

FILED
COURT OF APPEALS

No. 39973-3-II

10/12/14 PM 1:48

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

BY *ls*

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL LEO FILIPPI

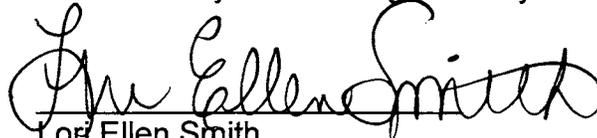
Appellant.

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE.....1

ARGUMENT.....9

A. THE TRIAL COURT DID NOT ERR WHEN IT DENIED FILIPPI'S MOTION TO SUPPRESS BECAUSE FILIPPI'S CONSENT WAS VALID AND THE OFFICERS' ACTIONS WERE LAWFUL.....9

1. The Issue of Whether the Underlying No Contact Order Contained a Valid "No Firearms" Condition is Waived Because Filippi Did Not Raise This Issue Below.....10

2. Filippi's Consent Was Voluntary and the Officers Did Not Misrepresent or Incorrectly Represent Their Legal Authority, Nor is There Any Other Evidence That Filippi's Consent was "Coerced".....12

i. Filippi's Discussion of RCW 9.41.800 is Misleading.....17

ii. The Cases Cited by Filippi Are Distinguishable.....21

B. FILIPPI'S CONTENTIONS REGARDING THE BAIL JUMPING CONVICTION AND INSTRUCTIONS IS CONTRARY TO LAW, UNSUPPORTED BY AUTHORITY, AND BASED ON WILD SPECULATION.....26

C. FILIPPI HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.....28

CONCLUSION.....37

TABLE OF AUTHORITIES

Cases

<u>DeHeer v. Seattle Post-Intelligencer</u> , 60 Wn.2d 122, 372 P.2d 193 (1962).....	26
<u>Frazier v. Elmore</u> , 173 S.W.2d 563, 565 (Tenn. 1943).....	24
<u>In re Davis</u> 151 Wash.App. 331, 211 P.3d 1055, 1059 (2009),	35
<u>McLean v. State Dept. of Corrections</u> 37 Wash.App. 255, 680 P.2d 65, 66 - 67 (1984)	24
<u>State v. Apodaca</u> , 67 Wn.App. 736, 839 P.2d 352 (1992).....	13
<u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289, <i>cert. denied</i> , 510 U.S. 944 (1993).....	29
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990)	35
<u>State v. Collins</u> , 152 Wn.App. 429, 216 P.3d 463 (2009)	26
<u>State v. Dennison</u> , 115 Wn.2d 609, 801 P.2d 193 (1990)	26
<u>State v. Downing</u> , 122 Wn.App. 185, 93 P.3d 900 (2004)	28
<u>State v. Elliott</u> , 114 Wash.2d 6, 785 P.2d 440 (1990).....	26
<u>State v. Ferrier</u> , 136 Wn.2d 103, 960 P.2d 927 (1998)....	4, 5, 14, 15
<u>State v. Flowers</u> , 57 Wn.App. 636, 789 P.2d 333, <i>review denied</i> , 115 Wn.2d 1009 (1990)	13
<u>State v. Hagen</u> , 55 Wash.App. 494, 781 P.2d 892 (1989).....	10
<u>State v. Hashman</u> , 46 Wash.App. 211, 729 P.2d 651 (1986), <i>review denied</i> , 108 Wash.2d 1021 (1987).....	10
<u>State v. Hill</u> , 68 Wash.App. 300, 842 P.2d 996, <i>review denied</i> , 121 Wash.2d 1020, 854 P.2d 42 (1993)	9
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313(1994).....	12
<u>State v. Hoggatt</u> , 108 Wn.App. 257, 30 P.3d 488 (2001),	12
<u>State v. Israel</u> , 113 Wn.App. 243, 54 P.3d 1218 (2002)(.....	35
<u>State v. Kyлло</u> 166 Wash.2d 856, 215 P.3d 177 (2009).....	33
<u>State v. Lemus</u> , 103 Wn.App. 94, 11 P.d 326 (2000)	12
<u>State v. Logan</u> , 102 Wn.App. 907, 10 P.3d 504 (2000)	26
<u>State v. Lyons</u> , 76 Wn.2d 343, 458 P.2d 30 (1969).....	14
<u>State v. McFarland</u> , 127 Wash.2d 322, 899 P.2d 1251 (1995).....	29
<u>State v. Mennegar</u> , 114 Wash.2d 304, 787 P.2d 1347 (1990).....	9
<u>State v. Mierz</u> , 127 Wn.2d 460, 901 P.2d 286 (1995).....	13
<u>State v. Prater</u> 30 Wash.App. 512, 635 P.2d 1104 (1981)	11

<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	22
<u>State v. Rodriguez</u> , 32 Wn. App. 758, 650 P.2d 225, <i>review denied</i> , 98 Wn.2d 1005 (1982)	15
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	35
<u>State v. Shoemaker</u> , 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975)	12
<u>State v. Studd</u> , 137 Wash.2d 533, 973 P.2d 1049 (1999)	32, 33
<u>State v. Thorkelson</u> , 25 Wn.App. 615, 611 P.2d 1278, <i>review denied</i> , 94 Wn.2d 1001 (1980).....	15
<u>State v. Townsend</u> , 142 Wash.2d 838, 15 P.3d 145 (2001)	29
<u>State v. Varga</u> , 151 Wash.2d 179, 86 P.3d 139 (2004)	29
<u>State v. Walton</u> , 64 Wn.App. 410, 824 P.2d 533 (1992).....	36, 37
<u>State v. West</u> , 139 Wn.2d 37, 983 P.2d 617 (1999)	30
 <u>Statutes</u>	
RCW 9A.76.170	28
 <u>Rules</u>	
RAP 10.3(a)(5)	26
 <u>FEDERAL CASES</u>	
<u>Anderson v. United States</u> , 393 F.3d 749, (8th Cir.2005)	33
<u>Bumper v. North Carolina</u> , 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).....	12, 21, 22
<u>Haight v. Commonwealth</u> , 41 S.W.3d 436(Ky.2001)	33
<u>Hall v. Doering</u> 997 F.Supp. 1445 (D.Kan., 1998)	23
<u>People v. Reed</u> , 556 N.W.2d 858 (Michigan 1996)	33
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	29, 33
<u>Washington v. Chrisman</u> , 455 U.S. 1, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982).....	12
 <u>OTHER</u>	
<u>WPIC 120.41</u>	28, 32

SUPPLEMENTAL STATEMENT OF THE CASE

In addition to facts otherwise cited in the argument below, plus this supplemental statement of the case, Appellant's statement of the case is adequate for purposes of responding to this appeal.

At the suppression hearing, Trooper Jason Hicks testified that on April 11, 2009, he assisted Officer Tara Hicks of the Morton Police Department with a civil standby involving the Michael Filippi. 1RP 4,5.¹ A "civil standby" is a term used for the situation when law enforcement officers go to a location to make sure no further conflict occurs while a citizen removes his or her property from the location. 1RP 5. In this case, a no-contact order had been entered, and that order said that Mr. Filippi could return to the residence one time, and the order also stated that Mr. Filippi was not allowed to possess any type of firearm. 1RP 5,6; Ex.1.

Trooper Hicks also explained:

I knew Mr. Filippi because I was present the day he was arrested for domestic violence. At that time we had a report that he was barricaded in his house with a firearm. Once he came out of the house, Deputy Sue Shannon and I cleared the residence and I observed in his closet several firearms. So I had previous knowledge that there were firearms in the residence that we were going to have to seize based on that court order. [1RP 6]

¹ The transcript of the suppression hearing is referenced as "1RP," and the transcript of the jury trial is referenced as "2RP".

PROSECUTOR: And based on that knowledge, what did you talk to Mr. Filippi about on April 11?

TROOPER: While we were at the Morton Police Department Officer Hicks and I spoke to Mr. Filippi and informed him if he was going to take any type of container large enough to contain a firearm, it would be necessary for us to look in the container to make sure he wasn't trying to sneak a weapon out of the residence.

PROSECUTOR: And how did he respond?

TROOPER: He said that was perfectly fine.

1RP 6,7.

After this conversation with Filippi, Trooper Hicks, Officer Hicks, Filippi and Filippi's ex-wife went to 249 Division, where Mr. Filippi had been living. They entered the residence and went to Filippi's bedroom, which had a padlock on the door. 1RP 7. Mr. Filippi had the key and unlocked the door. 1RP 7. Once inside the bedroom, Trooper Hicks went to the closet where he had previously seen the firearms. 1RP 7. Trooper Hicks removed rifles, and shotguns. 1RP 7. Mr. Filippi then pointed out a 9 millimeter pistol on the top shelf of the closet, and Trooper Hicks took that gun as well. 1RP 7. Trooper Hicks handed all of the weapons to Officer Hicks, who secured them in her patrol car. 1RP 7,8.

Trooper Hicks then just stood by in the bedroom as Mr. Filippi obtained his possessions. Mr. Filippi pointed to a locked

container in his closet. 1RP 8. Trooper Hicks said the item looked like an old military ammunition can made out of metal. 1RP 8.9. There was a padlock on the item. When Filippi pointed towards the item, Trooper Hicks reached into the closet, grabbed the item and put it down on the bed. 1RP 9. Mr. Filippi then unlocked the item. Trooper Hicks did not ask Filippi to unlock the can. 1RP 9. After Filippi unlocked the can, Trooper Hicks looked inside, and saw a prescription pill bottle with small plastic bags and a tube inside it. 1RP 9. Trooper Hicks said from his training and experience, the items appeared to be methamphetamine and a methamphetamine pipe. 1RP 9.

Trooper Hicks said he asked Filippi what was in the prescription bottle and Filippi first said he didn't know. 1RP 10. Trooper Hicks then placed Filippi in handcuffs, and told Filippi he was not under arrest, he was just being detained. 1RP 10. Trooper Hicks then read Filippi his constitutional rights from a card he carries. 1RP 10. Filippi said he understood his rights and he verbally waived his rights. 1RP 10,11. Filippi "then essentially admitted to being a methamphetamine user and that the bottle contained methamphetamine and a pipe." 1RP 10. Trooper Hicks did not arrest Filippi at that time because Filippi had to move so

much of his property. 1RP 11. Trooper Hicks removed the handcuffs from Filippi and told him the drug issue would be dealt with later. 1RP 11. Trooper Hicks took possession of the prescription bottle and contents. 1RP 11.

After Filippi obtained all of his personal belongings, Trooper Hicks asked Filippi for consent to search the rest of his "personal living areas." Trooper Hicks advised Filippi of his Ferrier warnings. 1RP 11. As to the Ferrier warnings, Trooper Hicks said that he advised Filippi as follows:

I advised Mr. Filippi that he had the right to refuse the search, he had the right to stop my search at any time, he had the right to limit the area that I searched, and that anything I found could be used against him in court.

1RP 12. Filippi told Trooper Hicks that he understood the warnings and gave consent to search. 1RP 12. Filippi "granted verbal consent for us to search the remainder of his room, telling [him] at the same time that [he] would find more paraphernalia for methamphetamine use." 1RP 11,12. After Filippi said he understood the Ferrier warnings and gave consent to further search, Trooper Hicks searched the remainder of Filippi's room. 1RP 12. Trooper Hicks said that at the time he asked for consent, he and Officer Hicks were both in the bedroom but "Mr. Filippi was standing outside the bedroom door with the open living room to his

back so that way he didn't feel like he was trapped or coerced to do anything." 1RP 12. The officers then searched the remainder of the residence, finding paraphernalia, and a marijuana pipe. 1RP 13. Filippi took the officers to another locked room and he unlocked the door. 1RP 13. Officers saw several boxes of ammunition, which were taken and secured. 1RP 13.

Everyone then went outside, at which time Mr. Filippi was placed under arrest and taken to the Morton Police Department. 1RP 13. Once at the station, Filippi gave a taped statement, after Miranda rights were again read to him. 1RP 14. During the taped statement, Filippi once again said that he willingly gave the officers consent to search his residence. 1RP 14. Trooper Hicks said that when he administered the Ferrier warnings to Filippi that Filippi did not withdraw his consent, nor did he ask the officers to limit their search, nor did Filippi ever say that he felt coerced into giving his consent. 1RP 14.

Trooper Hicks said that because the no-contact order said that Filippi could not possess firearms, he told Filippi that if any container he removed was large enough to hold a firearm, the officers would need to look inside that container. 1RP 17. Trooper Hicks also said, "Mr. Filippi basically requested us to take his

firearms because he didn't want them left in the house because he was afraid of theft by his roommates." 1RP 17.

As to knowledge that the prescription pill bottle probably contained methamphetamine, Trooper Hicks said that he has seen methamphetamine inside such a pill bottle before, plus "the fact that when Mr. Filippi was arrested prior, we did find bags of--a bag of methamphetamine on his person, so I knew that he was a methamphetamine user." 1RP 18. Trooper Hicks reiterated that he was "just enforcing the part of the order that said firearms were prohibited." 1RP 21.

Officer Tara Hicks's testimony was consistent with Trooper Hicks' testimony and Tara Hicks also noted that the no-contact order "said that [Filippi] wasn't allowed to possess firearms or ammunition." 1RP 24.

Filippi testified at the 3.6 hearing that he did not feel he had any choice regarding the search of his residence. 1RP 30. Filippi said, "I gave them all the runs and I thought that's all they were concerned about." 1RP 30. Filippi said he told Trooper Hicks he wanted the metal box that was locked and that he voluntarily unlocked that box. 1RP 31. Filippi said that Trooper Hicks told him

that he was lying and that Trooper Hicks told him "If you tell me the truth, I won't take you to jail." 1RP 32.

The existence or validity of the "no firearms" provision prohibition in the no-contact order was never questioned nor discussed at the suppression hearing. 1RP 2-45. A copy of the no contact order was admitted at the suppression hearing. Ex.1.

The trial court denied the motion to suppress, and orally explained his ruling as follows:

First of all, with regard to the consent to open the boxes, I want to go back to the consent to open the boxes, I want to go back to the--the order is what starts all of this prohibiting firearms. Trooper Hicks knew that that condition was in there, as did Officer Hicks. They knew that they were going to go and do the civil standby. Trooper Hicks knew from prior experience that there had been weapons there at this residence with this defendant. So he had that prior knowledge. [1RP 44] So because of that he has to be more careful. And it would be unreasonable to suggest that an officer with that knowledge faced with this order can say, go ahead, take whatever you want out of the house, even something that's a closed container that might conceal a weapon.

So what makes this case, I guess, a little bit different is the fact that the officers told the defendant right up front, "Okay, we'll go do this but because of this condition on weapons and firearms, we're going to need to look and make sure there aren't any." Mr. Filippi agreed to that, he agreed to that condition, and went on over to the house, opened the door, opened the boxes, and let the officers look inside everything. It was a reasonable request for the officers to make given their experience, given this order, and it was

reasonable for Mr. Filippi to consent to that, which he did in order to get his things. But he was--he agreed to that search. He agreed to those terms. He knew that those were going to be rules when they went over there.

Importantly, and I think the key is here, he had the right, he was in total control of this, and if he didn't want them to look in it he leaves it there.

He says, "I want to take this out."
"Fine, we have to look in it."
He opens it up. [1RP 45]

This is not--this is an easy consent issue. The consent was freely given and he testified to that on the stand here today, that he consented to that.

And with some prompting then it was, "[w]ell, yeah, I felt I had to get my stuff." Well, he didn't have to get everything and that's what the officers said, they weren't moving all of his things, this was just to get the necessary items that he needed. [1RP 46]

The second issue is opening the pill bottle. And that is once that ammo can was open then trooper sees a pill bottle, he can see that it's not pills, but he can see what looks like plastic bindles and he sees the pipe in there. So that's when he inquires further, a reasonable question that he asked at that time, got information from Mr. Filippi confirming that it was contraband. He knows that now, it was confirmed, and that's when he opened it to seize it. So this is not search incident to arrest. He wasn't under arrest at that time. This was looking at it, what is this, he's told what it is, he's told it's contraband. The officers' actions were appropriate here.

So for those reasons, I am denying the motion to suppress.

1RP 46. An order and written findings denying the motion to suppress were entered. CP 22-24. Filippi had a jury trial, and was convicted as charged. This appeal followed, and Respondent submits this brief in response to Filippi's opening brief on appeal.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR WHEN IT DENIED FILIPPI'S MOTION TO SUPPRESS BECAUSE FILIPPI'S CONSENT WAS VOLUNTARY AND THE OFFICERS' ACTIONS WERE LAWFUL.

Filippi claims that his consent to the civil-standby officers' search of his ammunition box was "involuntary, coerced by the officers' misleading and incorrect statements regarding their legal authority." This argument is not persuasive, and this court should affirm the trial court's denial of the suppression motion.

Standard of Review.

On review of a suppression motion, the reviewing court makes an independent evaluation of the evidence, allowing "great significance" to the findings; and defers to the trial court on issues of credibility. State v. Mennegar, 114 Wash.2d 304, 309-10, 787 P.2d 1347 (1990); State v. Hill, 68 Wash.App. 300, 304, 842 P.2d 996, *review denied*, 121 Wash.2d 1020, 854 P.2d 42 (1993). The reviewing court determines whether substantial evidence supports the findings of the trial court and whether those findings support the

conclusions of law. State v. Hagen, 55 Wash.App. 494, 498, 781 P.2d 892 (1989). The court's suppression findings will not be disturbed on appeal if they are supported by substantial evidence. State v. Hashman, 46 Wash.App. 211, 217, 729 P.2d 651 (1986), *review denied*, 108 Wash.2d 1021 (1987).

1. The Issue of Whether the Underlying No Contact Order Contained a Valid "No Firearms" Condition is Waived Because Filippi Did Not Raise This Issue Below.

Filippi's claims that the officers performing the civil standby could not rely on the "no firearms" prohibition in the no-contact order to search items large enough to hold a firearm because the box next to that provision in the order was allegedly "crossed out." Brief of Appellant 17,18. However, Filippi did not object on this particular basis below, so he has waived the right to raise that issue for the first time on appeal.

If there was any question about the validity of the "no firearms" provision in the no contact order, Filippi had a duty to raise that issue in the trial court. He did not. "It is fundamental that to preserve error for consideration on appeal, a claimed error must be called to the attention of the trial court at a time that will afford the court an opportunity to correct it." State v. Prater 30 Wash.App.

512, 518, 635 P.2d 1104 (1981), *citing State v. Wiley*, 26 Wash.App. 422, 613 P.2d 549 (1980).

In the trial court, Filippi argued only that the no contact order did not give the civil-standby officers authority to look inside containers that were large enough to hold a firearm. See e.g., 1RP 17 where defense counsel on cross asks Trooper Hicks:

where does the order give you permission to condition the performance of your obligation as a civil standby. . . where does that give you authority to come up with this ad hoc procedure that you can require him to submit to a search?

* * *

So, essentially, what you're really saying is that the only way that he would have of not subjecting any container of his large enough to contain a firearm would be essentially just leave it in the house and not take it?

1RP 17. Thus, Filippi's objections below to the search were based upon his view that the order did not give officers the authority to look inside containers that were big enough to hold a firearm. Filippi did not at any point below argue that the "no firearms" provision in the no contact order was invalid or had been "crossed out." Accordingly, that particular issue has not been preserved for review and this court should not address it.

2. Filippi's Consent Was Voluntary and the Officers Did Not Misrepresent or Incorrectly Represent Their Legal Authority, Nor is There Any Other Evidence That Filippi's Consent was "Coerced."

Filippi claims that any consent he gave to the officers was "coerced" and involuntary because, according to Filippi, the officers misrepresented their legal authority in order to gain consent. This is not correct.

A warrantless search is constitutional if voluntary consent is granted. Washington v. Chrisman, 455 U.S. 1, 9-10, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982). As to the voluntariness of consent to search, the trial court's findings are reviewed for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); State v. Lemus, 103 Wn.App. 94, 98-99, 11 P.d 326 (2000). "The precise question is whether a rational trier of fact taking the evidence in the light most favorable to the State could find consent by clear and convincing evidence." State v. Hoggatt, 108 Wn.App. 257, 30 P.3d 488 (2001), citing Bumper v. North Carolina, 391 U.S. 543, 548 n.9, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968)(further citations omitted).

The voluntariness of a consent to search is determined under the totality of the circumstances. State v. Shoemaker, 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975). Factors to consider

include whether the defendant received a Miranda warning prior to consenting, the defendant's education and intelligence, and whether the defendant was advised of his right not to consent. State v. Flowers, 57 Wn.App. 636, 645, 789 P.2d 333, *review denied*, 115 Wn.2d 1009 (1990). Other factors to consider may include *claims of authority to search, prior illegal police action, prior cooperation, and police deception as to purpose.* Flowers, 57 Wn.App. at 645. Threats to obtain a warrant may invalidate consent if sufficient grounds to obtain a warrant do not exist. State v. Apodaca, 67 Wn.App. 736, 739-40, 839 P.2d 352 (1992), *overruled on other grounds by* State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995).

There is nothing in the record of the present case that indicates that Filippi's consent was "coerced" in any way. This case did not involve officers falsely asserting they could get a warrant when they could not. The trial court here also did not find there was anything to indicate that Filippi was mentally disabled or did not understand the precautionary limitation officers put on his removal of containers that could contain a firearm. 1RP 6,7; 45,46. Filippi was told about this condition before he entered the residence and he did not object or indicate that he did not understand. Id.

There is nothing in the record of the suppression hearing to indicate that Filippi lacked the education or intelligence to make an informed decision. 1RP 2-45.² The trial court heard the witnesses at the suppression hearing, including Filippi, and was in the best position to evaluate the officers' motives and any possible coercion of Filippi. Id.

Furthermore, officers' initial statements to Filippi about looking in any containers as he removed them did not amount to a "knock and talk" procedure where they were looking for evidence of a crime that would trigger Ferrier warnings at that point. State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998). All the officers wanted to do initially was inspect certain-sized containers to make sure no weapons were carried out of the house. Filippi agreed to this process. 1RP 6. Even if Filippi was "not happy" about agreeing to this condition, "[b]owing to events, even if one is not happy with them, is not the same thing as being coerced." State v. Lyons, 76 Wn.2d 343, 346-47, 458 P.2d 30 (1969). Nor does

² Filippi's testimony at trial is full of self-serving, suddenly-remembered "facts" surrounding officers' actions during the civil standby--none of which were mentioned by Filippi in his testimony at the suppression hearing. For example, at trial, Filippi had an entirely new recollection (and "defense") as to what transpired during the discovery of the drugs in the metal box. 2RP 62,63. At trial Filippi also suddenly remembered that he had a "life-long" learning disability (discussing the bail jumping offense). Id.

"reluctant consent" rise to the level of coercion. State v. Thorkelson, 25 Wn.App. 615, 617, 611 P.2d 1278, *review denied*, 94 Wn.2d 1001 (1980)(voluntariness not vitiated by fact that home owner consented to search only after police warned they would "impound" her house until they could get a search warrant).

Regarding advice of rights, "Miranda warnings are not a prerequisite to a voluntary consent; they relate to the compulsory self-incrimination barred by the Fifth Amendment and not to unreasonable searches and seizures proscribed by the Fourth Amendment." State v. Rodriguez, 32 Wn. App. 758, 880, 650 P.2d 225, *review denied*, 98 Wn.2d 1005 (1982).

Here, the only point that Miranda was required was at the point after Filippi himself unlocked the ammunition box, revealing the pill bottle that obviously contained methamphetamine (according to Trooper Hicks). 1RP 9,10. At that point, Trooper Hicks correctly administered Miranda warnings to Filippi before Filippi told Trooper Hicks that the substance inside the pill bottle was methamphetamine. 1RP 10. Furthermore, at such time that officers did decide they wanted to obtain Filippi's consent to search the home for further evidence of a crime, proper Ferrier warnings

were administered and Filippi said he understood and granted consent. 1RP 10,11.

Respondent disagrees that officers "misrepresented" their legal authority in such a way to vitiate Filippi's consent. Despite Filippi's new argument on appeal that the "no firearms" provision in the no contact order did not exist because it had been "crossed out" by the issuing court, Respondent does not agree that this is obvious or "clear" (as Filippi now says) from looking at the order. Ex. 2. Nor was this alleged "cross out" obvious to the officers either--since they "reviewed" the order on the day of the civil standby. 1RP 6. Rather than appearing "clearly" crossed, out as characterized by the Appellant, this provision in the order looks more like the box next to the "no firearms" provision is simply entirely "filled in"--as one would fill in the circles on a test answer sheet.

Additionally, Trooper Hicks--assisting with the civil standby--also responded to the underlying assault offense that resulted in the no-contact order--an offense that apparently involved Filippi's "barricading himself inside with a firearm." 1RP 6; 2RP 6. Trooper Hicks acknowledged his awareness of these facts at the suppression hearing when he stated:

I knew Mr. Filippi because I was present the day he was arrested for domestic violence. At that time we had a report that he was barricaded in his house with a firearm. Once he came out of the house, Deputy Sue Shannon and I cleared the residence and I observed in his closet several firearms. So I had previous knowledge that there were firearms in the residence that we were going to have to seize based on that court order.

1RP 6 (emphasis added); 2RP 6.

Thus, given Trooper Hicks' previous involvement with the offense that led to the issuance of the no contact order, plus his personal knowledge that Filippi had several firearms in his residence, Trooper Hicks certainly would not have questioned a "no firearms" provision in the no-contact order. Not to mention the fact that given Trooper Hicks' recent prior knowledge about the existence of firearms in the residence, Trooper Hicks surely had a duty to carry out the civil standby in a safe manner consistent with his knowledge of the firearms inside.

After all, the purpose of providing officers to carry out a "civil standby" is to ensure that no further violent altercations occur between the defendant and the victim while the defendant retrieves his belongings from the residence. To argue that an officer performing standby who has recently seen firearms inside the defendant's residence should nonetheless disregard that knowledge when a defendant re-enters the residence to remove

property is illogical and contrary to public safety-- if not irresponsible.

The bottom line is that given Trooper Hicks' personal knowledge of firearms gained during access to Filippi's house when the offense that led to the no contact order was committed, a "no firearms" provision would be expected in the no contact order. And Trooper Hicks this provision in the order when he reviewed it before going back to the residence for the civil standby. 1RP 6. Additionally, it is not "clear" on the face of the no contact order that the "no firearms" provision is "crossed out." Nor did Filippi make such a claim in the trial court..

*i. **Filippi's Discussion of RCW 9.41.800 is Misleading***

Although Filippi did not bring this to the trial court's attention, he now also claims that there was "indirect evidence . . . from the order itself . . . that it did not prohibit Filippi from possessing firearms." Brief of Appellant 18. Filippi then states that in order to impose such a prohibition, "the district court was bound to 'specifically make findings pursuant to RCW 9.41.800' either that Filippi had used or displayed a firearm in the commission of a felony, or that he had previously been convicted of firearm-

disqualifying offenses under RCW 9.41.040." Brief of Appellant 18, citing "3.6 Ex.at 2."

But this statute is not quite so narrow as Filippi makes it out to be. RCW 9.41.800 provides, in pertinent part:

(1) Any court when entering an order authorized under RCW 9A.46.080, 10.14.080, 10.99.040, 10.99.045, 26.09.050, 26.09.060, 26.10.040, 26.10.115, 26.26.130, 26.50.060, 26.50.070, or 26.26.590 shall, upon a showing by clear and convincing evidence, that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040:

- (a) Require the party to surrender any firearm or other dangerous weapon;
- (b) Require the party to surrender any concealed pistol license issued under RCW 9.41.070;
- (c) Prohibit the party from obtaining or possessing a firearm or other dangerous weapon;
- (d) Prohibit the party from obtaining or possessing a concealed pistol license.

* * *

(4) In addition to the provisions of subsections (1), (2), and (3) of this section, the court may enter an order requiring a party to comply with the provisions in subsection (1) of this section if it finds that the possession of a firearm or other dangerous weapon by any party presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

RCW 9.41.800 (emphasis added).

Thus, contrary to Filippi's portrayal of this statute, a trial court can enter a firearms prohibition without the underlying crime being

a felony, if it finds the conditions set out under subsection (4). And, if the underlying assault that led to the no contact order did indeed involve Filippi "barricading himself inside the house with a firearm" it seems that the District Court (Municipal Court) may very well have *intended* to prohibit Filippi from possessing a firearm due the facts of the underlying assault. As for the additional finding that Filippi was to turn over all of his guns under the statute as well, it is just as likely that the District Court simply forgot to make that finding or check that box.

If the assault that caused the issuance of the no contact order in the present case involved Filippi "barricading himself inside the residence with a firearm" (as Trooper Hicks stated) then the District Court *could have* lawfully prohibited Filippi from possessing firearms in the no contact order under RCW 9.41.800(4). Of course, we do not know exactly why the municipal court entered the "no firearms" provision--but it certainly seems there would have been grounds to do so. The point is, Filippi's portrayal of the statute which gives the reasons for which such a provision may be entered is somewhat misleading.

In the end, though, Filippi's arguments on appeal claiming the "non-existence" of the "no-firearms" provision and/or whether

such a provision *could* be lawfully imposed at all, are not properly before this court because he did not make these specific objections below. 1RP 2-45.

But most importantly, the facts do not support Filippi's argument that the officers misrepresented their legal authority and that Filippi's consent was therefore "coerced." As the trial court noted in its oral ruling, "the key is here, [Filippi] had the right, he was in total control of this, and if he didn't want them to look in it he leaves it there. . . . this is an easy consent issue. The consent was freely given and he testified to that on the stand here today." 1RP 46. As previously argued, this Court should agree, and the trial court's denial of the suppression motion should be affirmed.

ii. The Cases Cited by Filippi Are Distinguishable

In arguing that officers "coerced" Filippi's consent because they allegedly made "misleading and incorrect statements regarding their legal authority" Filippi relies upon case law that is nowhere near on-point. Brief of Appellant 14-17.

For example, Filippi cites a case in which the officers acquired consent by falsely asserting they possessed a warrant. Br. App. , citing Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). Respondent agrees that officers

cannot assert that they have a warrant when they do not have one. However, no such thing occurred here. Nor is there any indication in the present case of any "police deception as to identity or purpose." Brief of Appellant 16, citing State v. Reichenbach, 153 Wn.2d 126, 132, 101 P.3d 80 (2004).

Here, the officers did not lie to Filippi like in Bumper. Instead, Trooper Hicks made reasonable representations based upon his prior first-hand knowledge that there were firearms in the residence, and upon the "no firearms" provision in the no contact order. 1RP 6; 2RP 6; Ex.1. Based upon this information, the officers merely told Filippi before Filippi began removing items from his residence, that if he wanted to bring out a container that was large enough to hold a firearm, the officers would need to look inside the container. 1RP 6,7. *Filippi consented to this condition before* he began removing his property. 1RP 6,7.

Respondent has not found any Washington authority to indicate that, as part of a civil standby, officers there to ensure a "peaceable" removal of property--cannot put reasonable conditions on the removal of said property when the officers know there are firearms in that residence. And in the present case, this is not just "any" general or rumored knowledge. This is knowledge gained by

the same officer who responded to the original assault call where Filippi was "barricaded in the house with a firearm"--the offense that resulted in the no contact order. 1RP 6; 2RP 6; Ex.1. Moreover, Filippi has not cited a single case that states that an officer performing a civil standby, *who had the knowledge these officers had* about the "no firearms" provision, and the existence of firearms inside the residence, cannot lawfully take action to ensure that no weapons are secreted out of the home (during removal of the property). Nor has Respondent found any Washington case that addresses the facts presented here.

In fact, Respondent has not found any express authority in Washington law for a "civil standby." This situation seems analogous to that in another jurisdiction where one Court observed, "[t]he Court finds no express authority in Kansas law for a 'civil standby' or 'civil assist.' The record suggests that [officers] accompanied all or part of the defendants to protect them from violence or interference by plaintiffs, however, and K.S.A. 19-813 authorizes officers to preserve peace." Hall v. Doering 997 F.Supp. 1445, 1450 (D.Kan.,1998).

A comparable Washington statute might be RCW 10.93 *et seq* (Washington Mutual Aid Peace Officers Powers Act); *see also*

definitions at RCW 9A.04.110. Further, a law enforcement officer has been defined as one “whose duty it is to preserve the peace.” McLean v. State Dept. of Corrections 37 Wash.App. 255, 257, 680 P.2d 65, 66 - 67 (1984)(*citing* Black's Law Dictionary 796 (5th rev. ed. 1979)(*citing* Frazier v. Elmore, 180 Tenn. 232, 173 S.W.2d 563, 565 (1943)).

However, Respondent has not located any case involving a civil standby where officers took the actions they took here to ensure that Filippi did not remove his firearms from the home based upon the no contact order provision, and officers' prior knowledge that firearms were in the home. Nor did Respondent find a case even remotely analogous. And none of the cases cited by Filippi address a situation similar to the circumstances presented here.

The present case is simply not analogous to a situation where an officer gains consent by claiming he has a warrant but doesn't, or where officers otherwise "bullied" the defendant into consenting by pinning him against a wall, or where officers asked someone without authority to consent, to give consent. In these types of situations, it is easier to see how a person might feel he had no choice but to consent to a search. None of these circumstances were present here.

Here, given the "no firearms" provision in the no contact order, plus Trooper Hicks' personal knowledge that firearms were in the residence when the Trooper entered the home during the incident that led to the issuance of the no contact order, the officers' admonition to Filippi about inspecting removed containers large enough to hold a firearm was reasonable and lawful. And the trial court made this finding in its order. CP 22-24.

Indeed, the officers' restrictions on what Filippi could take out of the residence (no firearms) also seem entirely consistent with the function of officers performing a civil standby (peaceable removal of property?). Indeed, one can only imagine the possible horrific scenarios that could occur during a "civil" standby when a defendant, known to have recently holed up inside the same residence with a firearm, is allowed to re-enter the residence when officers know there are firearms in the residence (and there is an order prohibiting possession of firearms). Ex.1; 1RP 6; 2RP 6.

The actions of the officers here were proper, reasonable, and entirely consistent with their role to see that items were removed from Filippi's residence in a "peaceable" manner. This Court should affirm denial of the suppression motion.

B. FILIPPI'S CONTENTIONS REGARDING THE BAIL JUMPING CONVICTION AND INSTRUCTIONS ARE CONTRARY TO LAW, UNSUPPORTED BY AUTHORITY, AND BASED ON WILD SPECULATION.

Filippi also claims jury instruction number 12, the "to convict" instruction on the bail jumping charge, relieved the State of its burden. But Filippi's argument contains no citation to on-point authority and in fact he *admits* that this jury instruction *is* supported under current law. Therefore, his argument fails.

This Court need not consider claims that are insufficiently argued, or unsupported by citation to authority. RAP 10.3(a)(5); State v. Elliott, 114 Wash.2d 6, 15, 785 P.2d 440 (1990); State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (refusing to consider issues raised without citation to authority). Furthermore, this Court is "not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn.App. 907, 911 n. 1, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)); State v. Collins, 152 Wn.App. 429, n.27 440, 216 P.3d 463 (2009)(quoting Palmer v. Jensen, 81 Wn.App. 148, 913 P.2d 413 (1996).

For the first time on appeal, Filippi takes exception to jury instruction number 12--the "to convict" instruction for bail jumping.

In a wildly speculative argument that is utterly unsupported by any on-point authority-- complete with an "it-depends-on-what-the-definition-of- 'a'- is" argument--Fillipi claims jury instruction 12 relieved the State of its burden. Brief of Appellant 23-26. Fillipi argues that Instruction number 12 "was facially confusing in that it permitted the jury to find Filippi guilty even if it was not convinced he ever had notice of the date of the court hearing he allegedly missed." Brief of Appellant 12.

Not only is Filippi's argument not supported by authority, he *admits* that the language of instruction 12 is in fact the language of the statute, and that its validity is supported by current case law. Brief of Appellant 24, and law cited therein. Nonetheless, Filippi launches into a twisted, fanciful argument filled with "could haves" and "may haves." *Id.* Filippi speculates that instruction number 12 "*could have*" caused various untenable scenarios in which "the jury may have" or "the jury could have" or "the jury may have gone on to reason. . . ." *Id.* 25. Filippi claims all of these "may haves" come about because the interpretation of Instruction number 12 "depends on what the definition of 'a' is." This argument is, frankly, unfathomable.

In contrast, Instruction number 12 as submitted in this case, mirrors the statute, and contains the language recommended in a current Washington Pattern jury instruction, and case law. RCW 9A.76.170; WPIC 120.41; State v. Downing, 122 Wn.App. 185, 192, 93 P.3d 900 (2004). Respondent is not aware of a single Washington case that has dissected this bail jumping instruction down to "what the meaning of 'a' is" and held that the instruction therefore improperly allows the jury to convict on "shoddy and incomplete proof of the elements of the offense." Brief of Appellant 24. Nor does Filippi cite any such cases. In fact, as even Filippi acknowledges, the law supports the instructions given in this case. Accordingly, there is no error in Instruction number 12 and this Court should affirm.

C. FILIPPI HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.

Nor is Filippi's claim that his trial counsel was ineffective for failure to object to the "no firearms" provision in the no contact order persuasive. Filippi also faults his trial counsel for failing to object to Instruction number 12, and for failing to move to dismiss the bail jumping charge at the end of the State's case for insufficient evidence. Brief of Appellant 28. These arguments all fail, mainly

because Filippi cannot show he was prejudiced by his counsel's alleged deficient performance.

Filippi's claim of ineffective assistance of counsel is reviewed *de novo*, based on the record below. State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995). Great judicial deference is given to trial counsel's performance and the analysis begins with a strong presumption that counsel was effective. State v. Townsend, 142 Wash.2d 838, 843, 15 P.3d 145 (2001); McFarland, 127 Wash.2d at 335. Only "a clear showing of incompetence" will overcome this presumption of effectiveness. State v. Varga, 151 Wash.2d 179, 199, 86 P.3d 139 (2004) (citing State v. Piche, 71 Wash.2d 583, 590-91, 430 P.2d 522 (1967), *cert. denied*, 390 U.S. 912, 88 S.Ct. 838, 19 L.Ed.2d 882 (1968)).

To succeed on an ineffective assistance of counsel claim, Filippi must show (1) his attorney's conduct falls below a minimum objective standard of reasonableness and (2) there is a reasonable probability that, but for the attorney's deficient performance, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993); Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Moreover, "If it is easier to dispose of an ineffectiveness

claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697(emphasis added). Furthermore, " 'not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.' " State v. West, 139 Wn.2d 37, 46, 983 P.2d 617 (1999), *quoting Strickland*, 466 U.S. at 693.

"Failure to Properly Interpret" The District Court Order

Filippi's counsel was not ineffective for "failing to interpret" the District Court order for the exact same reasons already discussed above in Section A of this response. Again, contrary to Filippi's apparent "x-ray vision"--it is not "apparent from even a cursory inspection of the document" that this order "did not preclude Filippi from possessing firearms." Brief of Appellant 28. This claim is not supported by anything contained in the record of the suppression hearing. 1RP 2-45. To the contrary, Trooper Hicks testified that before going out to the residence for the civil standby, he "reviewed" the no contact order, and that it was the same order shown to him in court at the suppression hearing, and that it contained a provision stating Filippi could not possess firearms. 1RP 5,6; Ex.1.

Indeed, it simply strains credulity to claim now that the "no firearms" provision in this no contact order was so obviously crossed out or voided that its "voidness" all but jumped out from the page. Defense counsel surely cannot be expected to object to something that is not apparent to anyone who looked at this order--except, of course, for appellate counsel. Even more offensive to Respondent is Filippi's implied allegation that the trial prosecutor intentionally misled the court regarding the "no firearms" provision in the no contact order. Brief of Appellant 28 (commenting on the "indefensible assertion by the State that the no contact order included a prohibition against possessing firearms"). This comment is irresponsible, unsupported by the record, should be stricken from Appellant's brief.

But the bottom line here is that Filippi has not shown that his trial counsel was ineffective for allegedly "failing to see" what (in reality), is not "obvious" or "clear" on the face of the no contact order. And, it is apparent from the trial court's oral ruling that it did not see any defect in the order either, and its discussion also at least infers that the existence of the "no firearms" prohibition in the order was to be expected--given the nature of the underlying

offense. 1RP 44. Filippi's claim of ineffective assistance on this basis fails .

Failure to Object to Instruction No. 12

Filippi's claim that his counsel was ineffective for not objecting to Instruction number 12 fails for the same reasons his entire argument with regard to this instruction fails, as previously set out in Section B of this brief. Furthermore, his trial counsel cannot be faulted for failing to object to a pattern jury instruction that is, even by Filippi's admission, currently supported by the law.

Instruction number 12 is a standard, Washington Pattern Jury Instruction. See, 11A Washington Practice, WPIC 120.41. Our Courts have considered whether counsel was ineffective when proposing a standard WPIC. State v. Studd, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999). In Studd, 137 Wash.2d at 551, the Court determined that counsel could not be faulted for requesting a then-unquestioned WPIC, and concluded that counsel's performance was not deficient.

Although this instruction was not necessarily "requested by" Filippi's trial counsel, he surely cannot be found deficient for failing to object to a pattern jury instruction that had not been "questioned" under any case that either Filippi or Respondent has found.

Accordingly, similar to the outcome of this claim in Studd, Filippi's trial counsel was not deficient for failing to object to an instruction that was not "objectionable" under the law. See *also*, State v. Kylo 166 Wash.2d 856, 866, 215 P.3d 177 (2009). Furthermore, Filippi cannot show that his trial counsel's failure to object to this pattern instruction prejudiced him because his entire argument regarding the "flaw" in this instruction is "novel" to say the least, and is unsupported by citation to on-point authority. See previous section.

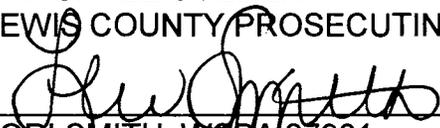
Trial counsel is not ineffective for failing to make "novel" arguments. Indeed, many state and federal cases have concluded that an attorney's failure to raise novel legal theories or arguments is not ineffective assistance. See, e.g., Anderson v. United States, 393 F.3d 749, 754 (8th Cir.2005) ("[c]ounsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective"); Haight v. Commonwealth, 41 S.W.3d 436, 448 (Ky.2001) ("while the failure to advance an established legal theory may result in ineffective assistance of counsel under Strickland, the failure to advance a novel theory never will"); People v. Reed, 556 N.W.2d 858 (Michigan 1996) ("counsel's performance cannot be deemed deficient for failing to advance a novel legal argument"). This Court should agree with the reasoning of these Courts and

Filippi's other arguments have merit, his trial counsel cannot be ineffective for failing to make the same meritless arguments to the trial court. Accordingly, Filippi's convictions and sentence should be affirmed in all respects.

RESPECTFULLY SUBMITTED THIS 2nd day of August, 2010.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

By:

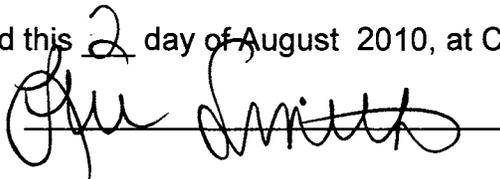

LORI SMITH, WSPA 27961
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Declaration of Service

The undersigned certifies that a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows:

Christopher Gibson
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1908 E. Madison Street
Seattle, WA 98122

Dated this 2 day of August 2010, at Chehalis, Washington.



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