely places to pull over. CP 115.

When Trooper Dahl approached the right side of Ahearn's car and signaled Ahearn to roll the window down, Ahearn struggled with the window switches before rolling the window down approximately half way. Dahl asked him to open it all the way, and Ahearn again struggled with the switches before he rolled the window all the way down. CP 115.

Because Ahearn was sweating quite profusely, Dahl asked him if he was OK, which Ahearn asserted he was. Dahl could not feel any extremely hot air exit the vehicle and the interior of the vehicle did not seem to be extraordinarily warm. In addition to the extreme sweating, Ahearn also had blood-shot and watery eyes and his speech was be fast and broken. CP 115. Finally, his face was flushed. CP 118.

Dahl asked Ahearn to exit the car and talk to him at the front of the vehicle. Dahl advised Ahearn he could put his jacket on if he wished. Ahearn grabbed his jacket and began to exit the vehicle. CP 115.

Ahearn first struggled trying to open the door. Once it was open, Ahearn stood in the door opening and tried to put on his jacket. He kept

trying to push the door all the way open but the door kept closing on him while he was trying to put on his jacket. Ahearn tried this four times before getting his jacket on. He also struggled with the buttons on the jacket. As Ahearn started walking towards the front of the vehicle Ahearn stumbled and had to place his right hand on the hood of the vehicle to catch his balance. CP 115.

Dahl performed four FSTs on Ahearn. The first, the HGN, showed Ahearn to be negative for alcohol. CP 115. Ahearn also tested negative for alcohol in a portable breath test. CP 116. He did, however, have violent body tremors and sway in a circular motion during the HGN test. CP 115.

While giving Ahearn the instructions for the walk-and-turn test, Ahearn started the test early twice. Ahearn also lost his balance and had to step offline to his right to catch his balance. Once Ahearn began the test Ahearn missed heel to toe on steps five six and seven on his first nine steps. Ahearn then made a quick turn in one motion to his right. On Ahearn's second nine steps Ahearn missed heel to toe on steps five, six, seven, eight, and nine. Ahearn also used his arms for balance during the test and took his steps at a faster than normal pace. CP 116.

For the one-leg-stand test, Ahearn stood on his right leg and raised his left foot. During the test Ahearn swayed and had body tremors.

Ahearn also did not count as he was instructed, Ahearn counted “one, two, three,” etc. instead of “one-thousand and one, one-thousand and two” etc. CP 116.

For the Romberg balance test Ahearn estimated 30 seconds in 34 actual seconds. Ahearn began counting out loud by thousands until Dahl reminded him to count in his head. During this test, Ahearn again had violent body tremors, and swayed in a circular motion. CP 116.

Ahearn was given his *Miranda*<sup>2</sup> and *Ferrier* warnings and consented to a search of his car. In the car’s console where two syringes, one containing methamphetamine, CP 111, and the other empty with the tip broken off. CP 116.

While Ahearn was outside performing the tests, he continued to sweating, even with the colder temperature. CP 116. Then, while Dahl was transporting Ahearn to the WSP district office, the rear windows fogged up and had a considerable amount of condensation on them, due to the heat Ahearn was giving off. Ahearn also asked him to roll the rear window down. By the time they arrived at the office, Ahearn had sweat dripping off of him. CP 117.

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

### III. ARGUMENT

**A. THE TOTALITY OF THE CIRCUMSTANCES KNOWN TO TROOPER DAHL, INCLUDING AHEARN'S WEAVING WITHIN AND WITHOUT HIS TRAFFIC LANE, PROFUSE SWEATING, LACK OF COORDINATION, SWAYING AND TREMORS, RAPID AND BROKEN SPEECH, AND POOR PERFORMANCE ON FIELD SOBRIETY TESTS, SUPPORTED A FINDING OF PROBABLE CAUSE FOR DUI.**

Ahearn argues that the trooper lacked probable cause probable cause to arrest him for DUI. This claim is without merit because the totality of the circumstances known to Trooper Dahl, including Ahearn's weaving within and without his traffic lane, profuse sweating, lack of coordination, swaying and tremors, rapid and broken speech, and poor performance on field sobriety tests, supported a finding of probable cause for DUI.

A police officer may arrest a person without a warrant upon probable cause to believe that the person has committed the offense of DUI. *O'Neill v. Department of Licensing*, 62 Wn. App. 112, 116, 813 P.2d 166 (1991); RCW 10.31.100(3)(d). Probable cause to arrest must be judged on the facts known to the arresting officer before or at the time of arrest. “[P]robable cause to arrest exists 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.”

*O'Neill*, 62 Wn. App. at 116-17 (quoting *Waid v. Department of Licensing*, 43 Wn. App. 32, 34-35, 714 P.2d 681 (1986)).

Probable cause to arrest requires more than “a bare suspicion of criminal activity,” but does not require facts that would establish guilt beyond a reasonable doubt. Probable cause has also been defined as “a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.” And “[t]he question of probable cause should not be viewed in a hypertechnical manner.”

*State v. Gillenwater*, 96 Wn. App. 667, 670, 980 P.2d 318 (1999), *review denied*, 140 Wn.2d 1004 (2000). On appeal of denial of a motion to suppress, findings are reviewed for substantial evidence and the conclusions of law derived from those findings are reviewed de novo. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).

Ahearn argues that Dahl lacked probable cause to arrest him for DUI. First, Ahearn grossly minimizes the weaving that Dahl observed. Dahl did not simply observe “brief incursions” over the fog line. *See* Brief of Appellant, at 11-12. Dahl observed Ahearn weaving within his lane, leave his lane and cross the white fog line and then the “skip line,” which separated the left and right lanes. RP (7/21) 17. He continuously weaved for about a mile, in a “snake-like manner.” RP (7/21) 19. He crossed the fog line multiple times. RP (7/21) 18. One of the times he crossed the fog line he stayed over it for about a hundred yards. RP (7/21) 19. *See also* Exh. 1, at 1-2 (Ahearn crossed the fog line by two tire widths, swerve back

across his lane and cross into the left lane, by one-quarter of vehicle width, weaved more and then crossed fog line by one-half vehicle width and drove that way for 100 yards).

Ahearn also claims that there was no contradiction of his supposed testimony that visibility was poor. The very passage Ahearn cites contradicted Ahearn's claim:

Q. Okay. And then there was also some testimony this was an extremely foggy morning and that visibility was extremely poor; is that accurate?

A. I don't remember any fog in the area. I do know that fog does settle in the Central Valley area. It could be clear everywhere else, but that area does have some fog that can sit there. I don't, however, remember it being super foggy that night.

RP (7/21) 186. Dahl further testified that once he was behind Ahearn's vehicle, he never had any difficulty seeing it. RP (7/21) 187.

Additionally, Ahearn failed to completely stop at the bottom of the exit or use his turn signal before turning. While Ahearn is correct that this might not per se show impairment, Brief of Appellant at 12, it is certainly a factor the Dahl was permitted to consider when weighing the totality of the circumstances.

Next, when Dahl attempted to pull Ahearn over, Ahearn was slow to comply. Ahearn did not immediately stop or otherwise react to the emergency lights. RP (7/21) 20, 22. Ahearn's lack of reaction,

particularly given the darkness at that hour, added to Dahl's suspicions that Ahearn was impaired. RP (7/21) 22. Ahearn drove over a quarter of a mile before pulling over. RP (7/21) 185. There were a number of level places where he could have pulled over before he did. RP (7/21) 185.

Once he made contact with Ahearn, Trooper Dahl noted that Ahearn struggled with his window controls, was sweating profusely, had bloodshot and watery eyes, and his speech was fast and broken. Ahearn again minimizes the degree of these factors.

Dahl testified that was sweating profusely, even though it was February and quite cool out. RP (7/21) 24. Dahl observed that usually on a cool night, when a driver opened the window, he would immediately feel the heat from the car heater. RP (7/21) 24-25. He did not feel any heat coming from Ahearn's car. RP (7/21) 25. Nor did it feel warm in Ahearn's car when Dahl reached across from the passenger-side window to accept his license. RP (7/21) 190. The first question Dahl asked was whether Ahearn was okay, because of how much he was sweating. RP (7/21) 25. It did not seem normal, considering the temperature. RP (7/21) 25.

Ahearn argues that the trial court did not take into consideration the clothing Ahearn was wearing or that he had just taken a shower. Brief of Appellant at 12. However, Ahearn stated that he had showered in



Brownsville, and then gone to the Wal-Mart in Bremerton where he sat for a while, “drinking water and waiting.” RP (7/21) 144. Only then did he begin driving to Poulsbo, which was when Dahl stopped him. Furthermore, in the same testimony, Ahearn claimed that he was not sweating at all until after his arrest. RP (7/21) 163, 170. The trial court rejected that testimony. Finally, this contention fails to comport with Dahl’s recollections, which the trial court did accept. Dahl testified that Ahearn was sweating so much that his shirt was soaked through. RP (7/21) 26.

Ahearn again relies on his own rejected testimony to minimize his difficulty operating the power window controls. Brief of Appellant at 13 (*citing* RP (7/21) at 153; the citation to Dahl’s testimony is regarding the license and registration. RP (7/21) 86.). Dahl, on the other hand testified that Ahearn had considerable difficulty:

A. The windows were fully rolled up on the passenger side. I knocked on the front window, asking the driver to roll it down. I saw him fumbling with the switches. I don’t remember if he was looking at me or at the switches, but I did see his hand moving on the switches for a little bit before he was able to begin rolling down the window. And I believe the rear window rolled down a little bit, and then he started to roll down the front window, and it rolled approximately half to a quarter of the way down. At that point, I asked him if he could fully roll down the window, and he again started fumbling with the switches before the window was all the way down.

Q. Okay. Do you have manual windows or automatic windows in your car?

A. I do.

Q. I didn't --

A. Oh, sorry. I have automatic.

Q. Okay. And have you had the same experience, where you're trying to figure out which one to do, or you try to roll down your front window and you accidentally roll down your back window?

A. I have , where you think you're on a different switch, and you go, "oops," and move on to the next one.

Q. Is that what you think may have been happening that night?

A. For the first one, when the back window came down initially, it was something to say, "Oh, wrong switch." But the fact that he kept fumbling with the switches is something I became aware of.

RP (7/21) 188.

Ahearn next brushes off Dahl's observations of his speech. Brief of Appellant at 13. Dahl characterized it as very fast and rapid. RP (7/21) 24-25. Ahearn's speech pattern seemed to be more than the usual nervousness Dahl had observed people exhibit when they were stopped by the police. RP (7/21) 27. Ahearn spoke very rapidly throughout the entire contact. RP (7/21) 27. His speech was also "broken," which Dahl said meant that "you're trying to get words out but it's almost like your brain can't catch up with what your mouth is trying to say. So you're talking ahead of what you're actually thinking, and so it kind of -- there's pauses and breaks. Words aren't complete." RP (7/21) 96.

Ahearn's speech patterns were consistent with someone who was

under the influence of a stimulant. Dahl explained that people who have taken a stimulant are “peppier”: they talk faster, they cannot sit still, they have a lot they want to do, and they “have almost like a fire burning inside of them.” RP (7/21) 54. The stimulant makes also their body temperature rise, and they can sweat like Ahearn did. RP (7/21) 54.

Finally, Ahearn again minimizes the trooper’s observations before he conducted the FSTs, contending that he had minor difficulty putting his jacket on, but “quickly steadied himself, while walking around to the front of the car.” Brief of Appellant at 13. This contention is again based on Ahearn’s own rejected testimony.

Dahl related a different version of what occurred. Dahl asked Ahearn to step out of the car, but because of the weather, told him he could put his jacket on first. RP (7/21) 28. Ahearn grabbed his jacket and got out. RP (7/21) 28. He tried to put it on, the car door kept closing on him. RP (7/21) 28. It happened three times. RP (7/21) 28. Ahearn also had difficulty trying to button the jacket. RP (7/21) 29.

Dahl asked Ahearn if he would talk to him at the front of the car. RP (7/21) 30. Ahearn agreed and as he was walking to the front of the car, he stumbled and had to place his hand on the hood to regain his balance and catch himself from falling. RP (7/21) 31. There was nothing on the ground that he could have tripped on. RP (7/21) 30. He was wearing

tennis shoes. RP (7/21) 31.

When added to all of these facts, Dahl's observations during the FSTs fully supported a finding of probable cause for arrest. Dahl asked Ahearn to perform the walk-and-turn test.<sup>3</sup> RP (7/21) 39. He instructed Ahearn to imagine a straight line in front of him. He then asked him to place his left foot on the line, and then place his right foot on the line immediately in front of it with the heel of the right foot touching the toe of the left. RP (7/21) 39. He then asked Ahearn to hold that position and not do anything until he told him to begin the test. RP (7/21) 39. He then told him when the test started to take nine steps and showed him how to turn. RP (7/21) 39. Dahl only took three steps in the demonstration, and specifically pointed that out to Ahearn and explained that Ahearn needed to take nine. RP (7/21) 39-40. After the demonstration, Dahl asked if Ahearn had any questions. RP (7/21) 40. He did not. RP (7/21) 40. Dahl then told him to begin. RP (7/21) 40. The instructions and demonstration were according to the NHTSA manual. RP (7/21) 45.

Even before the test began, Ahearn was unable to hold the position on the imaginary line. RP (7/21) 40. He had to step to the right to catch his balance. RP (7/21) 40. Ahearn missed the heel-to-toe on several of

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<sup>3</sup> The first test was the HGN. RP (7/21) 31. The HGN test did not indicate that Ahearn was under the influence of alcohol. RP (7/21) 34. A portable breath test also showed negative for alcohol. RP (7/21) 53. Neither of these results is particularly relevant, since Dahl suspected Ahearn was under the influence of a stimulant, not alcohol.

the first nine steps, performed the turn incorrectly, and then missed several heel-to-toes on the way back. RP (7/21) 41.

For the turn, Ahearn was instructed to keep his forward foot on the line, and take a series of small steps with the other foot. RP (7/21) 44. Ahearn kept his rear foot in place and made the steps with the front one. RP (7/21) 44.

There are clues to watch for during this test: the person cannot keep his balance during the instructions, steps off the line, uses arms for balance, misses heel-to-toe, incorrectly performs the turn, and a few others. RP (7/21) 41. Dahl concluded that Ahearn performed poorly on the test. RP (7/21) 42.

Based on the testimony of his expert, whose profession is testifying on behalf of DUI defendants, Ahearn claims that the test was improperly administered. Brief of Appellant at 14. However, Ahearn overstates his own expert's conclusions. The expert stated that Dahl gave proper instructions for walk-and-turn test. RP (7/21) 109. His only quibble was the grade of the roadway. (7/21) 112. Even then, however, he noted that the officer could still make valid observations.

Although the grade was moderate, Dahl characterized it as "just above slight;" it was not so steep that a person would have to adjust his balance to be able to stand. RP (7/21) 42. The expert did not even visit

the scene before opining that the grade was too steep to produce valid results. RP (7/21) 122.

Dahl began the test with Ahearn facing uphill. RP (7/21) 43. Dahl was trained that while a non-level grade could lessen the weight given to the test, it could still be considered. RP (7/21) 46. Moreover, the problem with Ahearn's turn would not have been affected by the grade; he simply did not follow the instructions. RP (7/21) 44. Further, even Ahearn's expert had no issue with the grade with regard to the one-leg stand. RP (7/21) 131. As such, that Ahearn was unable to keep his balance while standing still with both feet on the ground was certainly probative of impairment.

The next test was the one leg stand. RP (7/21) 46. In this test, Ahearn was told to balance on the leg of his choice and to raise the other foot about six inches, maintaining the foot parallel to the ground. RP (7/21) 46. He was then instructed to count by one-thousands (one-one-thousand, two-one-thousand, three-one-thousand, etc.) until Dahl told him to stop. RP (7/21) 46. The standard time period was 30 seconds. RP (7/21) 46.

Ahearn swayed during the test, which was a standardized clue. RP (7/21) 47. He also counted incorrectly (one, two, three, etc.). RP (7/21) 47.

The final test was the Romberg balance test. RP (7/21) 50. Although not one of the standard NHTSA tests, Dahl was taught it in his ARIDE training. RP (7/21) 50. It is used to help determine impairment from a cause other than alcohol. RP (7/21) 50.

Dahl instructed Ahearn to close his eyes and tilt his head back, basically to look straight up with his eyes closed. RP (7/21) 50. When Dahl said “begin,” Ahearn was to count estimate 30 seconds in his mind and then tilt his head forward, open his eyes, and say “stop” when he thought 30 seconds had passed. RP (7/21) 51.

Ahearn stopped at 34 seconds, which was pretty close. RP (7/21) 51. However, he again failed to follow the instructions, and began counting out loud. RP (7/21) 51. He also had violent body tremors and swayed in a circular motion during the test. RP (7/21) 52.

Additionally, Ahearn had body tremors throughout the contact. RP (7/21) 48. It was almost like a severe shiver, his muscles were tensing and contracting and relaxing he did not have any control over it. RP (7/21) 49. With the amount of sweat coming off him, Dahl did not think it was ordinary shivering from the cold. RP (7/21) 49. He also had a bit of sway when he was standing. RP (7/21) 48. Ahearn again discounts all of Dahl’s observations and argues that he “did well” on these last two tests. Brief of Appellant at 15.

Based on the test clues and all the other circumstances since Dahl had first observed Ahearn driving, he believed that Ahearn was impaired by a stimulant. RP (7/21) 54. The totality of the circumstances supports this conclusion.

Additionally, the court properly took into account Dahl's specific training and experience regarding impaired drivers. That included training by certified instructors on the NHTSA standard field sobriety tests, including administration of the tests and spotting of impaired drivers. RP (7/21) 10. Dahl also took a 16-hour course in Advanced Roadside Impaired Driving Enforcement (ARIDE), which focused on drug-impaired driving. RP (7/21) 10. The training was conducted by certified drug recognition experts. RP (7/21) 57. With regard to his experience, Dahl had made around 75 arrests of alcohol-impaired drivers. RP (7/21) 11. He had also arrested 30 to 40 drivers for being impaired by drugs. RP (7/21) 11.

Ahearn's bad driving and physical signs of impairment were certainly enough for any reasonably cautious person to conclude his driving was impaired. The trial court's findings leading to its conclusion that Dahl had probable cause to arrest Ahearn for DUI are supported by substantial evidence and should be upheld by this court.



**B. EVEN IF AHEARN'S DUI ARREST WERE UNLAWFUL, THE TAINT WAS DISSIPATED AS TO THE METHAMPHETAMINE OBTAINED FROM THE POST-ARREST CONSENSUAL SEARCH OF AHEARN'S CAR WHERE THERE WAS NO OTHER POLICE IMPROPRIETY OR MOTIVE, THE CONSENT WAS SPECIFICALLY FOUND VOLUNTARY, AHEARN WAS GIVEN BOTH *MIRANDA* AND *FERRIER* WARNINGS BEFORE HE CONSENTED, AND WAS BROUGHT NEAR THE CAR SO HE COULD LIMIT OR TERMINATE THE SEARCH WHILE IT WAS OCCURRING**

Ahearn also claims that if his DUI arrest was unlawful, then the methamphetamine found after Ahearn consent to the search of his car must be suppressed as fruit of the poisonous tree. However, even if probable cause were lacking, the methamphetamine recovered after a consensual search of Ahearn's car would not properly be suppressed as fruit of the poisonous tree because Ahearn was given *Miranda* and *Ferrier* warnings, there was no egregious police misconduct, and the consent to search was otherwise voluntary.

Several factors are relevant in determining whether consent to a search is tainted by a prior illegal seizure: "(1) temporal proximity of the illegality and the subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of Miranda warnings." *State v. Armenta*, 134 Wn. 2d 1, 17, 948 P.2d 1280, 1287 (1997) (quoting *State v. Soto-*

*Garcia*, 68 Wn. App. 20, 27, 841 P.2d 1271 (1992), *abrogated on other grounds*, *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996)). In *Soto-Garcia*, this Court compared a number of cases when discussing the rule:

In *State v. Gonzales*, [46 Wn. App. 388, 731 P.2d 1101 (1986)], a defendant who was stopped for a traffic infraction was arrested on burglary charges after he disclaimed any connection to property clearly visible in his car. Because the arrest was made before the police verified that a burglary had, in fact, occurred, the court held that the arrest was not based on probable cause and, thus, was illegal. After the illegal arrest, the defendant voluntarily consented to a search of his home. Thus, at issue was whether the consent was tainted by the illegal arrest. In concluding that it was not, the court noted (1) Gonzales volunteered his consent rather than being asked for it, (2) Gonzales was told that he need not consent, and (3) the police misconduct in prematurely arresting Gonzales was not flagrant. *See generally* *Gonzales*, 46 Wn. App. at 398.

In contrast to *Gonzales*, *Soto-Garcia* was not told that he could withhold consent to having his license checked and to being searched. Additionally, the police misconduct was more intrusive than it was in *Gonzales*. In *Gonzales*, there were reasonable grounds to suspect that the defendant had committed a traffic infraction, whereas here there was no evidence that *Soto-Garcia* was engaged in any criminal activity.

In *State v. Jensen*, [44 Wn. App. 485, 723 P.2d 443 (1986)], a defendant's consent to search his vehicle was deemed valid, notwithstanding a prior illegal search of that vehicle, where the defendant, who had been legally arrested for driving with a suspended license, was (1) afforded an opportunity to make a telephone call, (2) given his *Miranda* rights, and (3) advised that he could withhold consent to the subsequent search. *Jensen*, 44 Wn. App. at 490-91. Being advised that he could withhold consent was viewed as a substantial intervening circumstance. *Jensen*, 44 Wn. App. at 490-91. Unlike the situation in *Jensen*, *Soto-Garcia* was

not advised that he could withhold consent, nor was he given any *Miranda* warnings prior to being searched.

This case is more akin to *State v. Sistrunk*, [57 Wn. App. 210, 216, 787 P.2d 937 (1990)]. There, an illegal search of an automobile led to the discovery of a used syringe. After locating the syringe, the officer confronted the defendant with it, asked for permission to continue searching the vehicle and advised her that a warrant would be obtained if she refused to consent. *Sistrunk*, 57 Wn. App. at 213. Because the syringe was found pursuant to an illegal search, and was used to obtain the defendant's consent to continue the search, the court held that consent was obtained by exploitation of the prior illegality. *Sistrunk*, 57 Wn. App. at 216.

Applying the principles we glean from the above, we conclude that Soto-Garcia's consent to the search was obtained through exploitation of his prior illegal seizure. As we have noted, Soto-Garcia was stopped at night in the city of Kelso at a time when there was no reason to suspect that he was engaged in criminal activity. After he was confronted by the police officer he was immediately searched without having been afforded the benefit of *Miranda* warnings or advice that he could withhold his consent to being searched. Under these circumstances, the evidence obtained as a result of that search was properly suppressed.

27-29.

The facts of the present case are more similar to those of *Jensen* and *Gonzalez*. While there was little temporal space between Ahearn's arrest and the consent to search, the other three factors counsel in favor of finding that any taint was attenuated.

As noted in *Jensen*, advising the suspect that he may refuse consent is a substantial intervening circumstance. Here, Ahearn was given

*Ferrier* warnings and advised that he could both refuse consent, and that he could revoke it any time. Further, Dahl had another trooper stand with Ahearn within Dahl's earshot so Ahearn could terminate the search at any time. RP (7/21) 60, 63. Ahearn never restricted or revoked his consent to search. RP (7/21) 64. The trial court specifically found that the consent to search was knowing and voluntary. CP 127 (COL IV). It rejected as not credible Ahearn's claim that Dahl "pestered" him until he consented. CP 127 (FOF XXIV).

Next, Dahl's arrest of Ahearn was neither flagrantly improper nor done for any improper purpose. Even if the Court were to find that Dahl lacked probable cause to arrest Ahearn, it cannot be disputed that there was significant evidence that he was intoxicated. Moreover, there is no evidence whatsoever that Dahl stopped or arrested Ahearn for any improper purpose or for any motive other than his belief that Ahearn was impaired.

Finally, Dahl also gave Ahearn *Miranda* warnings before he sought consent to search. RP (7/21) 59. Even Ahearn testified that he understood and waived the warnings. RP (7/21) 164-65.

The totality of the factors show that Ahearn's consent to search was voluntary. They further show that any taint from the alleged illegality of Ahearn's arrest would have been attenuated. As such, even if Dahl had

lacked probable cause to arrest Ahearn for DUI, there would have been no basis to suppress the methamphetamine recovered from the consensual search of the car.

**C. THIS COURT SHOULD REMAND FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE STIPULATED-FACTS BENCH TRIAL.**

Ahearn next claims that the trial court erred in failing to enter written findings regarding its verdict. Ahearn is correct that the proper remedy is remand for entry of written findings of fact and conclusions of law for the stipulated bench trial, as required under CrR 6.1(d). *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (“Remand for entry of written findings and conclusions is the proper course” when such a defect occurs). Those findings should address the elements of the crimes separately and indicate the factual basis for each. *State v. Denison*, 78 Wn. App. 566, 570, 897 P.2d 437, 439 (1995) (citing *State v. Russell*, 68 Wn.2d 748, 415 P.2d 503 (1966)).

**D. ALTHOUGH THE EVIDENCE IS MORE THAN SUFFICIENT, THIS COURT SHOULD NOT CONSIDER AHEARN’S SUFFICIENCY OF THE EVIDENCE CLAIM UNTIL AFTER THE TRIAL COURT HAS ENTERED FINDINGS.**

Ahearn next claims that the evidence is insufficient to support his conviction for DUI. This claim is premature, and should be raised after

remand.

In the absence of the required findings, this Court cannot review whether the evidence was sufficient to support a conviction. *Denison*, 78 Wn. App. 566, 570-71 (citing *Russell*, 68 Wn.2d at 751). The Court should therefore decline to address this issue and remand the case for entry of written findings, as Ahearn has requested.

However, it should be noted that this contention is substantively without merit. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

Ahearn stipulated to the facts contained in Dahl's report, *see* CP 113-20; to the fact that the substance recovered from his console was methamphetamine; that "standardized field sobriety tests are a valuable tool in drug related DUI investigations and provide observational information for law enforcement;" and that "Dahl is a skilled DUI investigator." CP 111-12.

To convict Ahearn of DUI as charged, the trial court had to find:

(1) That on or about February 2, 2014, the defendant drove

... a motor vehicle;

(2) That the defendant at the time of driving ... a motor vehicle ... was under the influence of or affected by ... a drug; ...

and

(3) That this act occurred in the State of Washington.

WPIC 92.02; RCW 46.61.502(1)(c).

There is no dispute that Ahearn drove a motor vehicle in the State of Washington on the charged date.

The second element is further defined in WPIC 92.10:

A person is under the influence of or affected by the use of ... drugs if the person's ability to drive a motor vehicle is lessened in any appreciable degree.

*Accord, State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995).

Such evidence may be circumstantial. *Wilhelm*, 78 Wn. App. at 192-93.

Here, Ahearn was observed weaving within his lane at 3:15 in the morning. He then crossed the fog line by approximately two tire widths, traveled back across the lane and crossed the center skip line separating the right and left lane by one-quarter of the vehicle width. After that he continued to weave within the lane and again crossed the fog line by approximately half the vehicle width and continued to drive over the fog line for approximately 100 yards. Ahearn then reentered the lane and began weaving within its lane again. CP 114.

After exiting the freeway, Ahearn failed to stop at the stop sign at

the bottom of the ramp and failed to use his turn signal before turning. He then failed to immediately respond to the trooper's emergency lights, and continued driving for a quarter of a mile while passing several likely places to pull over. CP 115.

When Trooper Dahl approached the right side of Ahearn's car and signaled Ahearn to roll the window down, Ahearn struggled with the window switches before rolling the window down approximately half way. Dahl asked him to open it all the way, and Ahearn again struggled with the switches before he rolled the window all the way down. CP 115.

Because Ahearn was sweating quite profusely, Dahl asked him if he was OK, which Ahearn asserted he was. Dahl could not feel any extremely hot air exit the vehicle and the interior of the vehicle did not seem to be extraordinarily warm. In addition to the extreme sweating, Ahearn also had blood-shot and watery eyes and his speech was fast and broken. CP 115. Finally, his face was flushed. CP 118.

Dahl asked Ahearn to exit the car and talk to him at the front of the vehicle. Dahl advised Ahearn he could put his jacket on if he wished. Ahearn grabbed his jacket and began to exit the vehicle. CP 115.

Ahearn first struggled trying to open the door. Once it was open, Ahearn stood in the door opening and tried to put on his jacket. He kept trying to push the door all the way open but the door kept closing on him



while he was trying to put on his jacket. Ahearn tried this four times before getting his jacket on. He also struggled with the buttons on the jacket. As Ahearn started walking towards the front of the vehicle Ahearn stumbled and had to place his right hand on the hood of the vehicle to catch his balance. CP 115.

Dahl performed four FSTs on Ahearn. The first, the HGN, showed Ahearn to be negative for alcohol. CP 115. Ahearn also tested negative for alcohol in a portable breath test. CP 116. He did, however, have violent body tremors and sway in a circular motion during the HGN test. CP 115.

While giving Ahearn the instructions for the walk-and-turn test, Ahearn started the test early twice. Ahearn also lost his balance and had to step offline to his right to catch his balance. Once Ahearn began the test Ahearn missed heel to toe on steps five six and seven on his first nine steps. Ahearn the made a quick turn in one motion to his right. On Ahearn's second nine steps Ahearn missed heel to doe on steps five, six, seven, eight, and nine. Ahearn also used his arms for balance during the test and took his steps at a faster than normal pace. CP 116.

For the one-leg-stand test, Ahearn stood on his right leg and raised his left foot. During the test Ahearn swayed and had body tremors. Ahearn also did not count as he was instructed, Ahearn counted "one, two,

three,” etc. instead of “one-thousand and one, one-thousand and two” etc. CP 116.

For the Romberg balance test Ahearn estimated 30 seconds in 34 actual seconds. Ahearn began counting out loud by thousands until Dahl reminded him to count in his head. During this test, Ahearn again had violent body tremors, and swayed in a circular motion. CP 116.

Ahearn was given his *Miranda* and *Ferrier* warnings and consented to a search of his car. In the car’s console where two syringes, one containing methamphetamine, CP 111, and the other empty with the tip broken off. CP 116.

While Ahearn was outside performing the tests, he continued to sweating, even with the colder temperature. CP 116. Then, while Dahl was transporting Ahearn to the WSP district office, the rear windows fogged up and had a considerable amount of condensation on them, due to the heat Ahearn was giving off. Ahearn also asked him to roll the rear window down. By the time they arrived at the office, Ahearn had sweat dripping off of him. CP 117.

This evidence, when considered together, paints a clear picture. Ahearn was observed having difficulty controlling his vehicle. Upon stopping, he had trouble operating his windows, walking, and standing. He was sweating profusely on a cool night. He speech was pressured. He

swayed; he tremored; he could not follow instructions; he had drugs and an empty syringe in his car. Any reasonable trier of fact could conclude beyond a reasonable doubt that Ahearn was driving under the influence of a drug.<sup>4</sup> If the Court considers this claim, it should be rejected.

#### IV. CONCLUSION

For the foregoing reasons, the trial court's suppression ruling should be affirmed and the matter remanded for entry of written findings of fact and conclusions of law supporting Ahearn's convictions.

DATED August 4, 2015.

Respectfully submitted,  
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<sup>4</sup> Ahearn makes various attempts to discount the evidence, but that ignores the standard of review, as does his attempts to minimize the difficulty he had driving. Finally, nothing in the stipulated facts supports Ahearn's contention that he was homeless. Brief of Appellant at 25.

# KITSAP COUNTY PROSECUTOR

**August 04, 2015 - 4:21 PM**

## Transmittal Letter

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Court of Appeals Case Number: 46645-7

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