

65876-0

65876-0

REC'D

FEB 28 2011

King County Prosecutor
Appellate Unit

NO. 65876-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD D. COUSINS,

Appellant.

2011 FEB 28 PM 4:32

B

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

The Honorable Douglass A. North, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206)623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining To Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	5
1. THE TRIAL COURT DISTURBED COUSINS' PRIVATE AFFAIRS IN VIOLATION OF ARTICLE I, SECTION 7 BY DENYING A MOTION TO SUPPRESS EVIDENCE FOUND DURING AN UNCONSTITUTIONAL SEARCH INCIDENT TO ARREST.	5
a. Introduction.....	5
b. Bailey's search was not a valid search incident to arrest.....	6
c. Exigent circumstances did not justify the search ...	13
2. THE TRIAL COURT'S FAILURE TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE SUPPRESSION HEARING REQUIRES DISMISSAL OR REMAND.....	16
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Afana,
169 Wn.2d 169, 233 P.3d 879 (2010)..... 10, 11, 12

State v. Armenta,
134 Wn.2d 1, 948 P.2d 1280 (1997)..... 13

State v. Boyce,
52 Wn. App. 274, 758 P.2d 1017 (1988)..... 6

State v. Buelna Valdez,
167 Wn.2d 761, 224 P.3d 751 (2009)..... 6, 7, 8, 9, 11, 12

State v. Cannon,
130 Wn.2d 313, 922 P.2d 1293 (1996)..... 16

State v. Carter,
151 Wn.2d 118, 85 P.3d 887 (2004)..... 13

State v. Chesley,
__ Wn. App. __, 239 P.3d 1160 (2010)..... 8, 9

State v. Cruz,
88 Wn. App. 905, 946 P.2d 1229 (1997)..... 17

State v. Duncan,
146 Wn.2d 166, 43 P.3d 513 (2002)..... 13

State v. Hall,
53 Wn. App. 296, 766 P.2d 512,
review denied, 112 Wn.2d 1016 (1989)..... 15

State v. Head,
136 Wn.2d 619, 964 P.2d 1187 (1998)..... 16, 17

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. Hescoek</u> , 98 Wn. App. 600, 989 P.2d 1251 (1999).....	16
<u>State v. Hinshaw</u> , 149 Wn. App. 747, 205 P.3d 178 (2009).....	15
<u>State v. Jones</u> , 146 Wn.2d 328, 45 P.3d 1062 (2002).....	6
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	6
<u>State v. Mallory</u> , 69 Wn.2d 532, 419 P.2d 324 (1966).....	17
<u>State v. McIntyre</u> , 39 Wn. App. 1, 691 P.2d 587 (1984), <u>review denied</u> , 103 Wn.2d 1017 (1985).....	15
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999), <u>abrogated on other grounds by</u> <u>Brendlin v. California</u> , 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).....	6
<u>State v. Parker</u> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	6, 15
<u>State v. Rankin</u> , 151 Wn.2d 689, 92 P.3d 202 (2004).....	6
<u>State v. Ringer</u> , 100 Wn.2d 686, 674 P.2d 1240 (1983).....	7

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. Smith</u> , 165 Wn.2d 511, 199 P.3d 386 (2009).....	13
<u>State v. Smith</u> , 68 Wn. App. 201, 842 P.2d 494 (1992).....	17
<u>State v. Swetz</u> , __ Wn. App. __, __ P.3d __, 2011 WL 481028, *4 (2011).....	7
<u>State v. Tagas</u> , 121 Wn. App. 872, 90 P.3d 1088 (2004).....	16
<u>State v. Terrovona</u> , 105 Wn.2d 632, 716 P.2d 295 (1986).....	13
<u>State v. Tibbles</u> , 169 Wn.2d 364, 236 P.3d 885 (2010).....	13, 14, 15
<u>State v. Vailencour</u> , 81 Wn. App. 372, 914 P.2d 767 (1996).....	16
 <u>FEDERAL CASES</u>	
<u>Arizona v. Gant</u> , __ U.S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).....	8
<u>Brendlin v. California</u> , 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).....	6
<u>United States v. Patino</u> , 830 F.2d 1413 (7th Cir. 1987)	15

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER

CrR 3.6.....	17
CrR 3.6(b).....	1, 16, 18
CrR 6.1(d).....	17
JuCR 7.11(d).....	16
U.S. Const. amend. 4.....	5, 7, 8
Wash. Const. art. I, § 7.....	1, 5, 6, 7, 8, 12

A. ASSIGNMENTS OF ERROR

1. The trial court disturbed Richard D. Cousins' private affairs in violation of article I, section 7 by denying a motion to suppress evidence found during an unconstitutional search incident to arrest.

2. The trial court erred by failing to enter written findings of fact and conclusions of law as required by CrR 3.6(b).

Issues Pertaining to Assignments of Error

1. A police officer searched the driver's side floorboard of a vehicle incident to the driver's arrest after observing the driver slough a bag containing crack cocaine. The search occurred after the driver was out of the car and under the officer's control. An unrestrained passenger sat quietly in the front passenger's seat of the vehicle during the search. Did the trial court err by concluding the search was a valid search incident to arrest?

2. Does the trial court's failure to enter written findings of fact and conclusions of law as required by CrR 3.6(b) warrant dismissal or remand for entry of findings?

B. STATEMENT OF THE CASE

Shortly after midnight on a Saturday night, Seattle Police officers Bailey and Zwaschka were patrolling the busy Belltown bar district on

bicycles when they heard extremely loud music emanating from a Sport Utility Vehicle (SUV) being driven by Richard D. Cousins. 1RP 6, 9-12, 35, 70; 2RP 3-8, 11-12.¹ The SUV was stopped in traffic. 1RP 13, 15, 30-31; 2RP 7, 12. Bailey pedaled to the driver's door and got off his bicycle. 1RP 12. Zwaschka went to the back of the vehicle, noted the license plate number, and reported it and their activity via radio. 1RP 17-18, 31; 2RP 9.

Bailey looked into the SUV through a half-opened window. He observed an individual seated in the front passenger seat and an open can of beer in the center console. 1RP 11-14, 34, 64-65, 67. He told Cousins the music was too loud and to turn it down. As Cousins reached forward to lower the volume, Bailey noticed he clenched a clear plastic bag containing crack cocaine. 1RP 14-16, 34-35, 70-71. Intending to arrest Cousins for possessing cocaine, Bailey directed the driver to shut off the engine and remove the keys from the ignition. 1RP 16-17, 37.

After Cousins complied, Bailey ordered him out of the car. 1RP 18-19, 55-56; 2RP 10. On his way out, Cousins tossed the bag with crack onto the floorboard near his seat. 1RP 18-20. Bailey testified the passenger could have leaned over, reached down, and grabbed the bag

¹ Cousins refers to the four-volume verbatim report of proceedings as follows: 1RP – 6/16/10; 2RP – 6/17/10; 3RP – 6/21/10; 4RP – 7/26/10.

where it landed. 1RP 20, 57, 72-73, 77. Bailey ordered Cousins to place his hands on the rear driver's side door of his SUV. 1RP 20. The officer then quickly reached into the vehicle and retrieved the bag. 1RP 20-21. After that he arrested and handcuffed Cousins. 1RP 21, 56, 60, 67-70.

Bailey testified he grabbed the contraband before securing Cousins because the passenger could have reached over and quickly concealed or destroyed the sloughed cocaine. 1RP 22-24, 63-64. After arresting Cousins, Bailey searched under the driver's seat and found another baggie containing crack cocaine. 1RP 24-26, 60-61. At some point during the incident, a third bicycle patrol officer, McCauley, wheeled up to assist. 1RP 18, 38, 43, 54. McCauley read Cousins his rights. 1RP 43. By this time, a fourth officer had pulled up behind Cousins' SUV in a police car and transported him from the scene. 1RP 60; 2RP 16.

Meanwhile, the passenger quietly remained where he was, unsecured and making no furtive gestures. 1RP 25, 39-41, 58-59, 61-62, 73-74; 2RP 15. Bailey was unaware if one of his colleagues was on the passenger side of the SUV as he searched under the seat. 1RP 62. The passenger was removed from the vehicle and released after Bailey found the second bag. 1RP 66, 73-74.

Zwaschka did not recall if he contacted the passenger. 2RP 13. He did see the can of beer in the vehicle, however, because he wrote Cousins a ticket for having an open container of alcohol in his car. 2RP 14-15. He also issued a ticket for loud noise. 2RP 13-14.

Cousins moved to suppress the cocaine. CP 13-20. He argued Bailey's stop for playing loud music was really a pretext for the officer's desire to conduct a criminal search of the SUV. CP 18-19; 2RP 21-25. He also maintained the searches were unlawful because he was out of the car and secured at the time, while the passenger remained quietly seated without moving or trying to reach toward the driver's-side floorboard. CP 15; 2RP 25-28, 40-42.

The trial court disagreed. The court held Cousins was lawfully arrested for possessing cocaine at the point Bailey ordered him out of the SUV. 2RP 43. The court held both warrantless searches were incident to the arrest. Bailey had to act quickly to prevent the destruction of evidence, the court reasoned, because there was an unrestrained passenger in the vehicle. And the evidence Bailey was after was the basis for the arrest. 2RP 44. The trial court ruled the cocaine admissible at trial.

After hearing evidence similar to that presented during the suppression hearing, a King County jury found Cousins guilty of

possessing cocaine. CP 35; 3RP 19-57. The trial court imposed a standard range sentence of 12 months and one day in prison. CP 45-52.

C. ARGUMENT

1. THE TRIAL COURT DISTURBED COUSINS' PRIVATE AFFAIRS IN VIOLATION OF ARTICLE I, SECTION 7 BY DENYING A MOTION TO SUPPRESS EVIDENCE FOUND DURING AN UNCONSTITUTIONAL SEARCH INCIDENT TO ARREST.

A motor vehicle search incident to arrest is justified under article I, section 7 only if the passenger compartment of the vehicle is in the immediate control of the arrestee at the time of search. Cousins was out of his SUV and under Officer Bailey's control when Bailey searched the vehicle. The passenger remained seated inside the SUV. The search was unconstitutional because Cousins could not have reached the passenger compartment at the time of the search.

a. Introduction

Article I, section 7 provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Unlike the Fourth Amendment, which precludes only "unreasonable" searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs "without authority of law," whether

reasonable or unreasonable in the Fourth Amendment context. State v. Buelna Valdez, 167 Wn.2d 761, 771-72, 224 P.3d 751 (2009).

A warrantless search is per se unconstitutional under article I, section 7 unless it falls within an exception to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). "Exceptions to the warrant requirement are limited and narrowly drawn." State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The State always carries the "heavy burden" of proving a warrantless search is justified. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

This Court reviews conclusions of law in an order pertaining to suppression of evidence de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), abrogated on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

b. Bailey's search was not a valid search incident to arrest.

A search incident to arrest is an exception to the warrant requirement. Jones, 146 Wn.2d at 335. The exception must be "jealously and carefully drawn, and must be confined to situations involving special circumstances." State v. Boyce, 52 Wn. App. 274, 279, 758 P.2d 1017 (1988). The justifications for the search incident to arrest exception are

the need to protect police officers and the need to preserve evidence of the crime of arrest. Buelna Valdez, 167 Wn.2d at 776-77; State v. Ringer, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983).

Recognizing these justifications, our Supreme Court declared a bright line rule: Once an arrestee is secured and removed from an automobile, she cannot obtain a weapon from or conceal or destroy evidence of the crime of arrest in the automobile. Therefore, the arrestee's presence does not support a warrantless search under the search incident to arrest exception. Buelna Valdez, 167 Wn.2d at 777; see State v. Swetz, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 481028, *4 (2011) ("[A]rticle I, section 7 limits a search incident to arrest to situations where threats to officer safety or the preservation of evidence prevent the arresting officer from delaying the search to obtain a warrant.)"

Importantly, Buelna Valdez clarified the search there was unlawful under the Washington Constitution simply because the arrestee was handcuffed and secured in the backseat of a patrol car. The Court did not invalidate the search because it was unreasonable to believe evidence of the crime of arrest – a warrant – could be found in the car. Instead, the question of reasonableness applies solely in a Fourth Amendment analysis. Buelna Valdez, 167 Wn.2d at 771-72.

Buelna Valdez held the search violated the Fourth Amendment because the arrestee could not reach the passenger compartment at the time of the search and because the state did not show it was reasonable to believe evidence relevant to the crime underlying the arrest warrant might be found in the vehicle. Valdez, 167 Wn.2d at 778; see Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 1723-24, 173 L. Ed. 2d 485 (2009) ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.").

Under article 1, section 7, in contrast, the crime of arrest is irrelevant and the search is unconstitutional if it occurs after the arrestee is restrained.² This point is illustrated by State v. Chesley, ___ Wn. App. ___, 239 P.3d 1160 (2010). The first officer there saw the defendant quickly jump into the driver's seat of a car parked adjacent to a "bait car" that had been unlawfully entered. When backup arrived, that officer and his colleagues ordered the defendant out of the car and handcuffed him as he

² That the crime underlying the arrest warrant was irrelevant is made obvious by the fact that nowhere in Buelna Valdez did the Court identify the crime. It did not matter; the arrestee could not reach the passenger compartment at the time of the search.

complied. The officers also took two passengers into custody. Chesley, 239 P.3d at 1162.

The first officer observed the bait car's door lock had been punched through. He looked through the defendant's car, saw burglary tools on the floorboard, and arrested the defendant for vehicle prowl. Officers then searched the car and found several items that had been reported stolen. Chesley, 239 P.3d at 1162.

The burglary tools were obviously evidence of the crime of arrest. Nevertheless, the search incident to arrest was found unlawful because at the time of the search the defendant and passengers were in custody. The search, therefore, was not necessary to preserve officer safety or prevent concealment or destruction of evidence of the crime of arrest. Chesley, 239 P.3d at 1165-66.

Although the passengers in Chesley were also in custody when the search occurred, the rule is no different when there are occupants in addition to the arrestee who remain free during the search. For example, an officer arrested Buelna Valdez on a warrant, handcuffed him, and placed him in the backseat of his patrol car. Buelna Valdez, 167 Wn.2d at 766. The officer returned to the vehicle, asked the passenger to step out, and searched the interior with the other officer at the scene. Id. The

officers found two pounds of methamphetamine concealed under a molded cup holder and insulation. Id. There is no mention in the opinion that the passenger was restrained or beyond the reach of the passenger compartment during the search.

That is because it is the location and actions of the arrestee – not another occupant -- that determine the legality of a vehicle search incident to arrest. State v. Afana, 169 Wn.2d 169, 178-79, 233 P.3d 879 (2010). Because of the passenger's presence in Cousins' SUV during the search, further consideration of Afana is instructive.

In Afana, an officer's suspicions were aroused when he saw two individuals sitting in a legally parked car at about 3:30 a.m. The officer approached the car, learned the occupants were watching a movie on a portable DVD player, and asked both for identification. 169 Wn.2d at 174. The officer noted both names and advised the driver, Afana, and Bergeron, the passenger, to find another place to watch the movie. The officer ran warrant checks and learned there was an arrest warrant for misdemeanor trespass for Bergeron. Meanwhile, Afana began to drive away, so the officer turned on his emergency lights and stopped the car. Afana, 169 Wn.2d at 174.

The officer asked Bergeron to step out of the car and when she did, he placed her under arrest. The officer then ordered Afana out of the car, and he complied. The officer searched the car and found drugs and paraphernalia, which caused him to arrest Afana. Afana, 169 Wn.2d at 174.

The question on appeal was whether the search was an invalid search incident to Bergeron's arrest. Afana, 169 Wn.2d at 177. In light of Buelna Valdez, the more specific issue was whether the search "was justified by a concern for the safety of the arresting officer or the concealment or destruction of evidence of the crime of arrest." Afana, 169 Wn.2d at 178.

Importantly, the court held it did not matter that Afana was unsecured at the time of the search, "because he was not under arrest at the time the search was conducted[.]" Afana, 169 Wn.2d at 178-79. A search incident to arrest is justified only where an officer reasonable believes the arrestee poses a safety risk or is within reaching distance of the car's interior at the time of the search. Afana, 169 Wn.2d at 178-79. Because the arrestee – Bergeron – was already in custody when the officer searched the car, the search was unlawful.

Application of Afana to Cousins' case yields the same result. At the time officer Bailey reached into the SUV and swiftly plucked the first bag off the floorboard, Cousins was arrested and outside the vehicle. His hands were on the side of the vehicle and Bailey stood between him and the open driver's side door. 1RP 57, 65-68. Cousins cooperated with Bailey and did not struggle. 1RP 65. In other words, Cousins – the arrestee -- was within Bailey's control. Moreover, officers Zwaschka and McCauley were near the SUV as well.

After finding the bag, Bailey immediately handcuffed Cousins. Cousins was therefore even less of a threat to either officer safety or additional evidence at the time Bailey found the second bag with cocaine under the driver's seat. The passenger, meanwhile, sat quietly throughout the incident. But as Afana holds, the arrestee is the focus when analyzing the propriety of a search incident to arrest. And the arrestee was effectively neutralized before either search.

For these reasons, Bailey's search was not a valid search incident to arrest. The trial court erred by holding to the contrary. The cocaine should be suppressed. Because Bailey's search of Cousins' car violated article I, section 7, the evidence gathered during that search must be suppressed. Valdez, 167 Wn.2d at 778 (citing State v. Duncan, 146

Wn.2d 166, 176, 43 P.3d 513 (2002)). Without the cocaine, there is insufficient evidence to sustain a finding of guilt for possession of cocaine. This Court should therefore reverse the conviction and remand for dismissal with prejudice. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997).

c. Exigent circumstances did not justify the search.

The state may argue the presence of the passenger created an exigent circumstance that justified Bailey's warrantless search. The exigent circumstances exception allows a warrantless search "where the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009).

A court must consider the totality of circumstances in determining whether exigent circumstances exist. State v. Carter, 151 Wn.2d 118, 128, 85 P.3d 887 (2004). Circumstances that could be termed exigent include "(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence." State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010) (quoting State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986)).

These circumstances do not exist in Cousins' case. Cousins was not fleeing; Bailey testified Cousins complied with his demands, placed his hands on the side of the SUV, and exhibited no intent to flee. 1RP 65. Cousins was outside the vehicle when Bailey searched it. See Tibbles, 169 Wn.2d at 373 ("While there was probable cause that evidence of contraband existed in the vehicle, Tibbles was outside the vehicle when Trooper Larsen searched it and the State has not established that the destruction of evidence was imminent.").

Although the passenger sat unrestrained in the car, he remained quiet and still. And Bailey could see what he was doing "but for that brief second" when he removed Cousins from the vehicle. 1RP 57. Two other officers were also around the vehicle. Under these circumstances there was no realistic risk of the passenger destroying or concealing the cocaine. Finally, Bailey obviously did not believe he or his colleagues were in danger as a result of Cousins' or the passengers actions or, in this case, inactions. It strains credulity to believe Bailey, a trained police officer, would expose himself to injury by looking under the driver's seat if he reasonably feared the passenger.

Furthermore, had Bailey feared the passenger would either grab the cocaine or injure him, he could have called to one of his two colleagues on

the scene for help. Bailey also had authority to order the passenger out of the SUV. See Parker, 139 Wn.2d at 502 (vehicle stop and arrest alone provides officers objective basis to ensure their safety by ordering passengers out of vehicle); State v. McIntyre, 39 Wn. App. 1, 6, 691 P.2d 587 (1984) (where police claim exigent circumstances, court must consider alternative of guarding the evidence "while the usual warrant or a telephonic warrant is sought."), review denied, 103 Wn.2d 1017 (1985); see also Tibbles, 169 Wn.2d at 371 (noting "State has not established that obtaining a warrant was otherwise impracticable").

To the extent Bailey manufactured the exigency, the search was unjustified. The police themselves may not create exigent circumstances. State v. Hall, 53 Wn. App. 296, 303, 766 P.2d 512, review denied, 112 Wn.2d 1016 (1989); United States v. Patino, 830 F.2d 1413, 1417 (7th Cir. 1987).

"The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action." State v. Hinshaw, 149 Wn. App. 747, 754, 205 P.3d 178 (2009). Neither Bailey nor Zwaschka met their burden here. This Court should therefore reject a claim exigent circumstances justified Bailey's search.

2. THE TRIAL COURT'S FAILURE TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE SUPPRESSION HEARING REQUIRES DISMISSAL OR REMAND.

The trial court must enter written findings of fact and conclusions of law after a hearing on a motion to suppress evidence. CrR 3.6(b); State v. Tagas, 121 Wn. App. 872, 875, 90 P.3d 1088 (2004). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996); see also JuCR 7.11(d) (explicitly requiring prosecutor to submit proposed findings within 21 days after receiving the juvenile's notice of appeal).

The purpose of written findings and conclusions is to ensure efficient and accurate appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (“A prosecuting attorney required to prepare findings and conclusions will necessarily need to focus attention on the evidence supporting each element of the charged crime, as will the trial court. That focus will simplify and expedite appellate review.”).

Oral findings are not a suitable substitute for written findings under CrR 3.6(b). “A court's oral opinion is not a finding of fact.” State v. Hescoek, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a trial

court's oral opinion is merely an expression of the court's informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated in the written findings, conclusions and judgment. Id. at 622 (citing State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)).

When the trial court fails to enter written findings and conclusions as required by CrR 3.6, "there will be a strong presumption that dismissal is the appropriate remedy." State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997) (quoting State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992)); cf. Head, 136 Wn.2d at 624 (trial court's failure to enter written findings and conclusions mandated by CrR 6.1(d) required remand for entry of written findings and conclusions).

D. CONCLUSION

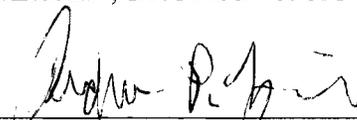
The trial court erred by denying Cousins' motion to suppress evidence because the warrantless search of his vehicle was neither a valid search incident to arrest or justified by exigent circumstances. This Court should reverse Cousins' conviction and remand for dismissal with

prejudice. In the alternative, because the trial court failed to follow CrR 3.6(b), this Court should remand for entry of proper findings of fact and conclusions of law or dismissal of the charge.

DATED this 29 day of February, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZINNER
WSBA No. 18631
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65876-0-1
)	
RICHARD COUSINS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF FEBRUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD COUSINS
3731 S. ORCHARD, #1
TACOMA, WA 98466

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF FEBRUARY 2011.

x. *Patrick Mayovsky*