96086-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 34844-0-III

STATE OF WASHINGTON, Respondent,

v.

CAESAR ARROYO, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Caesar Arroyo requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on June 12, 2018, declining to consider his fully-briefed argument that the trial court erred in denying his motion to suppress evidence after the State failed to present findings of fact and conclusions of law until after the Appellant's Brief was filed. A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

1. Whether, when the State failed to timely present findings of fact and conclusions of law supporting an order denying Arroyo's motion to suppress evidence, the Court of Appeals unreasonably denied Arroyo appellate review for failing to comply with the procedures outlined in *State v. Yallup*, __ Wn. App. 2d. __, 416 P.3d 1250 (2018), which had not yet been decided.
2. Whether the Court of Appeals' refusal to consider Arroyo's argument that the trial court erred in denying his motion to

suppress when the State contended the failure to enter written findings and conclusions was harmless because the trial court made extensive oral findings, the parties fully briefed the constitutionality of the search, and the written findings and conclusions belatedly entered by the trial court did not materially change the constitutionality analysis, deprived Arroyo of his right to appeal under article 1, section 22 of the Washington State Constitution.

3. Whether Arroyo's motion to suppress evidence obtained after police entered the backyard of a home without consent or a warrant should have been granted.

IV. STATEMENT OF THE CASE

Arroyo filed a pretrial motion to suppress evidence resulting from the unlawful search of a camp trailer after police entered the backyard of the property where it was parked without a warrant. CP 112, I RP 10-14. The State did not present written findings of fact and conclusions of law for entry after the trial court denied the motion. A jury convicted Arroyo of attempting to elude a pursuing police vehicle, driving under the influence, and driving with a suspended or revoked license in the first degre. CP 43-45. Arroyo then timely appealed. CP 1.

In his Appellant's Brief, Arroyo challenged the failure to enter findings of fact and conclusions of law in support of its ruling on the suppression motion. Relying on *State v. Smith*, 68 Wn. App. 201, 842 P.2d 494 (1992), he contended that the delay occasioned by the failure to enter written findings as well as the lack of clarity as to the basis for the ruling warranted dismissal as the appropriate remedy. *Appellant's Brief*, at 4. Although the evidentiary hearing on the motion was transcribed and reviewed as part of the record on appeal, the testimony was conflicting and often unclear, and the trial court did not rule on the motion following the hearing, nor was it evident from the docket when or if the trial court did issue a formal ruling. This precluded Arroyo from effectively challenging the suppression ruling since it was unclear what facts the trial court found and what legal conclusions it reached as a result.

In its response, the State conceded that it was error to fail to enter written findings and conclusions. *Respondent's Brief*, at 3. However, the State located the hearing at which the court announced its ruling (designated in the court docket as a pre-trial management hearing) and supplemented the appellate record to include it. That transcript contained extensive findings and conclusions and indicated the basis for the trial court's ruling was *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981), which held that if an officer has not intruded into a constitutionally

protected area, observations of objects in plain view are admissible. *Respondent's Brief*, at 4-5. Accordingly, the State argued that the record was adequate to permit appellate review and contended, "Appellate counsel is well positioned to evaluate the Court's decision-making and make any argument it feels necessary." *Respondent's Brief*, at 5.

Accordingly, Arroyo then filed a reply brief after reviewing the supplemental transcript, contending that later developments in the law concerning entry into the curtilage of a home rendered *Seagull*'s reasoning inapplicable. *Reply Brief*, at 4-5. In conclusion, Arroyo contended, "The trial court improperly denied Mr. Arroyo's CrR 3.6 motion to suppress evidence obtained from the unlawful search." *Reply Brief*, at 6. Arroyo did not include a specific assignment of error for the denial of the motion to suppress evidence in his reply brief, consistent with RAP 10.3(c).

After receiving the briefing, the Court of Appeals directed the parties to facilitate the entry of written findings and conclusions in the trial court and directed counsel for Arroyo to advise the court whether supplemental briefing would be requested to address the findings. *Letter from Court of Appeals*, dated March 31, 2018. After reviewing the findings and conclusions, which largely tracked the trial court's oral ruling, counsel advised the court that the findings did not alter the legal

analysis already briefed and the lawfulness of the search had been sufficiently addressed. *Letter to Court of Appeals*, dated April 9, 2018. Counsel took no position on whether the State should be permitted to file additional briefing to respond to the substantive argument, the State did not request to file any supplemental briefing, and the Court of Appeals did not call for any additional briefing from either party.

Thereafter, the Court of Appeals issued an unpublished opinion declining to consider whether the motion to suppress was properly granted. *Opinion*, at 1. It cited *State v. Yallup*, __ Wn. App. 2d __, 416 P.3d 1250 (2018), decided barely one month earlier, for the position that Arroyo's counsel should have filed a motion with the Court of Appeals to compel the entry of findings of fact and conclusions of law before filing a brief. *Opinion*, at 4-5. It did not overrule *Smith* or in any way address its reasoning that the failure to enter findings of fact and conclusions of law at the conclusion of an evidentiary hearing as required under CrR 3.6(b) may warrant dismissal of an appeal due to unreasonable delay and the likelihood of tailoring.

Instead, although it did not call for any additional briefing or express any concern about its ability to decide the issue based upon the information before it, the Court of Appeals declared itself unable to

address the merits, stating, "The briefing in this case raises more questions than it answers obscuring what might be a successful argument on the merits." *Opinion*, at 7. As consolation, the Court of Appeals indicated that since it would not address the merits of the suppression argument, Arroyo would not be precluded from raising it in a personal restraint petition. *Opinion*, at 7.

One judge dissented, arguing that the majority position elevated procedure over substance, wasted time, and created more work for the parties and the court. *Dissent*, at 1. Because the findings of fact and conclusions of law were subsequently entered, the dissenting judge believed that the court had the ability to consider the merits. *Dissent*, at 3. The dissenting judge also criticized the majority's reliance on *Yallup*, pointing out that the parties would not have been aware of it at the time. *Dissent*, at 5. Because Arroyo declined to file a supplemental brief on the grounds that his reply brief adequately addressed the substantive issue, the dissent stated, "This court acts unreasonably when impliedly compelling a party to file a new brief and when an earlier brief addressed the subject matter of the appeal." *Dissent*, at 6. On the majority's refusal to address the merits due to procedural deficiencies, which only arose because of the State's failure to timely enter the findings and conclusions and not because

of Arroyo's action or inaction, the dissenting judge cited RAP 1.2 in censure of the majority, stating,

> This court breaches the words and spirit of RAP 1.2 by failing to address now the merits of Caesar Arroyo's appeal. In a case where we know the nature of the appeal, when the body of the brief argues the relevant issues and cites relevant authority, and when the respondent suffers no prejudice, this court should exercise its discretion to consider the merits of the case or issue.

Dissent, at 6-7. Lastly, the dissenting judge pointed out that the court had the power to request additional briefing and had never been reticent to request it in the past, while relegating Arroyo to filing a personal restraint petition to seek relief on the merits merely imposed additional obstacles inherent in that process and created more work for Arroyo, the State, and the court. *Dissent*, at 8.

Arroyo now seeks review of the Court of Appeals' procedural analysis as well as the merits of the motion to suppress.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In this appeal, the Court of Appeals punished Arroyo for the State's failure to timely obtain written findings and conclusions on a suppression ruling by denying him appellate review. Under RAP 13.4(b)(1), (2), (3) and (4), the Washington Supreme Court will accept review if the Court of Appeals' decision conflicts with a decision of the

Supreme Court or a published opinion of the Court of Appeals, if a significant question of law under the Constitution of Washington or the United States is involved, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. All four factors are satisfied in the present case.

A. By declining to address the merits of Arroyo's suppression argument after the State failed to file findings and conclusions required under CrR 3.6 and directing him to file a personal restraint petition instead, the Court of Appeals effectively deprived Arroyo of his constitutional right to appeal and disregarded abundant authority calling for waiver of procedural defects in favor of resolution on the merits.

A criminal defendant has a constitutional right to appeal a conviction. Wash. Const. art. I, § 22. "The only means by which such an individual constitutional right in Washington may be relinquished is by a knowing, intelligent, and voluntary waiver." *City of Seattle v. Klein*, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007). The State bears the burden of proving the appellant intentionally relinquished or abandoned an appeal. *Id.* at 559. "[A] procedural defect (failure to file or failure to appear),

without notice that the right to appeal may be lost, does not constitute knowing waiver of the core constitutional right." *Id.* at 561.

The Court of Appeals' refusal to consider the merits of Arroyo's appeal flies in the face of these authorities that recognize the sanctity of the right to appeal and direct the court to overlook minor procedural deficiencies to afford substantial justice to the parties. Here, the Court of Appeals held that it could not review the merits of the appeal because Arroyo did not comply with the procedures described in *Yallup*, __ Wn. App. 2d. __, 416 P.3d 1250 (2018), which was not decided until approximately five months after the briefing in this case was completed, and because he did not expressly assign error to the trial court's order denying his motion to suppress, even though there was no order in the record and no findings or conclusions to which to assign error, and even though his intent to challenge the search was abundantly clear after the State argued the trial court's oral ruling was sufficient for review and Arroyo filed a reply brief arguing the merits based upon the oral ruling. *Opinion* at 4-6. This ruling conflicts with the language and spirit of the rules, as well as express authority from the Court of Appeals and the Supreme Court.

Procedural requirements on appeal are not mere justifications for avoiding substantive challenges. Under RAP 1.2(a):

> These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

Consequently, both the Washington Supreme Court and the Court of Appeals have concluded repeatedly that failure to specifically assign error to a particular issue should be disregarded when the nature of the challenge is clear and the issue is argued and properly cited. *See, e.g., State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995); *State v. Shupe*, 172 Wn. App. 341, 348, 289 P.3d 741 (2012), *review denied*, 177 Wn.2d 1010 (2013); *State v. Gassman*, 160 Wn. App. 600, 611-12, 248 P.3d 155, *review denied*, 172 Wn.2d 1002 (2011); *State v. Grimes*, 92 Wn. App. 973, 978, 966 P.2d 394 (1998).

Here, because no findings of fact and conclusions of law were entered, Arroyo could not challenge the ruling on the suppression motion in his Appellant's Brief. Review of a trial court's ruling on a motion to suppress evidence considers whether substantial evidence supports its findings of fact and evaluates *de novo* the conclusions of law deriving from those facts. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722

(1999), *abrogated on other grounds in Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). This review cannot be performed, nor can specific errors be identified and assigned, when the findings of fact and conclusions of law have not been made.

The majority faults Arroyo for not seeking tardy entry of the findings and conclusions to facilitate substantive review without apparent concern for the delay of approximately one and one-half years between the evidentiary hearing and the appeal. But "[j]ustice in all cases shall be administered openly and without unnecessary delay." Wash. Const. art. 1, § 10. This is precisely the reasoning adopted in *Smith*, where the court of appeals observed that a significant delay in the entry of findings and conclusions without explanation or justification is clearly "unnecessary." 68 Wn. App. at 209. Addressing the difficulties inherent in attempting to litigate suppression issues without formal findings and conclusions, the *Smith* court recognized that firm enforcement of CrR 3.6 would alleviate the problems and adopted "a strong presumption that dismissal is the appropriate remedy." *Id.* at 209-11. The Court of Appeals addressed none of these concerns, raised in Arroyo's Appellant's Brief, despite its decision to shift the burden of securing findings and conclusions from the State to Arroyo before it would deign to review the merits.

Lastly, the Court of Appeals' parsimonious remedy of a personal restraint petition is an inadequate substitute for Arroyo's right to appeal in the first instance. Most notably, Arroyo will be deprived of the assistance of counsel in preparing and filing his petition that he enjoyed on direct appeal. RCW 10.73.150; *Shumway v. Payne*, 136 Wn.2d 383, 398 n. 3, 964 P.2d 349 (1998). He must, therefore, expend resources presumably unavailable to him due to his indigency to hire an attorney to assist him, or attempt at his peril to meet the same standards as an educated and licensed attorney in order to obtain vindication of his rights. *See State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987) (noting that a *pro se* defendant must comply with substantive and procedural rules). Should the search ultimately be unlawful, the burden will no longer be on the State to prove that the error was harmless beyond a reasonable doubt, but will be shifted to Arroyo to demonstrate actual and substantial prejudice. *Compare In re Haverty*, 101 Wn.2d 498, 499, 681 P.2d 835 (1984) *and State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Because of these substantial differences, the Court of Appeals' substitution of collateral attack proceedings for the constitutionally guaranteed appeal is inadequate.

The decision to avoid review when the procedural awkwardness arose from the State's failure to present findings and conclusions as directed by the court is unfair, unreasonable, and inconsistent with

Arroyo's constitutional rights and prior court decisions prioritizing substantive review over procedural technicalities. Multiple courts, including the majority here, have recognized that failure to timely enter written findings and conclusions is a widespread problem. *Opinion*, at 4; *Yallup*, __ Wn. App. 2d __, 416 P.3d at 1254. The majority's shifting of fault from the State to the appellant under such circumstances thus has the potential to undermine the review rights of numerous appellants. Because the decision conflicts with published opinions of the Supreme Court and the Court of Appeals concerning RAP 1.2(a)'s direction to waive procedural technicalities where possible, because the decision undermines Arroyo's article 1, section 22 right to appeal by requiring him to employ collateral attack procedures with dramatically lowered protections, and because the court's burden-shifting in response to State error will affect the substantial rights of numerous appellants, this Court should grant review under RAP 13.4(b)(1), (2), (3), and (4).

B. On the merits, Arroyo's argument raises significant questions of constitutional law under the Fourth Amendment as well as article 1, section 7 of the Washington State Constitution because the continuing viability of *State v. Seagull*'s open view analysis has been undermined by subsequent developments in constitutional jurisprudence.

The trial court's ruling affirming the search in this case rested upon its application of *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981). In *Seagull*, this Court adopted a Fourth Amendment analysis to formulate an open view jurisprudence. Distinguished from the "plain view" exception to the warrant requirement, where police have intruded into a protected area and observed something illegal from that position, the "open view" doctrine concerns police observations from outside the constitutionally protected space. *Id.* at 901-02. In *Seagull*, the Court determined that police were not within a constitutionally protected space when they entered the curtilage of a residence on official police business. *Id.* at 902. It reached this conclusion by applying the "reasonable expectation of privacy" formulation of constitutional protection established in *Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). *Id.*

Since *Seagull*, article 1, section 7 jurisprudence has acknowledged that the "reasonable expectation of privacy" analysis is not appropriate in light of Washington's heightened protection of private affairs. *See, e.g.*, *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984); *State v. Young*, 123 Wn.2d 173, 181-82, 867 P.2d 583 (1994). Review should be granted here to evaluate whether *Seagull*'s formulation of the open view doctrine as applicable when police enter an area in which there is no reasonable expectation of privacy can be applied to an article 1, section 7 challenge, an issue that has not previously been decided by this Court.

Furthermore, in addition to article 1, section 7 jurisprudence, federal constitutional law governing police entry into the curtilage of a home has also undergone significant revision since *Seagull*. Significantly, in *Florida v. Jardines*, 569 U.S. 1, 9, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), the U.S. Supreme Court refined the scope of a police officer's right to enter the curtilage by noting that the implied license to enter property is limited by the purpose for which the entry is made. In reaching this conclusion, the *Jardines* Court expressly disapproved of the *Katz*-based reasonable expectation of privacy formulation as inapplicable in property rights cases involving entry into the curtilage. 569 U.S. at 11. This reasoning alone indicates that *Seagull*'s formulation of the open view doctrine must be revisited.

Subsequently, and mere weeks before the Court of Appeals issued its decision here, the U.S. Supreme Court decided *Collins v. Virginia*, __ U.S. __, 138 S. Ct. 1663, __ L. Ed. 2d ___ (2018), in which it held that the Fourth Amendment protection afforded the curtilage of a home is separate and independent from exceptions to the warrant requirement that may otherwise permit a search. Considering there whether the automobile exception to the warrant requirement would permit police to invade the curtilage to conduct a warrantless search of a car, the *Collins* Court concluded that to do so "would unmoor the [automobile] exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application." 138 S. Ct. at 1672-73. In reaching this conclusion, the *Collins* Court noted that observing evidence within a protected area does not give police the right to enter the protected area to seize the item; "A plain-view seizure . . . cannot be justified if it is effectuated by unlawful trespass." *Id.* at 1672 (internal quotations omitted). Yet, this is precisely what the trial court here sanctioned, when based upon law enforcement observations of a suspect vehicle in the back yard, it allowed the police to forego obtaining a warrant and instead permitted a further intrusion into the curtilage of the home to investigate their suspicions. Supp. CP at 155-57.

For these reasons, the continuing viability of *Seagull* as well as its application in the present case are in significant doubt. Because subsequent developments in both article 1, section 7 and Fourth Amendment jurisprudence undercut the rationale of *Seagull*, and because the fact that suspected evidence may be viewed from outside a protected area does not give police the right to enter the protected area without a warrant under *Collins* and *Jardines*, this case presents substantial questions of constitutional law under the Washington and federal constitutions. Review, therefore, should be granted under RAP 13.4(b)(3).

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(1), (2), (3), and (4) and this Court should enter a ruling that the Court of Appeals' refusal to consider the merits of the search in this case amounted to a denial of Arroyo's constitutional right to appeal and conflicted with prior published decisions of the courts and RAP 1.2(a), and reversing Arroyo's convictions based upon the erroneous denial of his motion to suppress evidence obtained when the police unlawfully entered the curtilage without a warrant.

RESPECTFULLY SUBMITTED this 12 day of July, 2018.

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest, pursuant to prior agreement of the parties, by e-mailing a copy to:

Leif Drangsholt
ldrangs@co.okanogan.wa.us

Shauna Field
sfield@co.okanogan.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 12 day of July, 2018 in Walla Walla, Washington.

Andrea Burkhart

APPENDIX

FILED
JUNE 12, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CAESAR ARROYO, Appellant.	)	No. 34844-0-III
	)	UNPUBLISHED OPINION

KORSMO, J. — This appeal focuses on procedure rather than on substance and ultimately fails for that reason. We affirm the convictions and expressly note that our decision does not preclude a personal restraint petition (PRP) raising the potentially meritorious issue that should have been raised on appeal. No costs will be awarded.

FACTS

Caesar Arroyo appeals from his Okanogan County convictions for attempting to elude a police vehicle, first degree driving while license suspended (DWLS 1), and driving while under the influence (DUI). The charges arose from a traffic stop attempted by Trooper Jeremy DeLano at about 10:30 p.m. on June 23, 2015 of a black Honda Civic.

The Civic pulled over into a parking lot initially, giving the trooper time to see the driver's face under the lights, but the car then accelerated away. The trooper pursued the car, but terminated the pursuit when it became unsafe.

Advised of the vehicle's registration address in Omak, the trooper proceeded to that location. He was joined by Trooper Conner Bruchman and sheriff's deputies. The side of the house faced the street, while the front door faced a gravel driveway that connected to the street. Trooper DeLano knocked on the front door of the house while the other officers took up positions on the property. Trooper Bruchman went up the driveway somewhat past the front door and could see into the backyard. There he spotted the Honda Civic parked by the house; it was not visible from the street. He confirmed through dispatch that the car was the same one that Trooper DeLano had pursued.

The vehicle's registered owner, Eric Arroyo, had responded to DeLano's knock and stepped outside the house to talk to the trooper. Trooper DeLano immediately realized that Eric Arroyo was not the driver he had pursued. Eric Arroyo ultimately told DeLano that his older brother, Caesar, had used the car that day with Eric's permission. By that time, Bruchman had spotted a camper trailer in the backyard near the Civic, and, seeing movement inside, walked over and shined his flashlight into the window. Spotting three men inside, he ordered them out. Two of the men advised the trooper that the third, Caesar Arroyo, had been the driver of the Civic. Trooper DeLano responded and likewise identified Caesar Arroyo as the driver. He was arrested.

Obviously intoxicated, Caesar Arroyo was given a breath alcohol test and determined to be under the influence. The prosecutor ultimately filed the previously noted charges of attempting to elude, DUI, and DWLS 1. The defense moved to suppress evidence, arguing that the arrest of Caesar Arroyo was improper and that evidence of the DUI and the backyard identification should be suppressed. The motion proceeded to a hearing on October 28, 2016. The court announced its ruling three days later and denied the motion after applying the "open view" test of *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981). The deputy prosecutor present for the ruling was directed to advise the deputy prosecutor who had conducted the hearing to prepare findings.

The case proceeded to jury trial. The jury convicted Mr. Arroyo as charged. He timely appealed to this court; counsel was appointed to represent him.

Appellant's counsel ordered a verbatim report of proceedings that included the October 28 hearing, but not the October 31 ruling. Appellate counsel filed a brief on October 17, 2017 that contained one assignment of error—the findings required by CrR 3.6 had not been entered. The brief sought reversal of the convictions for that reason. The prosecutor then ordered transcription of the October 31 ruling, had it transmitted to this court, and filed a brief that argued that the trial court's oral ruling was sufficient to resolve the appeal. However, the required CrR 3.6 findings still were not entered. Appellant filed a reply brief reiterating that the missing findings justified reversal and

also arguing, in response to the prosecutor's brief, that the suppression hearing had been wrongly decided.

This court ordered that the missing findings be entered and transmitted here as clerk's papers. Once that was done, we inquired whether appellant's counsel desired to file a supplemental brief addressing the CrR 3.6 findings. Counsel declined the opportunity, indicating that the reply brief was sufficient to make her argument. A panel subsequently considered the case without argument.

ANALYSIS

This case is one of several recent filings where required findings have not been entered and, instead of resolving that problem, the appellate briefing has focused on procedural issues resulting from the original failure instead of substantively addressing the merits of the issues presented. That unfortunate focus leaves this court in no position to address the merits of the case.

A recently published opinion addresses what counsel should do when mandatory findings are missing. *State v. Yallup*, ___ Wn. App. 2d ___, 416 P.3d 1250 (2018). In short, counsel are to confer in an effort to resolve the issue and, failing that, appellant's counsel should bring the matter to this court's attention by motion. Respondent's counsel has a continuing obligation to enter the findings promptly or explain what difficulty has arisen that has prevented action. Only after the findings are entered and appellate counsel

fully informed about the issues should a brief be filed. This procedure allows a faster resolution of the merits of an appeal. *Id.* at 1255.

This procedure was not followed in this case and, accordingly, it suffers from many of the deficiencies identified in *Yallup*. Fundamentally, this case is not in a posture where this court is in a position to resolve the merits of the claim. The sole assignment of error concerns the absence of findings. That problem has been remedied. The sole requested relief is reversal or dismissal of the convictions due to the missing findings. However, that is not the remedy for missing findings. *State v. Head*, 136 Wn.2d 619, 622-625, 964 P.2d 1187 (1998). Instead, the remedy is remand for entry of findings. *Id.* That step is unnecessary in this case since the findings are, belatedly, already in place.

Thus, this court now is facing an appeal where the sole assignment of error no longer needs a remedy and the sole relief sought was never available. Although the reply brief puts together a credible argument that the *Seagull* decision has been eclipsed by more recent United States Supreme Court authority, the case on which it relies is also distinguishable. The appellant's argument itself also is based on an extension of unsettled authority.[1] Indeed, it is questionable how much *Seagull* applies to this case. However, none of these points are argued by the parties, primarily because the issue has

[1] *See Collins v. Virginia*, No. 16-1027 (U.S. May 29, 2018) https://www.supremecourt.gov/opinions/17pdf/16-1027_7lio.pdf.

not been properly presented by the appeal and is only presented, to the extent it is at all, by a reply to an argument that there was no prejudice from the delayed findings.

There are additional problems. For one, the failure to assign error to the CrR 3.6 findings means that they are verities in this court. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). One of those findings, number six, expressly states that Trooper Bruchman was standing in the driveway near Trooper DeLano, and was able to observe the Honda Civic from that point. Clerk's Papers at 154. Since the house was accessed solely from the driveway, this finding would appear to allow the trooper's observations of the Honda to come into evidence. This would have appeared to have been at least a debatable point, but it cannot be debated given the failure to tackle the factual finding.

An additional problem with the briefing is the scope of the remedy from the allegedly illegal arrest of Mr. Arroyo in the backyard. At the suppression hearing, defense counsel argued that all of the DUI evidence derived from the arrest and the backyard identifications would be the fruit of the poisonous tree. That seems a very reasonable scope of suppression. *E.g.*, *State v. Tan Le*, 103 Wn. App. 354, 359-367, 12 P.3d 653 (2000). However, Mr. Arroyo does not argue that point at all here and seems to suggest that all evidence following the arrest should be excluded while failing to present any relevant authorities to support such a ruling. This, too, is an area that would have benefited from briefing by both parties.

Although more examples could be given, the preceding are sufficient. The briefing in this case raises more questions than it answers, obscuring what might be a successful argument on the merits. The failure of the appellant to brief the point also means that respondent has not had the opportunity to address these points, either. Accordingly, this court is in no position to do so.

As in *Yallup*, it is the prosecutor's initial error that put the case in its current posture. As there, we direct that no costs will be awarded since Mr. Arroyo did not cause that initial failure. Timely resolution of the findings problem would have significantly altered the trajectory of this appeal. It is not fair for Mr. Arroyo to pay the costs resulting from the absent findings.

The convictions are affirmed. Since this ruling does not address the merits of Mr. Arroyo's arguments, it will have no effect on any subsequent PRP challenge he might bring.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

I CONCUR:

Siddoway, J.

No. 34844-0-III

FEARING, J. (dissenting) — I dissent from the majority's refusal to entertain the merits of Caesar Arroyo's appeal. The majority's declination to review the appeal promotes procedure over merits, wastes time, and creates more work for the parties, if not this court. I would direct the parties to prepare any needed further briefing, and then I would resolve the substance of Arroyo's Fourth Amendment challenge to the search of the camper trailer and his seizure from the trailer.

The majority outlines salient facts depicting the conduct of Caesar Arroyo that gave rise to his prosecution and to law enforcement's search of Arroyo's Omak residence and his arrest at the residence. I emphasize some of the court proceedings.

The State of Washington charged Caesar Arroyo with attempting to elude a pursuing police vehicle, driving while under the influence of intoxicants, and first degree driving with license suspended. Arroyo filed a pretrial motion to suppress evidence on the basis that officers performed an unlawful search of the camper trailer and thereby unlawfully detained him and gathered information from him. Arroyo argued that the search of his backyard violated the Fourth Amendment. He emphasized that the troopers failed to garner his brother Eric's consent to search the backyard, the open view doctrine did not control because the public could not view the Honda and camper trailer from a natural access point to the residence's front door, exigent circumstances did not justify a search, and law enforcement should have procured a search warrant before peeping inside

the camper trailer. Arroyo requested the trial court to suppress all evidence obtained from the illegal search.

After an evidentiary hearing, the trial court delayed ruling for one business day in order to read cases. The following business day, the court reconvened and announced its ruling denying the motion to suppress. During the second day's hearing, the trial court iterated extensive findings and conclusions. At the conclusion of the hearing, the trial court requested that the State prepare written findings of fact and conclusions of law. The State failed to submit any written findings or conclusions. The prosecution proceeded to trial, and during trial, the State introduced evidence challenged in the suppression motion.

The trial court convicted Caesar Arroyo on all charged counts. Arroyo appealed.

In his opening appeal brief, Caesar Arroyo assigned error only to the trial court's failure to enter findings of fact and conclusions of law on the denial of Arroyo's motion to suppress. CrR 3.6 addresses a pretrial motion to suppress, and CrR 3.6(b) reads: "If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law." Instead of asking for remand for the entry of findings and conclusions, Arroyo sought reversal of the conviction because of a prejudicial delay of one and one half years in filing findings of fact.

In response to Caesar Arroyo's opening brief, the State conceded the absence of written findings of fact and conclusions of law attendant to the motion to suppress ruling.

The State argued, however, that the trial court made extensive oral findings of fact that this reviewing court should consider as substantially complying with CrR 3.6.

In a reply brief, Caesar Arroyo reiterated his argument that his convictions should be reversed because of the lack of findings but added the substantive argument that the trial court erred in denying the motion to suppress. Arroyo contended that law enforcement officers went beyond the implied license to approach one's front door when Trooper Conner Bruchman traveled further east on the gravel roadway and when both troopers entered the backyard. Arroyo did not expressly assign error to the trial court's denial of the motion to suppress.

After the filing of briefs, this appeals court directed the parties to procure findings of fact emanating from the order denying the motion to suppress from the trial court. On remand, the trial court entered findings of fact and conclusions of law. I list all of the findings in order to demonstrate the ability of this court to now address the merits of Caesar Arroyo's Fourth Amendment contentions.

> 1. On or about June 23rd 2015, Washington State Patrol Trooper Jeremy DeLano was on duty in the Omak area of Washington State. Trooper Delano observed a black Honda Civic. Trooper Delano noticed that one of the brake lights was not working. He also believed the exhaust system was too loud, and further observed that the car did not come to a complete stop at an intersection.
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> 2. Trooper DeLano activated his emergency lights. The Honda's driver responded to this by pulling into a Chevron gas station and slowing down.
>
> 3. Instead of completely stopping, the driver stuck his head out the window of the car and yelled something at the Trooper. Trooper DeLano

was [sic] that the driver was wearing a baseball hat. The driver then drove away at high speed.

4. Trooper DeLano then activated his sirens as well as the emergency lights, and pursued the Honda at high speed. The Honda passed through a number of intersections, and Trooper Delano stopped the pursuit because of safety concerns. However, Trooper Delano was able to obtain the license plate number from the Honda, and from this he learned that the registered owner of the Honda, Eric Arroyo lived at 127 South Granite Street in Omak.

5. Trooper DeLano informed other police officers of these developments and drove to the address at 127 South Granite Street. Trooper DeLano knocked on the door of a house there and spoke [to] resident, Eric Arroyo. Trooper DeLano saw that Eric Arroyo was not the individual that he was pursuing earlier. Trooper DeLano asked Eric Arroyo where the Honda was. Eric Arroyo said he didn't know where it was or who was using it.

6. While Trooper Delano spoke to Eric Arroyo, Trooper Conner Bruchman stood outside in the southeast section of the property at 127 South Granite Street as a "cover" officer. Trooper Bruchman was not standing in the backyard, or within the house, but was in a position somewhat near and adjacent to Trooper DeLano and near the front door. From this position, Trooper Bruchman could observe some of the backyard that Trooper Delano wasn't able to see. Trooper Bruchman noticed a Honda in the backyard.

7. Trooper Bruchman used his flashlight and took a closer look at the Honda and its license plate. Trooper Bruchman and Delano moved into the backyard and confirmed that the Honda was the car involved in the pursuit earlier. Nobody was inside of the Honda.

8. After identifying the Honda, the [sic] Trooper Bruchman looked at his surroundings. Trooper Bruchman noticed that there was movement inside a nearby trailer. The trailer was in close proximity to the Honda, in the backyard of 127 South Granite Street. Trooper Bruchman pointed his flashlight at the trailer and saw what looked to be several people inside.

9. Trooper Bruchman asked for these three people to come out of the trailer. Three people exited the trailer and were detained. Among the three people were Caesar Arroyo, the Defendant.

10. Shortly after these three exited the trailer and were detained, Trooper Delano and Bruchman went inside the trailer for a manner of

> seconds. The Trooper's did not find anyone else inside the trailer, but did see a baseball hat in plain view.

Clerk's Papers at 153-55. Since this court reviews conclusions of law anew, I do not list the trial court's conclusions.

On the forwarding of the findings of fact and conclusions of law to this reviewing court, this court asked Caesar Arroyo if he wished to supplement his legal argument. Arroyo declined and wrote that he would rely on his reply brief.

The majority writes that it sits in the unfortunate position of not being able to address the merits of Caesar Arroyo's motion to suppress and the denial of the motion. I disagree. The parties effectually litigated the suppression motion before the trial court. This reviewing court now possesses all of the trial court record needed to lucidly analyze the substance of Arroyo's Fourth Amendment contentions. We hold the transcript of the evidentiary hearing pursuant to Arroyo's motion. We own the findings of fact and conclusions of law entered as a result of the motion to suppress hearing.

The majority notes that Caesar Arroyo and the State did not follow the procedure this court outlined in *State v. Yallup*, ___ Wn. App. 2d ___, 416 P.3d 1250 (2018) when confronted with the absence of mandatory findings of fact. Of course, the parties did not know of this recently adopted procedure. The majority writes that the appellant should prepare his or her opening brief only after late entry of the findings of fact. In so writing, the majority ignores that Caesar Arroyo previously filed a reply brief that addressed his

Fourth Amendment contentions. When asked if he wished to submit more briefing, Arroyo declined because he deemed his reply brief sufficient. This court acts unreasonably when impliedly compelling a party to file a new brief and when an earlier brief addressed the subject matter of the appeal.

The majority correctly faults Caesar Arroyo for only assigning error to the trial court's former failure to enter findings of fact and not assigning error to the denial of the motion to suppress. RAP 10.3(a)(4) directs an appellant to include an assignment of error in his brief for each error claimed on appeal. Nevertheless, by earlier assigning error to the lack of findings of fact in response to the motion to suppress and supplying a reply brief that challenges the search of the backyard and the seizure of Arroyo's person, Arroyo necessarily assigns error to the denial of the motion to suppress.

RAP 1.2 read, in relevant part:

> **(a) Interpretation.** These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).
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> . . . .
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> **(c) Waiver.** The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).

This court breaches the words and spirit of RAP 1.2 by failing to address now the merits of Caesar Arroyo's appeal. In a case when we know the nature of the appeal, when the body of the brief argues the relevant issues and cites relevant authority, and when the

respondent suffers no prejudice, this court should exercise its discretion to consider the merits of the case or issue. *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). Assuming Arroyo failed to comply with RAP 10.3(a)(4), this court may waive the violation of the rule. Waiver of the rule particularly promotes justice in this setting when the State, not Caesar Arroyo, failed to timely file the findings of fact, a failure that led to the awkward procedure on appeal.

The majority faults Caesar Arroyo for only expressly seeking, in his briefs, dismissal of the charges rather than suppression of the evidence. Because of Arroyo's omission in his brief, the majority adjudges itself powerless to grant the proper remedy of squashing evidence. Nevertheless, this court may assume that Arroyo seeks such relief by the argument raised in Arroyo's reply brief. We possess the intelligence to determine that suppression of the evidence and remand for a new trial constitutes the proper remedy for a Fourth Amendment violation. We also maintain the power to remand for a new trial after suppressing evidence. The first sentence of RAP 12.2 declares:

> The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.

The majority registers confusion as to the amount of evidence requested by Caesar Arroyo to be suppressed. I read Arroyo's brief to wish for suppression of all evidence emanating from the search of the backyard and the seizure of Arroyo inside the camper trailer, which would include the identification of Arroyo at the residence and the results

of the breathalyzer. Assuming the majority remains confused, this court may ask Arroyo to clarify his request just as we previously directed the parties to enter findings of fact and conclusions of law.

The majority next suggests that the court needs more briefing particularly concerning the ramifications of *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981). The majority also notes that the State's responding brief only addressed the failure to enter written findings of fact and the State has not addressed in brief form Caesar Arroyo's Fourth Amendment challenge. Of course, this court holds the power to ask for additional briefing and has never before been reticent to forward such a request in other appeals.

The majority relegates Caesar Arroyo to now filing a personal restraint petition. This ruling by the majority imposes the obstacles inherent in a personal restraint petition to the review of the merits of Arroyo's Fourth Amendment challenge. The filing of a personal restraint petition will only create additional work for Arroyo, the State, and this court.

Fearing, J.

BURKHART & BURKHART, PLLC

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