

70305-6

70305-6

NO. 70305-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

CECIL L. BURKETT,

Appellant.

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

The Honorable Eric Z. Lucas, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Cecil L. Burkett's motion to suppress evidence found during a traffic stop in May 2011.

2. The State failed to prove Burkett possessed oxycodone and Ritalin in November 2011 with the intent to deliver.

3. The trial court exceeded its statutory sentencing authority by ordering Burkett to pay a \$100 domestic violence fine.

4. The trial court violated CrRs 3.5 and 3.6 by failing to file written findings of fact and conclusions of law.

Issues Pertaining to Assignments of Error

1. The officer in the May 2011 incident seized Burkett without a reasonable, articulable suspicion of criminal activity well before Burkett consented to a search that revealed oxycodone, hydrocodone and methylphenidate, as well as drug ledger-type notebooks.<sup>1</sup> Did the trial court err by denying Burkett's motion to suppress evidence?

2. Burkett had prescriptions for oxycodone and Ritalin. He admitted he sold eight oxycodone pills for \$160 shortly before he was stopped on the freeway in November 2011. Officers found him in

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<sup>1</sup> One brand name for methylphenidate is Ritalin. State v. Long, 19 Wn. App. 900, 903, 578 P.2d 871, review denied, 91 Wn.2d 1010 (1978).

possession of oxycodone and Ritalin, as well as about \$13,000. Did the State fail to prove Burkett possessed those substances in November 2011 with the intent to deliver?

3. Did the trial court err by ordering Burkett to pay a \$100 domestic violence fine for crimes that did not involve domestic violence?

4. Did the trial court violate CrRs 3.5 and 3.6 by failing to file written findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural history

The State charged Burkett with possession of oxycodone, hydrocodone, and methylphenidate with intent to deliver and unlawful possession of a firearm for a May 2011 incident, two counts of attempting to obtain oxycodone with a forged or altered prescription for incidents occurring in October 2011, and February 2012, and possession of oxycodone and methylphenidate with intent to deliver for an incident in November 2011. CP 64-65.

Burkett pleaded guilty to each count of attempting to obtain oxycodone with a forged or altered prescription. CP 45-60; 3RP 214-217.<sup>2</sup>

As for the May incident, Burkett moved to suppress evidence found in his backpack. CP 66-74, 76-79. The court denied Burkett's motion to suppress after hearing testimony and argument. 2RP 15-16. The court failed to file written findings of fact and conclusions of law as required by CrR 3.6.

The State requested admission of Burkett's statements to police.<sup>3</sup> Burkett did not contest the admission of his statements. 1RP 10, 2RP 17-19. He waived his right to a jury trial and agreed to a bench trial on documentary evidence. The trial court found Burkett guilty of possession with intent to deliver. CP 15-20; 3RP 219. The firearm charge was dismissed. CP 14, 21-23; 3RP 214-19.

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<sup>2</sup> The February 2012 offense was charged under a different cause number and is not part of this appeal. 3RP 214. Burkett did not move to withdraw either plea. The pleas will not be discussed further.

Burkett cites to the verbatim report of proceedings as follows: 1RP – 12/7/12; 2RP – 12/14/12; 3RP – 3/11-12/2013, 5/2/13.

<sup>3</sup> The State presented a written motion to admit statements. It was apparently not formally filed on its own. It is, however, part of the record on appeal because it was appended to Burkett's motion for discretionary review challenging the trial court's denial of his motion to suppress evidence. Supp. CP \_\_ (sub. no. 46, filed 2/5/13). Burkett later withdraw the motion for discretionary review. Supp. CP \_\_ (sub. no. 69, Certificate of Finality, filed 2/8/13).

With respect to the November incident, Burkett contended all statements he made to police before being advised of his constitutional rights should be suppressed. 2RP 17-18. After an evidentiary hearing, the trial court admitted the statements, concluding Burkett was not detained to the degree associated with formal arrest until he was advised of his rights. 1RP 45-74; 2RP 19. The court did not file written findings of fact and conclusions of law as required by CrR 3.5. The case proceeded to trial, after which the jury found Burkett guilty of possession with intent to deliver. CP 27.

Burkett came before the sentencing court with an offender score of 3. The court imposed concurrent, standard range sentences of 20 months plus one day for the two counts of possession with intent and one count of attempting to obtain oxycodone. CP 3-13.

2. CrR 3.6 hearing regarding May stop

In May 2011, officer Genoway pulled over the driver of a vehicle for speeding. The driver was Charles Drake and Cecil L. Burkett was the passenger. 1RP 12-14. Drake said he had picked Burkett up from Lake Washington Vocational School. 1RP 16. Genoway determined Drake was driving with a suspended license. 1RP 14-15. He had Drake step out and briefly spoke with him at the back of the car. Genoway arrested Drake,

handcuffed him, and directed him to sit on the front bumper of his patrol car. 1RP 15.

Genoway returned to Burkett to see if he was available to drive the car away from the scene. Burkett told the officer he was not sure if his driver's license was valid because he owed money. 1RP 16, 29-30. Genoway observed two backpacks in the rear seat and asked Burkett "general questions," including to whom the packs belonged. Burkett said he did not know. 1RP 16. Genoway said he asked about the packs because a person who goes to school is more likely to have a backpack. 1RP 16-17, 32. In his experience, he had seen contraband inside backpacks. 1RP 33. Genoway went back to where Drake sat and asked him about the packs. Drake said one pack was his and the other pack was Burkett's. 1RP 16-17.

Genoway looked back toward the stopped car and observed Burkett "over in the driver's area kind of lunged down." 1RP 17, 34. Genoway immediately went back to the car and told Burkett not to move about the car because it caused officer safety concerns. 1RP 17, 34, 44. He obtained Burkett's driver's license, wrote down its pertinent information, and returned it to Burkett. 1RP 18, 34-35, 42.

At that point, Genoway asked Burkett to step out of the car because of the presence of the backpacks, the inconsistent statements about the ownership of the packs, and Burkett's act of lunging over inside the car. 1RP 18-19, 35. Burkett complied, at which point Genoway frisked him for weapons. 1RP 35-36. He felt what was seemed to be a large wad of money in a front pants pocket. 1RP 19-20, 36. The officer did not believe the object was a weapon. 1RP 36. Genoway nevertheless asked Burkett to pull the object out of his pocket because he was curious whether it was a wad of money. 1RP 20, 36. His suspicion confirmed, Genoway told Burkett to return the money to his pocket, which he did. 1RP 20, 36-37.

Genoway then confronted him with Drake's statement regarding the packs. 1RP 19, 37. Burkett said, "[O]h yeah, I forgot, the one behind me in the back seat is my [*sic*] mine. 1RP 19. Suspicious about Burkett's changed position, Genoway asked for consent to search the packs. 1RP 19, 21. He did not advise Burkett of his right to refuse. 1RP 37. Burkett consented, and Genoway found several bottles of "mixed up prescription drugs" with several different names on them as well as suspected "drug notes." 1RP 21, 40. He arrested Burkett for possession of drugs with intent to deliver and advised him of his constitutional rights. 1RP 21, 37-

38. Burkett said he understood and waived his right to remain silent. 1RP 22-23.

3. Jury trial regarding November incident

In November 2011, undercover police officers Vargas and Wilfong were watching a truck idling in a shopping mall parking lot, away from other vehicles, with a driver inside. 3RP 26-27. A second truck soon pulled alongside the idling truck. 3RP 28. The man from the first truck got out and leaned into the second truck's passenger window for a few seconds. He then leaned back up, returned to his truck, and drove off. The driver of the second truck left as well. 3RP 28, 75-76.

Believing they had witnessed a drug transaction, the officers called dispatch to request the help of an officer in uniform and marked car to stop the second truck. 3RP 29-30, 76-77. Vargas and Wilfong followed the second truck. 3RP 29, 77. A uniformed officer in a marked patrol car eventually stopped that truck. 3RP 29-30, 77-78. Burkett was the driver and lone occupant. 3RP 28. Vargas, Wilfong and the uniformed officer converged upon Burkett. 3RP 30-31, 78-79. Vargas identified himself as a detective with the Regional Drug and Gang Task Force. 3RP 30-31.

Vargas told Burkett he believed he had witnessed Burkett and another person conduct a drug transaction in the mall parking lot. 3RP 31.

Burkett said Vargas was correct. He disclosed that he received \$120 from the man in the other truck, Brian Lively, as advance payment for oxycodone pills he was to provide Lively the following day. 3RP 31-33. Burkett said he was working with another member of the Task Force, Detective Molly Spellman, and was setting Lively up for Spellman. 3RP 33-34.

Vargas did not believe Burkett because he never heard of an officer authorizing an informant to sell drugs without police present. 3RP 33. Vargas told Burkett he made no sense. Burkett changed his story slightly, stating he had received \$160 instead of \$120. 3RP 34. Vargas asked Burkett if he had any oxycodone pills in the truck, and Burkett said he did. He finally told Vargas he sold eight such pills to Lively for \$160. 3RP 34-35, 59-60.

Vargas stepped away from Burkett's truck and called Spellman. 3RP 35-36. Spellman told him she was scheduled to meet with Burkett the following, but did not tell him to sell anything for her. 3RP 36. Wilfong had been standing away from Vargas and heard only parts of the conversation. He spoke with Burkett while Vargas was away. 3RP 78-79. He asked whether Burkett had oxycodone pills in his truck and Burkett

said he did. 3RP 81-82. Burkett said the pills were from his own prescription and that he sold eight to Lively for \$160. 3RP 82.

Vargas returned to Burkett's truck and told him what Spellman said. 3RP 36. He asked Burkett for consent to search his truck and a backpack that was in the truck. Burkett consented, and just before Vargas began searching, Burkett said he had about \$10,000 in his truck. Believing the money was from drug sales, Vargas advised Burkett he was under arrest for delivery of a controlled substance. 3RP 37, 83.

Wilfong advised Burkett of his rights. 3RP 37, 83-84. Burkett said he wanted to fully cooperate. 3RP 84. Vargas asked about the money and Burkett first said he had withdrawn it from three different bank accounts and that Vargas would find the withdrawal slips in the pack. 3RP 38. Burkett then retracted that assertion and said he had cashed a \$5000 check from Snohomish County and borrowed the remainder from a friend because he needed to make a house payment. 3RP 40. When Vargas said he would try to corroborate that with Burkett's friend, Burkett changed his story, explaining the money came from a check from Snohomish County and savings from a job he had done. 3RP 39-40.

Vargas searched the pack while Wilfong searched the cab. 3RP 39-40, 84-85. Vargas found three labeled prescription pill bottles. 3RP

40-45; Exs. 1-3. One label identified the patient as Richard Durham and the contents as methylphenidate. 3RP 45-46. The prescribing doctor was Dr. Lew. 3RP 47. The second, in Burkett's name, was for oxycodone. The doctor was David Sinclair. 3RP 47-48. The third, in the name of "Leon C. Burkett," was for methylphenidate, and was prescribed by Dr. Sinclair. 3RP 48-49. Vargas said Burkett's full name is Cecil Leon Burkett. 3RP 56.

Vargas sent the bottles to the crime lab for testing. 3RP 41-45; Ex. 9. The bottle with Durham's name on it actually contained 14 oxycodone pills. 3RP 45-47. Burkett told Vargas that Durham was a friend who accidentally left the bottle in his truck. 3RP 49. The bottle with Burkett's name on it contained 92 oxycodone pills. 3RP 47-48. The bottle labeled "Leon C. Burkett" contained methylphenidate. 3RP 48-49.

Vargas also found two bundles of currency inside a stocking cap. 3RP 49-50. Most of the bills were for \$10, \$20 and \$100, denominations Vargas said were consistent with drug dealing. 3RP 52. He found no receipts in the pack. 3RP 53-54.

Burkett testified on his own behalf. He detailed the facts of his forging incidents. 3RP 97-106, 110-11, 140-51. The officer who arrested him after the October 2011 forgery asked him if he would cooperate with

the Task Force for a chance to avoid a felony conviction. He agreed to help. 3RP 99, 105-06, 145-46. Spellman called him several times thereafter, but they did not meet before the November incident. 3RP 107, 150-54. Spellman did not ask him to buy or sell drugs on his own, or to meet anyone in the parking lot in November. 3RP 154-55.

Burkett said Lively paid him \$160 for items he had bought for an electrical job. 3RP 114-15. They chose to meet in the mall parking lot because they were both in Everett at the time and the lot was just off the freeway. 3RP 114-15. He was stopped about 40 minutes after he and Lively departed. 3RP 118-19.

Vargas walked up to Burkett's truck, identified himself, and asked him if he had been involved in a drug deal at the parking lot. Burkett said no. Vargas and Wilfong had him step out of his truck and Vargas searched his pockets. 3RP 119. Vargas removed \$160 and asked him where he got the cash. Burkett told him Lively had paid him for a job. Vargas asked him how many \$20 bills there were, and he said seven or eight. 119-20, 160. Vargas asked if there were drugs or weapons in his truck. He said his medication and more than \$10,000 were in a backpack. 3RP 122-23, 161.

Meanwhile, Wilfong pulled out a plastic garbage bag and began putting items from Burkett's truck inside the bag. Burkett asked Wilfong what he was doing, and the officer responded he was seizing the property because he had heard Burkett say he just sold eight pills for \$160. Burkett denied selling pills. 3RP 120-22, 158-59.

Burkett testified Exhibit 2 contained one of his prescription bottles, for oxycodone, that was prescribed for his personal use. 3RP 126. Exhibit 3, he said, was a bottle with the name of Leon C. Burkett on the label, along with the word methylphenidate. 3RP 126-27. He explained he goes by the name Leon. 3RP 112. Each prescription had been filled on different dates in October by different pharmacies. 3RP 127.

He said Richard Durham, whose name was on the bottle in Exhibit 1, had been a part-time employee of his electrical contracting business. 3RP 115-17. For about two weeks preceding his meeting with Lively, Burkett was driving his work van while Durham drove his truck. 3RP 117-18. Burkett did not know Durham left a prescription bottle with his name on the label in the cab of his truck until Wilfong found it during his search. 3RP 161.

C. ARGUMENT

THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS EVIDENCE GENOWAY FOUND IN BURKETT'S BACKPACK.

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). One exception, an investigative detention, permits an officer to briefly stop and detain a person he reasonably suspects is engaged in criminal conduct. State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). An investigative detention constitutes a seizure. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). Officer Genoway seized Burkett well before he formed a reasonable suspicion of criminal activity. He therefore did not lawfully obtain Burkett's consent to search his backpack without a warrant. The oxycodone found inside the pack should have been suppressed.

Burkett moved to suppress evidence Genoway found in his backpack. CP 66-74, 76-79. Relying on Rankin, Burkett contended he was seized, without the required articulable suspicion, from no later than the moment Genoway asked him for his driver's license. CP 67-68; 2RP 3-6, 9-10, 14-15.

Burkett was a passenger in Drake's car. "[A] mere request for identification from a passenger for investigatory purposes constitutes a seizure unless there is a reasonable basis for the inquiry." Rankin, 151 Wn.2d at 697. This Court has observed the reasoning of Rankin is based on the fact "that a driver's traffic infraction gives an officer cause to pull a vehicle over and get the driver's, but not the passenger's, identification." State v. Mote, 129 Wn. App. 276, 290, 120 P.3d 596 (2005).

The trial court distinguished Rankin, noting the officers there "went directly after the passenger from the beginning." 3RP 15. The court also held neither driver was arrested in Rankin. 3RP 15. Because Drake was arrested for driving with a suspended license, the court reasoned, Genoway wanted to see Burkett's license to see if he could drive the car away.

In each of the two cases discussed in Rankin, the officers did not ignore the driver at the expense of the passenger. The officer requested the driver's license and then asked Rankin if he had any identification on his person. 151 Wn.2d at 692. In the other case, the officer simultaneously asked the driver and Staab for their driver's licenses. Id. at 693.

Here it is true Genoway first dealt with Drake before returning to the car and speaking with Burkett. While this may be pertinent if Burkett were arguing Genoway's ultimate search was pretextual, that was not his argument. The trial court did not explain the significance of its distinction as applied to the issue before it. The distinction is not significant and lends no support to the trial court's conclusion.

The court's second distinction, that Genoway needed to verify whether Burkett could drive the car from the scene, also does not support its conclusion. By the time of the request for a driver's license, Burkett had already told Genoway he was not sure whether his license was valid "because he had some payments he needed to make." 1RP 16. Furthermore, Burkett expressed no interest in driving the car. Nor did Drake request Genoway to ask Burkett if he could drive the car.

Under the trial court's theory, any passenger who happens to be in a vehicle at the time of the driver's arrest could be asked by an officer for identification, whether the passenger wished to drive or not. Such a rule is inconsistent with Washington law regarding vehicle-related searches and seizures.

"From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in

automobiles." City of Seattle v. Mesiani, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988). Rankin made clear that passengers of vehicles stopped by police have greater privacy protections than do pedestrians. 151 Wn.2d at 697. Passengers enjoy an independent, constitutionally protected privacy interest that is not reduced "merely upon stepping into an automobile with others." State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Therefore, the arrest of one or more vehicle occupants does not alone justify the search of other nonarrested passengers or personal belongings clearly associated with passengers. Parker, 139 Wn.2d at 502-03. Finally, an officer must "be able to articulate an objective rationale predicated specifically on safety concerns" for demanding a passenger stay in the vehicle or get out of the vehicle. State v. Mendez, 137 Wn.2d 208, 220, 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).

These cases make clear that in Washington, passengers in a stopped car have their own privacy protection that may not be invaded absent a suspicion of criminal conduct independent from that of the lawfully seized driver. The trial court's second Rankin distinction eviscerates that protection and this Court should reject the court's reasoning.

The State argued that under the step-by-step analysis explained in State v. Harrington,<sup>4</sup> Burkett was not unlawfully seized. 2RP 10-14. The trial court agreed. 2RP 16. This was error.

In fact, Harrington favors Burkett's position, and provides additional support to reverse the trial court's denial of the suppression motion. Harrington stands for the proposition that a "progressive intrusion" can turn a mere social contact into a seizure and that a court must determine when the seizure point has come. 167 Wn.2d at 669. The court observed that police actions likely to constitute a seizure include the intimidating presence of several officers, an officer's display of a weapon, a touching of the person, or the use of language or tone suggesting compliance with the officer's request may be required. 167 Wn.2d at 664.

Genoway's contact was a progressive intrusion that ripened into a seizure well before he obtained Burkett's consent to search the backpack. He asked Burkett if he had a valid driver's license, then noticed the backpacks in the back seat. He asked "general questions" about them, including to whom they belonged. 1RP 16. He went back to Drake, who said one pack was his and the other belonged to Burkett. 1RP 16-17.

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<sup>4</sup> State v. Harrington 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

He turned back and saw Burkett "over in the driver's area kind of lunged down." 1RP 17. He explained Burkett's "front portion of his body was bent over towards the driver's area." 1RP 17. He went back to Burkett and told him "not to move around in the car for officer safety reasons." 1RP 17.

He then asked Burkett for his driver's license, wrote the information down, and returned the license. Then he asked Burkett to get out of the car "to get him away from whatever he was reaching for in the car." 1RP 18-19. Burkett complied.

Genoway confronted him with Drake's statement that one of the backpacks was Burkett's. 1RP 19. Burkett then admitted the pack behind him in the back seat was his. 1RP 19. He then frisked Burkett for weapons and felt what he believed was currency in a pocket. 1RP 20. He asked Burkett to pull it out, which he did. 1RP 20. Genoway then requested Burkett's consent to search the backpack. 1RP 21, 37.

Directing Burkett to not move around in the car changed Genoway's contact into a seizure. A "key inquiry" in determining when a contact becomes a seizure is whether the officer displays authority in a manner that would cause a reasonable person to feel compelled to remain with the officer. State v. Bailey, 154 Wn. App. 295, 300, 224 P.3d 852,

review denied, 169 Wn.2d 1004 (2010). Police seize a person when they "objectively manifest" they are restraining the person's movement, and a reasonable person would believe he is not free to leave. State v. Salinas, 169 Wn. App. 210, 217, 279 P.3d 917 (2012), review denied, 176 Wn.2d 1002 (2013).

For Burkett to get out of the car and walk away, he would have had to disobey Genoway's command to not move around in the car. Furthermore, a passenger of a stopped vehicle "does not have the realistic alternative of leaving the scene as does a pedestrian." Rankin, 151 Wn.2d at 697. This is especially true of Burkett under the circumstances. Genoway stopped the car along the freeway. 1RP 13. Had Burkett wished to leave, he presumably would have had to walk on the shoulder, with cars whizzing by at freeway speeds, until he reached an exit ramp.

To leave would have also required Burkett to leave his backpack behind. Burkett could see his driver was arrested and handcuffed. A reasonable person in Burkett's position would not have felt free to leave.

The State may claim Burkett's reaching into the driver's area prompted a justified command to sit still because Genoway was concerned for his safety. Such a claim would be disingenuous. First, Burkett was reaching across the front seat and the backpacks were in the back seat.

Second, Genoway's actions belie his claim of fear for his safety. Had he believed Burkett retrieved or could retrieve a weapon, he likely would have ordered Burkett to show his hands as he approached the car or when he got to the vehicle. Instead he asked Burkett for his driver's license. Burkett was seized when Genoway told him not to move around in the car.

If this Court disagrees, Genoway's request that Burkett get out of the car converted the contact into a seizure. Two cases are particularly apt. One is State v. Johnson, 156 Wn. App. 82, 92, 231 P.3d 225 (2010), review granted, cause remanded on other grounds, 172 Wn.2d 1001 (2011). In Johnson, the lone officer parked his patrol car 10 to 15 feet behind a vehicle illegally parked and did not activate his emergency lights or siren. He walked up to the driver and asked why she and her passenger were there and why they parked in the spot. He did not demand identification or ask the driver to step out of the vehicle until after learning she had outstanding warrants. 156 Wn. App. at 87, 92.

The appellate court held that until that point, a seizure had not occurred. Id. at 92. By specifically noting the officer did not ask the driver to step out of the vehicle, the court demonstrates the significance of such a request when determining whether a seizure occurred.

The second case is State v. O'Neil, 148 Wn.2d 564, 62 P.3d 489

(2003). In O'Neil, the officer pulled up behind a car parked in front of a closed store after dark. He activated his spotlight and determined someone was in the car. He approached the driver's side of the car, shined a flashlight in the driver's face, and asked him to roll the window down, which he did. The officer asked what he was doing there, and the driver explained his car had broken down and would not start.

The officer then asked for identification, registration, and insurance papers. The driver, known by this time as O'Neil to the officer, produced registration that showed the car was registered to another person. When O'Neill said he was the other person, the officer asked him to step out of the car. 148 Wn.2d at 571-72. The Supreme Court held the officer did not seize O'Neil until he requested O'Neill to exit the car. 148 Wn.2d at 581. See also, State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995) ("Although the request that Watkins exit the car constituted a seizure, it did not amount to a custodial arrest."). These cases establish Genoway seized Burkett when he asked him to step out of the car.

If this Court remains unconvinced Genoway seized Burkett when he asked him to step out of the car, seizure occurred when Genoway frisked him. "Requesting to frisk is inconsistent with a mere social contact." Harrington, 167 Wn.2d at 669. "In most stop-and-frisk

situations, the citizen is not 'free to go.'" State v. Byers, 85 Wn.2d 783, 790, 539 P.2d 833 (1975), reversed on rehearing on other grounds, 88 Wn.2d 1 (1977), overruled on other grounds, State v. Williams, 102 Wn.2d 733, 741 n.9 (1984).

Finally, Genoway seized Burkett when he asked for consent to search the backpack. As with frisks, a request to search is inconsistent with a social contact. State v. Guevara, 172 Wn. App. 184, 190-91, 288 P.3d 1167 (2012) (citing Harrington, 167 Wn.2d at 669).

At the time of this request, and/or the frisk, and/or the request to step out of the car, and/or the request for a driver's license, Genoway did not have a reasonable, articulable suspicion that Burkett was involved in criminal activity. Burkett's consent to search the backpack was tainted by the illegal detention and does not save Genoway's violation. Harrington, 167 Wn.2d at 670. This Court should reverse the trial court's denial of Burkett's motion to suppress. Without the evidence found in the backpack, the State cannot prove Burkett possessed controlled substances with the intent to deliver as charged in count one. This Court should remand to the trial court for reversal with prejudice.

2. THE STATE FAILED TO PROVE BURKETT POSSESSED OXYCODONE WITH THE INTENT TO DELIVER ON NOVEMBER 2.

Due process requires the State to prove each essential element of a crime beyond a reasonable doubt. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). In assessing a challenge to the sufficiency of the evidence, a reviewing court views the evidence in the light most favorable to the State. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). The question is whether a rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012).

It is illegal to possess a controlled substance with the intent to deliver. RCW 69.50.401. To sustain a conviction, the State must prove the accused intended to deliver the controlled substance presently or at some point in the future. State v. Davis, 79 Wn. App. 591, 594, 904 P.2d 306 (1995). Mere possession – even of a large amount of a controlled substance – is not sufficient to support an inference of intent. State v. Zunker, 112 Wn. App. 130, 136, 48 P.3d 344 (2002), review denied, 148 Wn.2d 1012 (2003).

In Burkett's case, the State presented evidence in addition to possession of 106 oxycodone pills and some Ritalin pills. Burkett

admitted he sold eight oxycodone pills for \$160 on the day Vargas and Wilfong stopped him. 3RP 81-82. He testified he pleaded guilty to two separate counts of attempting to obtain drugs with a forged prescription. 3RP 107-08, 110-11, 141-43, 167. He had \$13,000 in his backpack in denominations Vargas said were consistent with drug dealing. 3RP 130.

But the pill bottle containing 92 of the oxycodone pills, Exhibit 2, indicated it was filled October 18, and bore Burkett's name as well as the name Dr. David Sinclair. 3RP 47-48, 130-32. Burkett testified Dr. Sinclair had been his doctor. 3RP 131. His prescribed dosage in 2011 was eight oxycodone pills a day to manage pain caused by a 2004 accident. 3RP 108-10; Exhibit 2. Possessing 106 pills given the dosage is consistent with personal use rather than an intent to deliver.

Burkett said he had a prescription for Ritalin because he had been diagnosed as having Attention Deficit Disorder. 3RP 112. The bottle containing Ritalin bore the name Leon Cecil Burkett. 3RP 112. Leon was Burkett's middle name and he testified he often used that name. 3RP 112-13, 171. See State v. Sanders, 171 N.C. App. 46, 50, 613 S.E.2d 708, 711 aff'd, 360 N.C. 170, 622 S.E.2d 492 (2005) ("Although the State's evidence that Defendant kept the pills in a plastic bag rather than a labeled prescription bottle raised a suspicion that Defendant committed the offense

[of possession with intent to sell or deliver], it was not substantial evidence.").

As for the money, Burkett presented Exhibit 11, a receipt from Cascade District Court for \$2,540, an amount he posted as bail and received back at the conclusion of the case. 3RP 123-24, 163. He also presented Exhibit 12, a copy of a receipt dated October 12, 2011, for \$5,600 cash he was paid for a job he had completed as an electrical contractor. 3RP 124-27, 168. Burkett testified he had been paid \$8,500 by MC Construction for electrical work he had done. 3RP 163-64, 169-70. According to the receipt admitted as Exhibit 13, the amount was \$8,750. 3RP 169. These receipts were in his backpack, along with a lot of other paperwork, when Vargas searched it. 3RP 161-66.

Burkett testified he was physically addicted to oxycodone. There is scientific proof to support this claim. See *McCauley v. Purdue Pharma L.P.*, 331 F. Supp. 2d 449, 452 (W.D. Va. 2004) ("Like other opioids, including morphine, codeine, and hydrocodone, oxycodone interacts with the so-called mu receptor in the human central nervous system to provide pain relief. It is significant that all these opioid analgesics function in the same pharmacokinetic manner. They can all induce euphoria and intense

feelings of well-being, making them highly addictive and prone to illicit use.").

Burkett said if he did not have oxycodone around the time of the November incident, he "became very sick." 3RP 110. Withdrawal symptoms from oxycodone "include nausea, vomiting, diarrhea, loss of appetite, anxiety and depression, and elevated heart rates and breathing." United States v. Ilayayev, 800 F. Supp. 2d 417, 428 (E.D.N.Y. 2011). Forging prescriptions to get more than the properly prescribed amount of the drug is consistent with feeding an addiction and avoiding withdrawal.

Proving intent to deliver pills is more difficult than proving intent to deliver other forms of drugs because common indicia of intent to deliver -- packaging material, measuring devices, scales, cutting agents -- are not likely to be present because they are not needed. Instead, a monthly supply of a prescribed pill is generally dispensed in a vial or bottle. No additional packaging is necessary.

In addition, the State failed to present evidence as to what a typical use amount of oxycodone or Ritalin was. See Com. v. Asbury, 312 Pa. Super. 357, 362, 458 A.2d 999, 1001 (1983) ("Expert testimony on the matter of whether possession of [32] dosage units of a prohibited substance is consistent with personal use or is reflective of an intent to

deliver would have proved helpful. However, the Commonwealth declined to afford such a benefit, and in the absence of such testimony, we are unable to conclude that it was reasonable to infer an intent to deliver[.]").

Neither Vargas nor Wilfong found any ledger-type documents. See, e.g., State v. Campos, 100 Wn. App. 218, 220, 223-24, 998 P.2d 893 (2000) (possession of nearly one ounce of uncut cocaine, forensic scientist's testimony that cocaine police recover usually has cutting agent added to it to make a greater profit, detective's testimony that users usually buy 3.5 grams or less, \$1,750 on person, officer's testimony that large amount of cash in small, assorted denominations is consistent with narcotics sales, and piece of paper with columns of numbers and slang word for cocaine that officer testified could be record of drug sales was sufficient to prove intent to deliver), review denied, 142 Wn.2d 1006 (2000); State v. Huynh, 107 Wn. App. 68, 78, 26 P.3d 290 (2001) (absent any "packaging materials, scales, or other paraphernalia typically used by drug dealers," possession of large amount of cocaine insufficient to prove intent to deliver).

The evidence presented in Burkett's case was insufficient to establish intent to deliver. This Court should therefore reverse Burkett's conviction and remand for dismissal with prejudice.

3. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY BY ORDERING PAYMENT OF A \$100 DOMESTIC VIOLENCE PENALTY.

A sentencing court "may impose a penalty assessment not to exceed one hundred dollars on any person convicted of a crime involving domestic violence." RCW 10.99.080(1). The trial court ordered Burkett to pay a \$100 "Domestic Violence Penalty." CP 8. Burkett was not, however, convicted of any crime involving domestic violence. The fine was thus improperly ordered. State v. Moreno, 173 Wn. App. 479, 499, 294 P.3d 812, review denied, 177 Wn.2d 1021 (2013). This court should so find and remand with an order to strike the fine.

4. THE TRIAL COURT VIOLATED CrR 3.6 BY FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The trial court must enter written findings of fact and conclusions of law after a hearing on a motion to admit the accused's statements or to suppress evidence. CrRs 3.5(c), 3.6(b); State v. Hickman, 157 Wn. App. 767, 771 n.2, 238 P.3d 1240 (2010); State v. Tagas, 121 Wn. App. 872, 90 P.3d 1088 (2004). The trial court and 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) (regarding analogous CrR 6.1(d), which requires entry of written findings of fact and conclusions of law after bench trial).

The purpose of written findings and conclusions is to have a record made to aid the appellate court on review. State v. Pulido, 68 Wn. App. 59, 62, 841 P.2d 1251 (1992) review denied, 121 Wn.2d 1018 (1993). When the trial court fails to enter findings and conclusions, “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. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (trial court’s failure to enter written findings and conclusions mandated by CrR 6.1(d) required remand for entry of findings and conclusions).

This Court should remand for entry of complete and thorough findings. Head, 136 Wn.2d at 622-23; State v. Austin, 65 Wn. App. 759, 761, 831 P.2d 747 (1992) (if trial court fails to enter a finding as to an element of the crime charged, the appropriate remedy is to vacate and remand for appropriate findings).

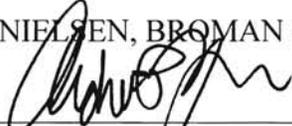
D. CONCLUSION

The trial court erred by denying Burkett's motion to suppress evidence Genoway seized. This Court should reverse the denial and remand for dismissal of the resulting conviction with prejudice. The State failed to prove Burkett possessed the oxycodone and Ritalin in the November incident with the intent to deliver. This Court should reverse the conviction and remand with an order to dismiss with prejudice. This Court should also find the trial court erroneously imposed the \$100 domestic violence fine and remand with an order to strike the fine.

DATED this 27 day of November, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70305-6-1
	)	
CECIL BURKETT,	)	
	)	
Appellant.	)	

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**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 27<sup>TH</sup> DAY OF NOVEMBER 2013, 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 AND/OR VIA EMAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF NOVEMBER 2013.

x *Patrick Mayovsky*