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DIVISION II

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STATE OF WASHINGTON
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No. 40914-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joseph Hudson,

Appellant.

Grays Harbor County Superior Court Cause No. 09-1-00172-6

The Honorable Judge Mark McCauley

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES..... iii

ARGUMENT.....5

I. **The trial judge did not find that Mr. Hudson made a knowing, intelligent, and voluntary waiver of his rights, and did not find that his statements were voluntary.....5**

II. **Mr. Hudson was arrested without probable cause.....8**

A. The error may be raised for the first time on review...8

B. The fruits of Mr. Hudson’s unlawful arrest should have been suppressed.....10

III. **The illegally recorded phone conversation should not have been introduced at trial.....12**

IV. **The evidence was insufficient to establish the validity and admissibility of Mr. Hudson’s blood test results...14**

V. **Mr. Hudson was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.15**

VI. **Mr. Hudson’s exceptional sentence violated his Fourteenth Amendment right to due process because the evidence was insufficient to prove that he displayed an egregious lack of remorse.16**

CONCLUSION16

TABLE OF AUTHORITIES

FEDERAL CASES

Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).....5, 6

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)5, 6, 8

U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).....9

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....11

WASHINGTON STATE CASES

Coluccio Constr. v. King County, 136 Wash.App. 751, 150 P.3d 1147 (2007).....12

In re Pullman, 167 Wash.2d 205, 218 P.3d 913 (2009)6, 8, 12, 15

State v. Armenta, 134 Wash.2d 1, 948 P.2d 1280 (1997).....7

State v. Grande, 164 Wash.2d 135, 187 P.3d 248 (2008)10

State v. Modica, 164 Wash. 2d 83, 186 P.3d 1062 (2008)13

State v. Nguyen, 165 Wash.2d 428, 197 P.3d 673 (2008)9, 15

State v. Pruitt, 145 Wash.App. 784, 187 P.3d 326 (2008)5

State v. Russell, 171 Wash.2d 118, 249 P.3d 604 (2011)9, 15

State v. Williams, 94 Wash.2d 531, 617 P.2d 1012 (1980)12, 14

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V5

U.S. Const. Amend. XIV5, 15, 16

Wash. Const. Article I, Section 79

WASHINGTON STATE STATUTES

RCW 9.73.03012, 14

RCW 9.73.05012

OTHER AUTHORITIES

CtR 3.5.....5

RAP 1.2.....9, 14, 15

RAP 2.5.....8, 9, 15

ARGUMENT

I. THE TRIAL JUDGE DID NOT FIND THAT MR. HUDSON MADE A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF HIS RIGHTS, AND DID NOT FIND THAT HIS STATEMENTS WERE VOLUNTARY.

An accused person's custodial statements are inadmissible unless the prosecution proves the person made a knowing, intelligent, and voluntary waiver of the right to remain silent and the right to counsel. U.S. Const. Amend. V; U.S. Const. Amend. XIV; *Miranda v. Arizona*, 384 U.S. 436, 444-445, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The prosecution must also satisfy a voluntariness test imposed by the due process clause. U.S. Const. Amend. XIV; *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

In this case, the trial judge did not find that Mr. Hudson made a knowing, intelligent, and voluntary waiver of his right to remain silent and his right to counsel.¹ CP 3-4. Nor did the court find that the prosecution had satisfied the due process voluntariness test. CP 3-4.

¹ The court's initial oral ruling indicated that his statements were "freely voluntarily given after he was read his right to remain silent and talked." RP (3/12/10) 6. However, this oral ruling was superseded by the written findings and conclusions. CrR 3.5(c); see *State v. Pruitt*, 145 Wash.App. 784, 797, 187 P.3d 326 (2008). Furthermore, the oral ruling does not indicate that any implied waiver was knowing and intelligent, critical factors in light of Mr. Hudson's obvious intoxication. RP (1/8/10) 20; RP (6/2/10) 442; RP (6/3/10) 175-176.

Because the court's findings did not support admission of Mr. Hudson's statements, the statements should not have been admitted at trial. *Miranda*, at 444-445; *Dickerson*, at 434. Respondent argues that Mr. Hudson made an implied waiver, focusing on the fact that he spoke to police after being provided his rights. Brief of Respondent, pp. 4-7. Without citation to the record, Respondent erroneously claims that "written findings were entered in this case, specifically stating...that he voluntarily answered questions." Brief of Respondent, p. 6. Respondent also erroneously asserts—again without citation to the record—that "the trial court made a finding, in this case, that the appellant [sic] confession was voluntary." Brief of Respondent, p. 7.²

In fact, the court's written findings do not contain the words "voluntary" or "voluntarily." CP 3-4. Respondent's assertions are not supported by the record.

Respondent does not suggest that the trial court found that any implied waiver was knowing and intelligent. Brief of Respondent, pp. 4-7. The absence of argument on this point may be treated as a concession. *See In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

² *See also* Brief of Respondent, p. 7 ("Inherent in the trial courts [sic] finding that the appellant's statement were [sic] voluntary...")

Furthermore, the words “knowing” and “intelligent” do not appear in any form in the trial court’s findings.³ CP 3-4.

In the absence of *actual* findings of fact and conclusions of law addressing the required topics, Respondent implies that this Court should *infer* that the trial judge *meant to find facts* suggesting a valid implied waiver. Brief of Respondent, pp. 6-7.⁴ But this implied argument flies in the face of the Supreme Court’s admonition: the absence of a finding must be held against the party with the burden of proof. *State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997).

The circumstances in this case—including Mr. Hudson’s obvious intoxication, his injuries, and his general disorientation—suggest that any implied waiver was not knowing, intelligent, and voluntary. These circumstances also undermine any suggestion that his statements were voluntarily made.

³ The trial court came closest to addressing these factors when it noted that Mr. Hudson “stated that he understood” his rights. *See* Finding No. 1 (CP 3), Conclusion No. 2 (CP 4). However, a person’s statement of understanding is different from a finding that the person *actually* understood. The trial court made no finding or conclusion regarding Mr. Hudson’s understanding of his rights. CP 3-4.

⁴ It is worth noting that Respondent does not explicitly make the argument.

Furthermore, the prosecutor's proof suffered from four major deficiencies, as outlined in Appellant's Opening Brief, pp. 18-21.⁵ Respondent does not address these deficiencies, and the absence of argument on these points may be treated as a concession. *See Pullman*, at 212 n.4.

Given the circumstances under which Mr. Hudson's custodial statements were obtained, and the trial court's failure to find that the statements were voluntarily made after a knowing, intelligent, and voluntary waiver of constitutional rights, the statements should not have been admitted at trial. *Miranda*, *supra*. Mr. Hudson's convictions must be reversed. The statements must be suppressed and the case remanded for a new trial. *Id.*

II. MR. HUDSON WAS ARRESTED WITHOUT PROBABLE CAUSE.

A. The error may be raised for the first time on review.

The admission of evidence illegally seized may be challenged for the first time on appeal if it presents a manifest error affecting a constitutional right. RAP 2.5(a)(3). Furthermore, the Court of Appeals

⁵ Although Appellant outlined all four deficiencies in the Opening Brief, the introductory section erroneously stated that "[t]he evidence suffered from three deficiencies." Appellant's Opening Brief, p. 18.

has discretion to review any error raised initially on review. RAP 1.2(a); RAP 2.5(a); *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

In this case, evidence obtained by exploiting an unlawful arrest was admitted at trial in violation of Mr. Hudson's rights under Wash. Const. Article I, Section 7.⁶ The error is manifest because it had practical and identifiable consequences at Mr. Hudson's trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008). Without the unlawfully seized evidence, the state would have been far less likely to obtain a conviction. Even if the error were not considered manifest, review is available under RAP 2.5(a), because the Rules of Appellate Procedure must be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a); *see also Russell*, at 122. For these reasons, Respondent's argument that the issue is not preserved does not bar review in this case.

⁶ Although the unlawful arrest violated Mr. Hudson's rights as well, the admission of unlawfully seized evidence is not itself a constitutional error under the federal constitution. *See U.S. v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Thus, had Mr. Hudson claimed only a federal constitutional violation, he would not be able to argue that the error admitting the evidence was a manifest error affecting his Fourth Amendment right to be free from unreasonable search or seizure.

B. The fruits of Mr. Hudson's unlawful arrest should have been suppressed.

A person may not be arrested absent individualized probable cause. *State v. Grande*, 164 Wash.2d 135, 140, 187 P.3d 248 (2008). An individual who is part of a group of suspects need not wait until further investigation or an associate's confession alleviates suspicion. *Id.* at 146. Thus, for example, police who smell the odor of marijuana emanating from a car may not simply arrest everyone in the car. *Id.*

At the time police arrested Mr. Hudson, they did not have probable cause to believe he'd been the vehicle's driver.⁷ Because the police did not know who had been driving, they arrested Mr. Hudson, Ms. Charles, and Mr. Butler, and obtained blood samples from all three. RP (6/2/10) 43-44. The first time Detective Presba heard any suggestion that Mr. Hudson had been the driver was after the blood draw had already taken place. RP (6/3/10) 261.

These facts were insufficient to provide "a finding of individualized probable cause" that was "particularized with respect to" Mr. Hudson. *Grande*, at 140. Only later did other evidence provide additional arguable grounds for suspecting that he had been the one behind

⁷ Ms. Charles had told an officer that she was the driver, and Mr. Hudson had denied being the driver. RP (1/8/10) 17, 20; RP (6/2/10) 82-83.

the wheel.⁸ While it is understandable that police wanted to obtain blood samples and statements from anyone who might have been the driver, the constitution does not permit warrantless arrests in the absence of probable cause.⁹ *Grande*.

Respondent's contention that Mr. Hudson's "flight" provided a basis for the arrest is a post-hoc rationalization that cannot provide the basis for a finding of probable cause. Brief of Respondent, pp. 8-9. During the chaotic period following the accident, none of the officers believed Mr. Hudson had fled the scene; instead, searchers were dispatched to find him because it was believed he may have been ejected from the car. Even when he appeared, some hours after the accident itself, the police didn't know what to make of his absence. No testimony suggested that he was arrested because he had fled the scene. RP (6/2/10) 41, 64, 68-70, 88, 113, 135, 143150; RP (6/3/10) 173-176.

Because Mr. Hudson was arrested without probable cause, the fruits of the arrest may not be used against him. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). His

⁸ This evidence included Mr. Hudson's own subsequent admissions, the statements of other witnesses, and the forensic evidence which the state argued suggested Mr. Hudson was the driver. RP (6/2/10) 121-155; RP (6/3/10) 171-361.

⁹ Instead of arresting all available suspects, the officers should have sought permission to draw blood, and refrained from taking the suspects into custody prior to questioning.

convictions must be reversed, the evidence suppressed, and the case remanded for a new trial. *Id.*

III. THE ILLEGALLY RECORDED PHONE CONVERSATION SHOULD NOT HAVE BEEN INTRODUCED AT TRIAL.

The Privacy Act requires suppression of any illegally recorded telephone conversation. RCW 9.73.050; *see State v. Williams*, 94 Wash.2d 531, 548, 617 P.2d 1012 (1980). Although Mr. Hudson's Privacy Act rights were not directly violated, under the law he has standing to object to a violation of Ms. Underwood's rights.¹⁰ *Id.*, at 544-546.

In this case, the prosecution introduced a telephone conversation that was recorded without benefit of the announcement required by RCW 9.73.030(3).¹¹ Its introduction violated the plain terms of the Privacy Act. *Williams, supra.*

¹⁰ Respondent does not explicitly dispute this, but implies (without citation to authority) that Mr. Hudson should not be permitted to assert Ms. Underwood's Privacy Act rights. Brief of Respondent, p. 11 ("The appellant attempts to assert [Ms. Underwood's] right of privacy..."). This implied argument is contrary to law. *Williams*, at 544-546. Furthermore, where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

¹¹ Although an announcement was recorded when Ms. Underwood's daughter answered the phone, it was not repeated after Ms. Underwood herself took the phone. CP 42; Exhibits 85 and 86, Supp. CP. Furthermore, the announcement was deficient because it was not made by one of the parties to the conversation, and because it suggested only that recording *might* occur. *See* Appellant's Opening Brief, p. 31. Respondent's failure to address these points may be treated as a concession. *See Pullman*, at 212 n.4.

Respondent erroneously contends that the conversation did not qualify as a “private conversation” because of the recorded announcement made at the beginning of the call, before Ms. Underwood took the phone. Brief of Respondent, p. 10. Respondent relies on *State v. Modica*, 164 Wash. 2d 83, 186 P.3d 1062 (2008).¹² However, *Modica* does not apply. In that case, both parties heard the announcement made at the beginning of the call, and they explicitly discussed the fact that the call was recorded; the Supreme Court held that this was sufficient to defeat any reasonable expectation of privacy. *Modica*, at 88-89. In this case, Ms. Underwood did not answer the phone. She did not hear the initial announcement, and it was not repeated after she took the phone from her daughter. Nor did the parties discuss the possibility that the call might be recorded. CP 42; Exhibits 85 and 86, Supp. CP. Accordingly, the announcement did not defeat Ms. Underwood’s reasonable expectation of privacy, and *Modica* is inapplicable.

Next, Respondent incorrectly suggests that the record is insufficient for review, because “[t]his court does not have the information as to whether the [Ms. Underwood] was informed that the call was being recorded.” Brief of Respondent, p. 11. Respondent is incorrect. Even if

¹² Respondent erroneously refers to the case as *State v. Modicums*. Brief of Respondent, p. 10.

Ms. Underwood were informed (presumably by her daughter) that the call was being recorded, this communication would not satisfy the Act's strict requirements. Under the Act's plain language, consent can be inferred only when a party makes the announcement required under that section and the announcement is recorded. RCW 9.73.030(3). No such announcement was made while Ms. Underwood was on the phone. CP 42; Exhibits 85 and 86, Supp. CP.

Furthermore, if the record is insufficient for review on its merits, the Court should remand the case for a hearing on the issue. This would facilitate the goals of RAP 1.2 (which encourages decisions on the merits) and conserve judicial resources (since the alternative would be for Mr. Hudson to raise the issue in a separate proceeding such as a Personal Restraint Petition).

The recording violated the Privacy Act, and should not have been admitted at Mr. Hudson's trial. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Williams, supra*.

IV. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE VALIDITY AND ADMISSIBILITY OF MR. HUDSON'S BLOOD TEST RESULTS.

The prosecution failed to establish a *prima facie* case for the validity and admissibility of the blood test results. *See* Appellant's Opening Brief, pp. 32-34. Furthermore, the state relied on testimonial

hearsay in its attempt to lay a proper foundation. *See* Appellant's Opening Brief, pp. 34-36. Both errors are of constitutional magnitude, and may be reviewed under RAP 2.5(a)(3) because they had practical and identifiable consequences at trial. *Nguyen, at* 433. Furthermore, even if the issues do not present manifest errors affecting Mr. Hudson's constitutional rights, the Court of Appeals has discretion to decide the case on its merits. RAP 2.5(a); *Russell, at* 122. Finally, if the record is insufficient for review, the Court should remand the case for a hearing, in order to facilitate a decision on the merits and to conserve judicial resources by avoiding a subsequent Personal Restraint Petition. RAP 1.2.

Respondent fails to address the merits of Mr. Hudson's arguments. Brief of Respondent, pp. 12-13. The absence of argument may be treated as a concession. *See Pullman, at* 212 n.4. Accordingly, Mr. Hudson's convictions must be reversed and the case remanded for a new trial, with instructions to exclude the blood test results. *See* Appellant's Opening Brief, pp. 32-36.

V. MR. HUDSON WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Hudson's ineffective assistance claims turn on the merits of the issues already addressed in this brief. Accordingly, Mr. Hudson rests on the arguments set forth above and in the Opening Brief.

VI. MR. HUDSON'S EXCEPTIONAL SENTENCE VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT HE DISPLAYED AN EGREGIOUS LACK OF REMORSE.

Without citation to authority or the record, without reference to Mr. Hudson's arguments, Respondent contends that Mr. Hudson's actions were "simply egregious," and demonstrated "a reprehensible lack of remorse." Brief of Respondent, p. 16.

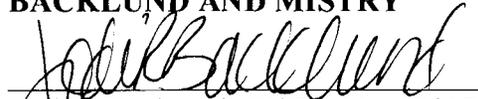
This is assertion; it is not argument. Accordingly, Mr. Hudson rests on the arguments set forth in the Opening Brief.

CONCLUSION

Mr. Hudson's convictions must be reversed and his case remanded for a new trial, with instructions to exclude his statements, his blood test results, and his telephone conversation with Ms. Underwood. In the alternative, the sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on July 27, 2011.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Joseph Hudson, DOC #341716
Stafford Creek Corrections Center
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and to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 27, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 27, 2011.

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