

NO. 46903-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRYSTAL R. COX,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY COURT
The Honorable Greg Gonzales, Judge
Cause No. 13-1-00627-8

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Cox's motions to suppress evidence.
02. In denying Cox's motions to suppress evidence, the trial court erred in entering Conclusions of Law 3, 4, 6 and 8 as fully set forth herein at pages 11-12.
03. The trial court erred in failing to suppress evidence of Cox's refusal to submit to a breath test.
04. In denying Cox's motion to suppress evidence of her refusal to submit to a breath test, the trial court erred in entering Conclusion of Law 7 as fully set forth herein at page 12.
05. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Cox of her constitutional due process right to a fair trial.
06. The trial court erred in denying Cox's motion for a new trial.
07. The trial court erred in miscalculating Cox's offender score.
08. The trial court erred in permitting Cox to be represented by counsel who provided ineffective assistance by failing to object or by inviting error to the miscalculation of her offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in denying Cox's motions to suppress evidence obtained and then

tested during separate searches where the affidavit in each instance failed to establish probable cause?

[Assignments of Error Nos.1 and 2].

02. Whether the trial court erred in refusing to suppress evidence of Cox's constitutional right to refuse to submit to a warrantless breath test?
[Assignment of Errors Nos. 3 and 4].
03. Whether Cox was denied her constitutional due process right to a fair trial where the prosecutor engaged in prejudicial misconduct during closing argument by minimizing the State's burden of proof?
[Assignment of Error No. 5].
04. Whether the trial court erred in denying Cox's motion for a new trial based on prosecutorial misconduct during closing argument?
[Assignment of Error No. 6].
05. Whether the sentencing court miscalculated Cox's offender score by including her prior convictions for vehicular assault and possession of a controlled substance?
[Assignment of Error No. 7].
06. Whether Cox was prejudiced as a result of her counsel's failure to object or by inviting error to the miscalculation of her offender score where the court included her prior convictions for vehicular assault and possession of a controlled substance in determining her score?
[Assignment of Error No. 8].

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C. STATEMENT OF THE CASE

01. Procedural Facts

Chrystal R. Cox was charged by amended information filed in Clark County Superior Court October 31, 2014, with felony driving while under the influence of intoxicants, contrary to RCW 46.61.502(6)(b)(ii). [CP 85].

The court denied Cox's pretrial motion to suppress evidence [CP 200-03], and trial to a jury commenced November 3, the Honorable Greg Gonzales presiding. Following a verdict of guilty, the court denied Cox's motion to arrest judgment or grant a new trial, sentenced her within her standard range, and timely notice of this appeal followed. [RP 650-59; CP 178, 183-194].

02. CrR 3.6 Hearings

02.1 October 14, 2014

On March 31, 2013, Trooper Jeffrey Heath stopped a vehicle driven by Cox for driving in excess of the posted limit of 60 miles an hour, with radar indicating her speed at "83 miles an hour." [RP 15-16]. "(S)he's doing 83. She's pulling away from me." [RP 68]. Cox was "(v)ery slow to respond to (Heath's) emergency lights, but eventually did pull over." [RP 16]. Upon contact with the vehicle, the trooper detected an odor of alcohol and observed that Cox's eyes were

watery and bloodshot and her speech slurred. [RP 16-17, 55]. She was the sole occupant of the vehicle and denied she had been drinking. [RP 16, 55, 57].

Based on these observations, Heath requested Cox submit to some field sobriety tests (FTSs) without informing her that the tests were voluntary. [RP 17-18, 56-60, 72]. He then performed the Horizontal Gaze Nystagmus (HGN) test, which indicated that Cox “had all six clues.” [RP 19]. A disagreement followed concerning additional tests before Trooper Ben Taylor arrived at the scene. [RP 20].

Cox spoke with Taylor and agreed to perform the voluntary FSTs, after which she was placed under arrest by Taylor on suspicion of DUI and read her implied consent warnings for a breath test, which she declined to provide. [RP 21-23, 65, 97, 104]. Taylor admitted that the manner in which he conducted the modified HGN test, which Cox failed, “probably decrease(d) the validity of the tests because that’s not how it is trained [RP 100],” but that Cox “had seven out of eight clues on the walk-and-turn test [RP 102](,)” and stopped the one-leg-stand test on her own. [RP 101].

When questioned during cross-examination regarding his affidavit for probable cause [10/14/14 Pretrial Exhibit 4],¹ Heath admitted he had not provided true and accurate information by failing to disclose that he had not performed the FSTs [RP 71], that Taylor had actually performed the tests [RP 71], and that he (Heath) had not performed the HGN test according to his field training. [RP 72]. Additionally, although in the affidavit he represented that he had “asked Cox to submit to voluntary standardized field sobriety tests [10/14/14 Pretrial Exhibit 4 at 3],” he admitted this was also untrue: he had never told her the tests were voluntary. [RP 72].

An expert for defense testified that Heath and Taylor did not comply with the National Highway Traffic Safety Standards requirements in performing the FSTs. [RP 85-86, 90].

02.2 October 24, 2014

On October 24, the court issued an oral ruling, finding in part that Trooper Heath had probable cause to stop Cox for speeding based on the trooper’s observations or the reading of his speed-measuring device and that there was probable cause to arrest [RP

¹ This is attached hereto as Exhibit “A” for the court’s convenience.

132-33, 143],² but suppressed evidence of Heath's "observations of the HGN test and the walk-and-turn test because it was never conducted [RP 136](,)" in addition to suppressing evidence of the blood draw:

So the Court, based upon the statements offered by Trooper Heath on the witness stand that he did not inform the magistrate regarding Trooper Taylor's involvement regarding FST observations for issuing the search warrant, which appears to have been miscommunication - - the Court will leave it at that - the Court's going to go ahead and suppress the affidavit for the search warrant for the blood [Pretrial Exhibit 4], which also - - then would suppress the subsequent search warrant for blood [Pretrial Exhibit 6]."

[RP 142].

02.3 October 30, 2014

On October 30, after reviewing what the court termed Heath's "misstatement or miscommunication" in his affidavit for probable cause, the court changed direction:

Therefore, this Court will correct itself in the interests of justice. The probable cause affidavit will be admissible if I take out the misstatements or miscommunication by Trooper Heath. The remaining portions of the probable cause affidavit do support the search for the evidence as indicated.

[RP 154].

So, again, the - - Trooper Heath's statements will be excised - - or the miscommunication will be excised, but

² While the court determined that Trooper Heath had probable cause to stop Cox's vehicle, only the lesser standard of reasonable suspicion was required for the stop. State v. Arreola, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012).

the rest of the statement does indicate probable cause existed for the search. That is the only clarification that the Court wishes to make.

[RP 155].

... And as I indicated earlier, I have a duty to correct with respect to my interpretation of the prior order to suppress based upon the fact that Trooper Heath's observations - - although they may have been incorrect, untruthful, and not communicated to Judge Rulli - - they do not defeat the overall purpose of the probable cause affidavit ...

[RP 167].

The court further suppressed the testing of the initial blood draw "based upon the current state of law." [RP 186]. See State v. Martines, 182 Wn. App. 519, 331 P.3d 105, review granted, 339 P.3d 634 (December 3, 2014).

02.4 November 3, 2014

On November 3, the court denied Cox's motion to suppress the results of the testing of blood remaining from the initial draw for lack of probable cause in the declaration [11/03/14 Pretrial Exhibit 2]³ in support of the search warrant for the evidence. [RP 243]. The court reasoned that even if it excised the challenged portions of the affidavit relating to the nonexistent declaration of Trooper Richard Thompson [RP 237], the nonexistent information claimed to have been

³ This is attached hereto as Exhibit "B" for the court's convenience.

received from the prosecuting attorney's office [RP 237], the unattached declaration in support of the initial search warrant [RP 237], and the unattached initial search warrant [RP 237], probable cause existed "based upon statements made by the officer in said declaration, which is Exhibit No. 2." [RP 243].

The officer, as I indicated previously, stated that he's charged with the responsibility for the investigation. He states that he's investigating a DUI under 46.61.502; that the blood - - the blood was previously drawn pursuant to a valid search warrant. Now we're testing the blood on this matter.

I'm going to go ahead and find that there is a causal connection between the first affidavit of probable cause to draw and this affidavit to test the blood ...

[RP 245].

02.4 Written Findings and Conclusions

The court entered the following Findings of

Fact and Conclusions of Law on 3.6 Hearing:

1. Trooper Heath is a Trooper with experience investigating DUI.
2. Trooper Heath came in contact with the defendant on March 31, 2013.
3. Trooper Heath identified the defendant as the same person he stopped on the day in question.

4. Trooper Heath first observed the defendant when he was traveling from sr 500 to I5 south.
5. Trooper Heath observed the defendant traveling in excess of the speed limit.
6. Based on the video of the defendant and Trooper Heath's statement to another Trooper, the defendant's car was pulling away from Trooper Heath and appeared to be travelling in excess of the speed limit.
7. Trooper Heath then activated his front radar - a speed measuring device.
8. The speed measuring device was tested before and after Trooper Heath's shift.
9. Trooper Heath's speed measuring device measured the defendant's speed at 83 mph in a 60 mph zone. Which was visually confirmed by Trooper Heath.
10. Trooper Heath stated that in order for him to be able to allow the defendant to drive home, she needed to do a few tests.
11. Trooper Heath asked the defendant to get out of her car and investigate her for DUI based on his observation or odor of intoxicants, slurred speech, and blood-shot, water eyes.
12. Trooper Heath stated he wanted the defendant to do the tests to see if she was telling the truth.
13. Trooper Heath did not tell the defendant the field sobriety tests were voluntary.

14. Trooper Heath told the defendant that performing the field sobriety tests was her choice and if she did not do them, they would have to make a probable cause determination based on her driving and other observations.
15. Trooper Heath testified that the defendant had six of the six clues on the horizontal gaze nystagmus test.
16. Trooper Heath then demonstrated the walk and turn.
17. Trooper Heath did not observe the defendant doing the walk and turn or one leg stand due to the argumentative nature of the defendant.
18. Trooper Heath called another Trooper to come on scene.
19. Trooper Taylor showed up at the scene.
20. Trooper Heath discussed some information about observations of the defendant with Trooper Taylor.
21. Trooper Taylor tells the defendant that he wanted to determine if the defendant was able to drive.
22. Trooper Taylor did tell the defendant that the SFSTs were voluntary.
23. Trooper Heath was the author of the affidavit fro the search warrant.
24. The defendant was taken Southwest Washington Medical center (sic).

25. Trooper Heath observed two vials of blood taken from the defendant.
26. Trooper Thompson's name appears on the affidavit and Trooper Heath was not sure why his name was on the affidavit.
27. Trooper Heath did not inform the magistrate that Trooper Taylor administered the FSTs.
28. The magistrate may have been lead to believe that Trooper Heath administered the field sobriety tests, which may have been misleading.

CONCLUSIONS OF LAW

1. Trooper Heath had probable cause to pull the defendant over for speeding where determined by his own observations or the reading from the speed measuring device.
2. Trooper Heath's observations of the defendant during the HGN test are suppressed based upon the fact that Trooper Heath did not inform the defendant the test were voluntary.
3. The results and observations made by Trooper Taylor during the SFSTs go to the credibility of the evidence and not its admissibility.
4. Trooper Taylor had the requisite probable cause to conduct his DUI investigation.

5. Under Washington law, the field sobriety tests administered by Trooper Taylor do not constitute a search.
6. The court finds that based on the sobriety tests administered by Troopers Taylor and Heath, probable cause existed to arrest the defendant for DUI.
7. The defendant's refusal to submit to a breath test is not suppressed.
8. The court excises the portion of Trooper Heath's affidavit which may have been misleading and the court finds that probable cause still exist to search the defendant's blood, taking into account the other portions of the affidavit.

[CP 200-03].

03. Substantive Facts: Trial

Trooper Heath testified on direct consistent with his testimony at the CrR 3.6 hearing concerning the stop of Cox's vehicle, his initial contact with her, and her subsequent arrest. [RP 301-08]. A video of these events was recorded by a camera within the trooper's patrol vehicle and was played to the jury. [RP 302-03]. In the video, Trooper Heath is observed saying he wasn't sure if Cox was impaired. [RP 306, 338]. During cross, he asserted that Cox was "argumentative and uncooperative," which he didn't appreciate [RP 331], though he eliminated all reasons for the stop, which occurred at 1:53, other than her

excessive speed. [RP 323-331]. Cox told him she had not been drinking. [RP 330]. She had no trouble exiting her vehicle, understanding his directions and promptly produced her identification. [RP 334, 336]. Heath never observed Cox either trip or stumble from the time of the stop through her arrival at the police station, some 15 minutes after the blood draw at about 5:04-05. [RP 337, 343].

Trooper Taylor, as he did at the CrR 3.6 hearing, testified to administering the standardized field sobriety tests (SFST) on Cox [RP 367-376], again admitting he had compromised the validity of the HGN test by modifying the procedure [RP 394-96], in addition to stating that Cox had stopped the one-leg-stand test on her own [RP 376] and that she had “six of eight clues” on the walk-and-turn test.⁴ [RP 374]. He “made the decision to arrest (Cox) for DUI.” [RP 377].

It was based on the performance of the testing, the observations that I was seeing, the odors that I was smelling, the demeanor of the subject was all taken into consideration. And based on the three standardized field sobriety tests and performance on them, I made the decision to arrest.

[RP 377].

⁴ At the CrR 3.6 hearing, Taylor had testified that Cox had seven of eight clues on the same test. [RP 102].

The toxicology report submitted by the State showed that Cox's blood tested positive for blood ethanol (0.10 grams per 100 milliliters), methamphetamine (0.50 milligrams per liter), and amphetamine (0.06 milligrams per liter). [RP 440, 442]. Her prior judgment and sentence for vehicular assault while under the influence of intoxicating liquor or any drug was admitted without objection. [RP 477-78]. She admitted to drinking three shots of whiskey earlier that morning between 12:50 and 1:30 and to consuming "a small piece" of methamphetamine in her coffee the morning of the previous day. [RP 482-85]. She claimed she was not impaired by this activity. [RP 484, 487].

Keen Meneely, an expert on forensic toxicology called by defense, testified that based on his review of the police reports, the forensic laboratory report, the forensic notes, and testimony, Cox's blood alcohol content was lower than reflected in the toxicology report referenced above because it would not have been absorbed into her blood stream at the time Trooper Heather contacted her. [RP 492, 497-98]. Based on his review of the video of the incident, Cox did not exhibit the clinical signs of a person with a methamphetamine level of .50 milligrams per liter. [RP 500-02].

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D. ARGUMENT

01. THE TRIAL COURT ERRED IN DENYING COX'S MOTIONS TO SUPPRESS EVIDENCE OBTAINED AND THEN TESTED DURING SEPARATE SEARCHES WHERE THE AFFIDAVIT IN EACH INSTANCE FAILED TO ESTABLISH PROBABLE CAUSE.

The Fourth Amendment to the federal constitution and Article I, Section 7 of our state constitution permit the issuance of a search warrant only on a determination of probable cause. State v. Fry, 168 Wn.2d 1, 5-6, 228 P.3d (2010) (citing State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)). Probable cause is established in an affidavit supporting a search warrant by setting forth facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity. State v. Perrone, 119 Wn.2d 538, 551, 834 P.2d 611 (1992); State v. Maxwell, 114 Wn.2d 761, 791 P.2d 223 (1990). The affidavit need not establish proof of this activity, but merely probable cause to believe it may have occurred. State v. Gunwall, 106 Wn.2d 54, 73, 720 P.2d 808 (1986). Support for the issuance of a search warrant is sufficient if a reasonable, prudent person would understand from the facts and circumstances contained in the affidavit that the items sought are connected with criminal activity and will be found in the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 151, 977 P.2d 582 (1999).

An affidavit is evaluated in a commonsense manner with doubts resolved in favor of validity, and with considerable deference being accorded the issuing judge's determination. State v. Partin, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977). The court issuing the warrant is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). While deference is given to the magistrate's ruling, and doubts are resolved in favor of the warrant's validity, State v. Wilkie, 55 Wn. App. 470, 476, 778 P.2d 1054 (1989), the deference accorded the magistrate is not boundless. State v. Maxwell, 114 Wn.2d 770. The review of the search warrant's validity is limited to the information the magistrate had when the warrant initially issued, that is, the four corners of the document. Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S.Ct. 1509, 1511 n.1 (1964); State v. Stevens, 37 Wn. App. 76, 80, 678 P.2d 832, review denied, 101 Wn.2d 1025 (1984). A magistrate may not issue a search warrant based on bare "suspicion or conjecture," State v. Chenoweth, 160 Wn.2d 454, 476, 158 P.3d 595 (2007), or upon "inference alone." State v. Lyons, 174 Wn.2d 354, 364, 275 P.3d 314 (2012). Probable cause determinations are reviewed de novo. In re Det. of Peterson, 145 Wn.2d 789, 801-02, 42 P.3d 952 (2002).

An affidavit that fails to establish probable cause for a search is invalid, and all evidence obtained as a result of the illegal search is tainted and must be suppressed. See State v. Huft, 106 Wn.2d 206, 720 P.2d 838 (1986); State v. Ridgway, 57 Wn. App. 915, 790 P.2d 1263 (1990).

Failure to suppress evidence in violation of a defendant's Fourth Amendment right is constitutional error and presumed prejudicial, and the State bears the burden to prove otherwise. State v. Tan Le, 103 Wn. App. 354, 367, 12 P.3d 653 (2000). Constitutional error is harmless unless the State can show beyond a reasonable doubt that any rational jury would have arrived at the same result without the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 144 L. Ed. 2d 35, 119 S.Ct. 1827 (1999)).

01.1 Initial Blood Draw

The test for probable cause when information is omitted or misrepresented in an affidavit in support of search warrant, as happened here, is whether the affidavit remains sufficient to support a finding of probable cause with the omissions inserted and/or the misrepresentations redacted. State v. Garrison, 118 Wn. 2d 870, 873, 827 P.2d 1388 (1992). On October 24, 2014, the trial court initially suppressed the blood draw because of Trooper Heath's misrepresentations and omissions in his affidavit in support of search

warrant [10/14/14 Pretrial Exhibit 4], as previously detailed supra at page 5. On October 30, the court rhetorically acknowledged that statements in Trooper Heath's affidavit may have been untruthful. [RP 167].

“Did you tell the magistrate you did not do the HGN according to the field training?”

“No.”

“Never told her the field - - FSTs were voluntary? Did you tell the magistrate you did not perform the FST?”

“No. Did not indicate I did one, correct.”

“Did you tell the magistrate Trooper - - did you tell the magistrate that Trooper Taylor performed the FSTs.”

The answer was “no,” but he does state in the probable cause affidavit that he did.

....

[RP 153].

Nevertheless, the court found that the remaining portions of the affidavit supported probable cause for issuance of the warrant, finding “most importantly that Trooper Taylor conducted the FSTs; and that she (Cox) was arrested for DUI, handcuffed, searched, and placed into the back of the affiant's (Heath's) vehicle.” [RP 155]. This reasoning is misplaced.

The affidavit in support of search warrant is six pages in length, dropping the cover and signature pages leaves four. [10/14/14 Pretrial

Exhibit 4]. Heath's reason for stopping Cox is not at issue. What remains after redaction and inclusion of Trooper Heath's "incorrect, untruthful, and not communicated" observations, does not support probable cause. It simply states that Heath detected a strong odor of intoxicants and observed that Cox's eyes were watery and her speech slurred. [10/14/14 Pretrial Exhibit 4 at 3]. While the affidavit sets forth Trooper Heath's training and experience [10/14/14 Pretrial Exhibit 4 at 2-3], it makes no mention of Trooper Taylor's, which is significant since Heath asserts that Cox was arrested solely on his (Heath's) "training and experience." [10/14/14 Pretrial Exhibit 4 at 4]. Nor was the magistrate made aware that Taylor and not Heath had performed the FSTs, being informed only that Cox had said she wanted Taylor to administer the tests and that she was later arrested after completing the tests. [10/14/14 Pretrial Exhibit 4 at 4]. Under these limited facts it cannot be concluded, as the court did in its written Conclusions of Law 3, 4, and 6, that Taylor's observations were of any consequence, or that he had "probable cause" to investigate, or that probable cause existed to arrest Cox for driving under the influence. And while Heath further represented to the magistrate that based on his "observations of Cox's erratic driving and the failure of the standardized filed sobriety tests Cox was placed under arrest for driving under the influence [10/14/14 Pretrial Exhibit 4 at 4](,)" no evidence of erratic

driving was presented and there was a lack of evidence that Heath observed Taylor performing the FSTs.

Based on this record, restricted solely to the four corners of the affidavit in support of search warrant, State v. Stevens, supra, it cannot be logically concluded that the affidavit for search warrant remains sufficient to support a finding of probable cause with Heath's omissions inserted and/or his misrepresentation redacted. State v. Garrison, supra.

01.2 Second Blood Test⁵

The same legal requirements vis-à-vis the affidavit for search warrant for the initial blood draw apply here and shall not be needlessly repeated. After redacting from the affidavit in support of search warrant [11/03/14 Pretrial Exhibit 2], as the court did, the nonexistent declaration of Trooper Richard Thompson [RP 237], the nonexistent information claimed to have been received from the prosecuting attorney's office [RP 237], the unattached declaration in support of the initial search warrant [RP 237], and the unattached initial search warrant [RP 237], what remains does not establish probable cause to test the blood remaining from the initial draw, given this court is

⁵ Of course, if this court suppresses the initial blood draw, there would be no blood to test and no further argument required.

required to consider only what remains in the affidavit that was before the issuing magistrate.

In the affidavit, Heath asserts that the blood was drawn pursuant to a search warrant and that the declaration for same “is attached to this declaration and is incorporated herein.” [11/03/14 Pretrial Exhibit 2 at 3]. This in addition to false assertions of incorporation of a declaration of Trooper Richard Thompson and information received from the prosecuting attorney’s office. [11/03/14 Pretrial Exhibit 2 at 2]. And while the court appears to rely heavily on the fact that “the blood was previously drawn pursuant to a valid search warrant [RP 245], neither the warrant nor any of the other alleged incorporated documents were attached to Heath’s affidavit or in front of the issuing magistrate. It is true that Heath asserted he had probable cause to believe there was evidence of the crime of driving under the influence within the vials of blood sought to be tested. It is also true there were insufficient facts in Heath’s affidavit setting forth probable cause for this belief, with the result that the blood test should be suppressed.

01.3 Conclusion

Based on the above, there is insufficient evidence to support the court’s Conclusion of Law 8 that probable cause

existed to search Cox's blood. This court should suppress the evidence and dismiss Cox's conviction for driving under the influence of intoxicants.

02. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE OF COX'S REFUSAL TO SUBMIT TO A BREATH TEST.

Prior to trial, Cox moved to suppress evidence of her refusal to submit to a breath test, arguing that refusal to consent to a warrantless search may not be presented as evidence of guilt. [RP 115-16]. The trial court disagreed, ruling that "the refusal, according to statute,⁶ that still comes in as evidence." [RP 145]. At trial, when asked if Cox agreed to do a breath test, Trooper Hearth responded that "[s]he did not." [RP 307]. Similarly, Trooper Taylor stated: "I offered her the portable breath test, and she refused." [RP 376]. In closing, the prosecutor reminded the jury of this: "You heard testimony from Trooper Heath that he read her her warnings for breath and she refused to provide a breath test." [RP 570].

A criminal defendant's assertion of her constitutional right to refuse to a warrantless search, as happened here, cannot be used as evidence of her guilt. State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010); State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); State v.

⁶ RCW 46.20.308(2)(b) states: "If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial"

Gauthier, 174 Wn. App. 257, 267, 298 P.3d 126 (2013). Use of the evidence for this purpose constitutes manifest constitutional error. United States v. Prescott, 581 F.2d 1343, 1351 (9th Cir. 1978); State v. Jones, 168 Wn.2d at 725; State v. Burke, 163 Wn.2d at 217.

In State v. Gauthier, Division I of this court reversed Gauthier's conviction for second degree rape, holding that the trial court had erred in allowing evidence of Gauthier's refusal to submit to a warrantless DNA test as evidence of his guilt. Gauthier, 174 Wn. App. at 267.

Both the United States and Washington Supreme Courts have held that defendants' exercise of their Fifth Amendment right to silence may not be introduced against them at trial as substantive evidence of guilt. (citations omitted). To hold otherwise would allow courts to penalize individuals for lawfully exercising a constitutional privilege. Griffin, 360 U.S. at 614, 85 S.Ct. 1229; Burke, 163 Wn.2d at 212, 221, 181 P.3d 1.

Gauthier, 174 Wn. App. at 264.

Exercising the right to refuse consent to a warrantless search may have nothing to do with hiding guilt. The jury should not be allowed to infer guilt in such ambiguous circumstances, particularly involving the exercise of a constitutional right.

Gauthier, 174 Wn. App. at 265.

Likewise, in State v. Burke, our Supreme Court reversed Burke's conviction for third degree rape of a child where the State had introduced

evidence of Burke's Fifth Amendment right to refuse to speak with police as evidence of his guilt. Burke, 163 Wn. 2d at 725.

As set forth above, the State introduced evidence of Cox's refusal to submit to the warrantless breath test twice at trial in addition to mentioning it at sentencing. This evidence of Cox's refusal did not impeach any of her testimony on direct examination nor that of her witness Keen Meneely. Thus it can be reasoned that the prosecutor elicited and commented on this testimony for the sole purpose of encouraging the jury to infer guilt based on Cox's refusal to submit to the breath test.

Given that the case as to whether Cox was under the influence or affected by intoxicants while driving the vehicle was neither clear-cut nor overwhelming, the admission of her constitutional right to refuse to submit to the warrantless breath test, as in Burke and Gauthier, cannot be deemed harmless, for there is no assurance beyond a reasonable doubt that any reasonable jury would have reached the same result absent the admission of Cox's refusal, Burke 163 Wn.2d at 222, with the result that this court must reverse and grant Cox a new trial. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

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03. THE PROSECUTOR ENGAGED IN
PREJUDICIAL MISCONDUCT BY
MINIMIZING THE STATE'S BURDEN
OF PROOF.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A criminal defendant's right to a fair trial is denied where there is an unsuccessful objection to the prosecutor's improper comments and there is a substantial likelihood the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

A prosecutor's obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the

fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Although a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Hoffman, 116 Wn.2d at 94-95, it is misconduct of the most flagrant degree to minimize the burden of proof and thereby encourage the jury to convict based on something short of proof beyond a reasonable doubt, which occurred in this case. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997); State v. Davenport, 100 Wn.2d at 763. proficiency

During rebuttal argument, in addressing the results of the blood test [RP 611], the prosecutor argued to the jury:

He (Cox's attorney) talked about competence of the blood test. You'll get this back there with you, and it states on it there's a 99.7 percent competence level. Most reasonable explanation is usually the correct one.

[RP 611]. When defense counsel immediately objected—“This argument is lowering the State’s burden”—the court responded:

So noted. It’s a reasonable doubt. They have the information in front of them. You may argue beyond a reasonable doubt, Counsel.

[RP 611]. The prosecutor then completed his argument:

He said you’ll get that instruction that says a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. But if from such consideration you have an abiding belief in the truth of the charge, you’re satisfied beyond a reasonable doubt.

[RP 611].

It was clearly misconduct for the prosecutor to argue to the jury that when deciding between competing arguments, the simpler one is the better. This, of course, is the principle of Occam’s Razor, where the appeal to simplicity seems to be more about shifting the burden of proof, and less about adhering to the legal standard of beyond a reasonable doubt. The prosecutor’s argument, in essence, minimized the State’s burden of proof to a level of asking the jury to render a verdict based on the most reasonable explanation with no regard for the required standard of proof.

In State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 10902 (2010), even though the jury, as here, was correctly instructed on the State’s burden of proof and that lawyers’ statements are not evidence, this court, while affirming since the

misconduct was not sufficiently prejudicial, held that the State committed misconduct by comparing its beyond a reasonable doubt burden of proof to everyday common decisions in which one might choose to act or refrain from acting, reasoning this was improper because it minimized the importance of the reasonable doubt standard and the jury's role in determining whether the State had met its burden. Anderson, 153 Wn. App. at 431. Similarly, in State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011), where the prosecutor trivialized the State's burden of proof by arguing that an abiding belief was like knowing what a scene depicted in a puzzle looked like prior to putting in the last pieces, this court reversed, reasoning in part that the State had impermissibly quantified the level of certainty required to satisfy its burden of proof. Johnson, 158 Wn. App. at 685-86.

Given that the presumption of innocence is the bedrock upon which the criminal justice stands, and because this presumption is defined by the reasonable doubt instruction, "it can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve(,)" State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007), which is what happened here. Because the State's case against Cox was neither clear-cut nor overwhelming, and because it "was controverted, the prejudicial impact of the misconduct is magnified."

State v. Perez-Mejia, 134 Wn. App. 907, 919, 143 P.3d 838 (2006). The jury sent out two questions regarding the results of the blood test with reference to the blood alcohol level [CP 96-97], thus indicating the court's ruling was insufficient to cure the prosecutor's improper argument, which pressed the jury to reach a verdict based on its determination of the competency of the blood test because the simplest answer is the best.

Based on this record, reversal is required, for there is a substantial likelihood that the prosecutor's comments affected the jury's verdict. The prosecutor's misconduct minimized the State's burden of proof and in the process ensured that Cox did not receive a fair trial.

Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient....

In re Glassman, 175 Wn.2d 696, 711, 286 P.3d 673 (2012).

04. THE TRIAL COURT ERRED IN
DENYING COX'S MOTION
FOR A NEW TRIAL BASED ON
PROSECUTORIAL MISCONDUCT
DURING CLOSING ARGUMENT.

A trial court's decision on a motion for arrest of judgment/new trial is reviewed under the abuse of discretion standard.

State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981); State v.

Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). An abuse of discretion occurs when a trial court makes a decision not supported by law. State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000).

In denying Cox's motion for a new trial based on prosecutorial misconduct during closing argument, as set forth in the preceding section, the court ruled as follows:

With respect to the new trial, specifically, Counsel, I believe you're referring to the statement made by State's prosecution in closing statement when he made reference to reasonable inference or reasonable connection. You instantly or within seconds of that statement objected to that statement, and this Court advised the jury that the standard was beyond a reasonable doubt and that they would be instructed to the same order that we had provided them the instruction, something to that effect.

I believe that if there was any mistake, it was inadvertent with respect to any reasonable inference from the admissions made by your client on the witness stand that three shots plus the meth, that the speed of 83 miles an hour in a 60 zone, the time of day, I believe that's what Counsel was referring to, but you objected and I cured it by indicating that the standard is beyond a reasonable doubt. So on that basis, I would also deny a motion for a new trial.

[RP 655-56].

It is difficult to reconcile Cox's motion for a new trial based on prosecutorial misconduct [CP 204-05] and the related closing argument [RP 611] with the court's above recollection and ruling. The same argument in the preceding section relating to prosecutorial misconduct

during closing is applicable and hereby incorporated. Point is, the misconduct was not cured by inadvertence, and the prosecutor's improper comment related to the competency of the results of Cox's blood test and not, as indicated by the court above, Cox's trial testimony. Be that as it may, the court's ruling during closing argument did not cure the misconduct for the reasons argued in the preceding section, with the result that this court should remand for a new trial.

05. THE SENTENCING COURT MISCALCULATED COX'S OFFENDER SCORE BY INCLUDING HER PRIOR CONVICTIONS FOR VEHICULAR ASSAULT AND POSSESSION OF A CONTROLLED SUBSTANCE.

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). As a matter of law, where a standard range sentence is given, the amount of time imposed may not be appealed. RCW 9.94A.585(1); State v. Friederich-Tibbets, 123 Wn.2d 250, 866 P.2d 1257 (1994); State v. Mail, 121 Wn.2d 707, 710, 854 P.2d 1042 (1993). An appellant, however, may challenge the procedure by which a sentence within the standard range was imposed. Mail, at 710-11; State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986).

In calculating Cox's offender score at 3, the sentencing court included the following criminal history: 2004 conviction for vehicular assault (2 points) and 2008 conviction for possession of a controlled substance (1 point). [CP 186, 194]. With a resulting standard range of 15 to 20 months, the court imposed a sentence of 18 months. [CP 187].

Former RCW 9.94A.525(2)(e)⁷ applies here:

If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.5604(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior convictions within ten years" as defined in RCW 46.61.5055.

The scoring for this case is controlled by subsection (2)(e). State v. Morales, 168 Wn. App. 489, 493, 278 P.3d 668 (Div. I 2012); State v. Jacobs, 176 Wn. App. 351, 360, 308 P.3d 800 (Div. II 2013).⁸ Under this

⁷ Amendments to this statute, which were effective September 18, 2013, were not in effect at the time of Cox's offense March 31, 2013.

⁸ Cf. State v. Hernandez, ___ Wn. App. ___, 342 P.3d 820, 822-23 (Div. III 2015) (in determining offender score for felony DUI, former RCW 9.94A.525(2)(e) does not preclude sentencing court from assigning points for prior offenses not among the limited classes of offenses listed in subsection 2(e)).

subsection, only prior felony DUI convictions, misdemeanor DUI convictions (as serious traffic offenses) and felony physical control convictions are to be included in determining the offender score. The definition of “serious traffic offense” does included vehicular assault. RCW 9.94A.030(44).

Neither of Cox’s prior convictions for vehicular assault or possession of a controlled substance should have been counted in determining her offender score because neither was among the classes of prior offenses listed in former RCW 9.94A.525(2)(e), with the result that the matter must be remanded for resentencing without consideration of these prior convictions.

06. COX WAS PREJUDICED AS A RESULT OF HER COUNSEL’S FAILURE TO OBJECT OR BY INVITING ERROR TO THE MISCALCULATION OF HER OFFENDER SCORE WHERE THE COURT INCLUDED HER PRIOR CONVICTIONS FOR VEHICULAR ASSAULT AND POSSESSION OF A CONTROLLED SUBSTANCE IN DETERMINING HER SCORE.⁹

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the

⁹ While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to

review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

Should this court determine that Cox's attorney waived the issue regarding the miscalculation of her offender score by failing to object to the miscalculation or by inviting error by asserting to the calculation of the score, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to object or invite error for the reasons argued in the preceding section. The prejudice is self-evident: but for counsel's failure to object or by inviting error, Cox was sentenced based on an incorrect offender score, which rendered a higher standard range. Remand for resentencing should follow.

E. CONCLUSION

Based on the above, Cox respectfully requests this court to reverse her conviction and/or remand for resentencing consistent with the arguments presented herein.

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DATED this 22nd day of May 2015.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

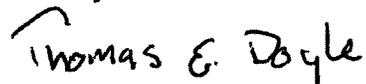
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Anne M. Cruser
Prosecutor@Clark.wa.gov

Chrystal R. Cox
7816 NE 156th Place
Vancouver, WA 98682

DATED this 22nd day of May 2015.



THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

Exhibit "A"

[10/14/14 Pretrial Exhibit 4]

STATE OF WASHINGTON
CLARK COUNTY SUPERIOR COURT

STATE OF WASHINGTON,
Plaintiff,
v.
CHRystal ROSE COX,
Defendant.

NO. 13-004217
AFFIDAVIT IN SUPPORT OF SEARCH
WARRANT FOR EVIDENCE OF A CRIME,
TO WIT:
 DRIVING WHILE UNDER THE
INFLUENCE, RCW 46.61.502
 PHYSICAL CONTROL OF VEHICLE
WHILE UNDER THE INFLUENCE,
RCW 46.61.504
 DRIVER UNDER TWENTY-ONE
CONSUMING ALCOHOL,
RCW 46.61.503

I, Jeffrey J. Heath, being duly sworn and upon oath, depose and say--

I am a duly appointed, qualified, and acting law enforcement officer for the:

- Washington State Patrol
- _____ County Sheriff's Department.
- _____ Police Department.

I am charged with responsibility for the investigation of criminal activity occurring
Clark County,
within Washington, and have probable cause to believe, and do, in fact, believe, that

COPY

evidence of the crime(s) of:

- Driving While under the Influence, RCW 46.61.502
- Physical Control of Vehicle While under the Influence, RCW 46.61.504
- Driver under Twenty-one Consuming Alcohol, RCW 46.61.503
- _____

is concealed in, about or upon the person of CHRYSTAL ROSE COX, who is currently located within the County of CLARK, my belief being based upon information acquired through personal interviews with witnesses and other law enforcement officers, review of reports and personal observations, said information being as further described herein--

My training and experience regarding investigations of the above crime(s) is as follows:

Your Affiant's belief is based upon the following facts and circumstances:

Currently your Affiant is a duly commissioned Trooper with the Washington State Patrol, assigned to the Field Operations Bureau, Vancouver Detachment, in the County of Clark, State of Washington.

Your Affiant has been employed with the Washington State Patrol since December 01, 2006. From December 1, 2006 to July 2007, your Affiant was employed as a Trooper Cadet and was assigned to the Washington State Patrol Academy in Shelton, WA. In July 2007, your Affiant was commissioned as a Trooper and assigned to District 5, Vancouver. Your Affiant has received over 100 hours of additional hours of criminal interdiction training since graduating from the Washington State Patrol Academy, including 20 hours of Advanced Roadside Impaired Driving Enforcement training. Your Affiant has received basic criminal investigation training from the Washington State Patrol Basic Trooper Academy, where he was trained in the recognition by sight and odor of controlled substances, to include marijuana, hashish, heroin, methamphetamine, cocaine, and alcohol. Your Affiant has made over 300 arrests for alcohol related crimes.

Based on your Affiant's training and experience, your Affiant knows how to identify driver's that have consumed alcohol and operate a motor vehicle while under the influence of alcohol. Your Affiant has recently received refresher training in the administration of standardized field

sobriety tests and the administration and use of the state certified BAC data master in March 2013.

The facts supporting the initial contact with CHRYSTAL ROSE COX are as follows:

On March 31, 2013 your Affiant was patrolling southbound I-5 from SR 500 and observed a white Nissan Altima traveling southbound I-5 from Fourth Plain Boulevard at a high rate of speed. Your Affiant activated his front BIII radar (R2564) and observed a digital display of 83 MPH in a posted 60 MPH speed zone. Your Affiant attempted to overtake the vehicle as it traveled southbound I-5. Your Affiant activated his emergency lights; the vehicle was slow to respond to the over head lights. The vehicle eventually pulled to the right shoulder southbound at the exit to Mill Plain Boulevard.

Your Affiant contacted the driver from the passenger side of the vehicle. Your Affiant knocked on the window and observed as the driver was reaching in the glove box. The driver opened the passenger side window. Your Affiant advised the driver of the reason for the stop. Your Affiant advised the driver the stop was being both audio and video recorded. The driver stated she thought she was not speeding and immediately became argumentative. Your Affiant asked the driver for her license, registration, and proof of liability insurance. The driver stated she was driving a rental car and did not have the information available. The driver handed your Affiant a Washington driver's license, the driver as Chrystal Rose Cox (DOB 11-02-1982). While talking with Cox your Affiant detected a strong odor of intoxicants coming from inside the vehicle, her speech was slurred and had bloodshot and watery eyes; there were no other occupants in the vehicle.

Your Affiant asked Cox to exit the vehicle to which she did. Your Affiant asked Cox how much alcohol she had been consuming this evening. The driver stated she works at a bar and had not been drinking. Your Affiant explained to Cox that based on his observations and the odor of intoxicants he believed she had been consuming alcohol this evening and asked Cox to submit to voluntary standardized field sobriety tests. Your Affiant, while explaining and demonstrating the field sobriety tests, Cox became argumentative and refused to continue until your Affiant's supervisor arrived on scene. Your Affiant requested Sergeant Clark #241 respond to the scene to

assist with the contact. Within a few minutes Trooper Taylor #1196 arrived on scene. Your Affiant explained to Taylor the reason for the stop and the situation at hand. Taylor contacted Cox and explained how the process works. At this time, Cox advised she wanted Taylor to administer the field sobriety tests. After completing the field sobriety tests Cox was arrested for DUI. Cox was handcuffed, searched, and placed into the back of your Affiants vehicle. Your Affiant then read Cox her constitutional rights; Cox advised she understood her constitutional rights.

Your Affiant was advised, after running a driver's check through the Washington Department of Licensing, that Cox had one prior conviction of vehicular assault. You're Affiant, after consulting with Taylor and Clark that I need to read Cox her implied consent warning for breath. Your Affiant, after reading Cox her implied consent for breath was advised she would not consent to a breath test. Your Affiant advised him it was her right and advised Cox the vehicle would be impounded and a search warrant would be applied for.

Pacific Towing arrived for the impound, and your Affiant transported Cox to the Clark County Jail for booking.

The facts supporting my belief that CRYSTAL ROSE COX is under the influence of intoxicants and/or drugs are as follows:

Based on my training and experience, your Affiant believes Cox was operating a motor vehicle under the influence in the state of Washington. Based on your Affiants observations of Cox's erratic driving and the failure of the standardized field sobriety tests Cox was placed under arrest for driving under the influence.

The defendant, CRYSTAL ROSE COX :

- has refused to take a breath alcohol test on an instrument approved by the State Toxicologist.
- is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility, or is at a location that lacks an instrument approved by the State Toxicologist for performing breath testing, and the defendant has refused to submit to a blood test.

- is incapable due to physical injury, physical incapacity, or other physical limitation, of submitting to a breath alcohol test, and the defendant has refused to submit to a blood test.
- has refused to submit to a blood test at the request of the undersigned, who has reasonable grounds to believe that the defendant is under the influence of a drug (as further described herein).
- was not offered an opportunity to take a breath alcohol test on an instrument approved by the State Toxicologist because:
 - the available instrument is currently out of order.
 - the defendant does not speak English and the implied consent warnings are not available in a language that the defendant understands.
 - a low alcohol concentration reading on a portable breath test device makes it probable that any impairment is the result of a substance or drug other than alcohol.
 -
- submitted to a breath test on an instrument approved by the State Toxicologist but the breath alcohol concentration reading of _____ is not consistent with the defendant's level of impairment suggesting that the defendant is also under the influence of a drug.

A sample of CHRYSTAL ROSE COX's blood, if extracted within a reasonable period of time after he/she last operated, or was in physical control of, a motor vehicle, may be tested to determine his/her current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive. This search warrant is being requested 02 hours 06 minutes after CHRYSTAL ROSE COX ceased driving/was found in physical control of a motor vehicle.

The Legislature has specifically authorized the use of search warrants for blood in cases in which the implied consent statute applies. *See* RCW 46.20.308(1) ("Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood."). The Legislature has also specified specific classes of people as being qualified to withdraw blood for alcohol testing. *See* RCW 46.61.506(5).

Therefore, I request authority to cause a sample of blood, consisting of one or more tubes, to be extracted from the person of CHRYSTAL ROSE COX by a physician, a registered nurse, a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW, a physician assistant as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or any technician trained in withdrawing blood.

<u>Jeffrey J. Heath 551</u> Printed Name of Peace Officer, Agency, and Personnel Number	<u>Jeffrey J. Heath</u> Signature of Peace Officer
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SUBSCRIBED AND SWORN to before me this 31 day of March, 2013.

JUDGE

James E. Rulli

Printed or Typed Name of Judge

Distribution if warrant obtained in person—Original (Court Clerk); 1 copy (Prosecutor), 1 copy (Officer).
Distribution if warrant obtained telephonically—If search warrant was obtained telephonically, this complaint must be read in its entirety to the judge after the officer is placed under oath. Original (Prosecutor); 1 copy (Officer).

Exhibit "B"

[11/03/14 Pretrial Exhibit 2]

STATE OF WASHINGTON

Clark

COUNTY

Superior

COURT

STATE OF WASHINGTON,

Plaintiff,

v.

Two vials of blood collected from the person of Chrystal R. Cox on the 31st day of March, 2013.

These vials of blood have been assigned Washington State Patrol Toxicology Laboratory Number ST-13-03130.

These vials have also been assigned the following case or incident or property number by the Washington State Patrol -13-004217.

Defendant.

NO.

DECLARATION IN SUPPORT OF SEARCH WARRANT FOR EVIDENCE OF A CRIME, TO WIT:

**DRIVING UNDER THE INFLUENCE,
RCW 46.61.502**

I, Jeffrey J. Heath, declare under the penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am a duly appointed, qualified, and acting law enforcement officer for the:

Washington State Patrol

_____ County Sheriff's Department.

_____ Police Department.

I am charged with responsibility for the investigation of criminal activity occurring within Clark County, Washington, and have probable cause to believe, and do, in fact, believe, the evidence of the crime(s) of:

- Vehicular Homicide, RCW 46.61.520
 - Reckless Manner Under the Influence of Liquor or Drugs
 - Disregard for the Safety of Others
- Vehicular Assault, RCW 46.61.522
 - Reckless Manner Under the Influence of Liquor or Drugs
 - Disregard for the Safety of Others
- Driving While under the Influence, RCW 46.61.502**
 - Physical Control of Vehicle While under the Influence, RCW 46.61.504
 - Driver under Twenty-one Consuming Alcohol or Marijuana, RCW 46.61.503

is concealed in, about, or within the vial(s) of blood collected from the person of Chrystal R. Cox (hereinafter referred to in this declaration as "the suspect") on the 31st day of March, 2013. These vial(s) of blood which have been assigned Washington State Patrol Toxicology Laboratory Number ST-13-03103 are currently located

- at the Washington State Patrol Toxicology Laboratory**
 - in the property room of the _____ Police Department
 - _____ County Sheriff's Office
- Washington State Patrol Detachment _____.

My belief being based upon information acquired through personal interviews with witnesses and other law enforcement officers, review of reports and personal observations, the Declaration of Trooper Richard Thompson, a copy of which is attached to this declaration and is incorporated herein, and information received from the prosecuting attorney's office, said information being as further described herein—

I have served as a law enforcement officer for over 7 years. My training and experience regarding investigations of the above crime(s) includes the following:

- Basic Law Enforcement Academy at the Washington Criminal Justice Training Commission
- Washington State Patrol Basic Academy**
- Standardized Field Sobriety Testing and/or SFST Refresher Training**
- Drug Recognition Expert School

- Collision Reconstruction Training
- Advanced Roadside Impaired Driving Enforcement Training**

Additional training and experience: Your Affiant has been employed with the Washington State Patrol since December 01, 2006. From December 1, 2006 to July 2007, your Affiant was employed as a Trooper Cadet and was assigned to the Washington State Patrol Academy in Shelton, WA. I was commissioned as a Trooper and assigned to District 5, Vancouver. Your Affiant has received over 180 hours of additional hours of criminal interdiction training since graduating from the Washington State Patrol Academy, including 20 hours of Advanced Roadside Impaired Driving Enforcement training, and 40 hours of interview and interrogations techniques. Your Affiant has received basic criminal investigation training from the Washington State Patrol Basic Trooper Academy, where he was trained in the recognition by sight and odor of controlled substances, to include marijuana, hashish, heroin, methamphetamine, cocaine, and alcohol. Your Affiant has made over 500 arrests for alcohol related crimes, and has conducted approximately two-thousand DUI investigations.

Based on your Affiant's training and experience, your Affiant knows how to identify driver's that have consumed alcohol and operate a motor vehicle while under the influence of alcohol. Your Affiant has recently received refresher training in the administration of standardized field sobriety tests and the administration and use of the state certified BAC data master in March 2013.

One or more vials of blood were collected from the suspect on the 31st day of March, 2013. The blood vial(s) that were collected are grey top tubes that are provided by and/or approved for the purpose by the Washington State Patrol Toxicology Laboratory. The blood, which has been stored within the grey top tubes, was drawn pursuant to a search warrant. A copy of the search warrant is attached to this declaration and is incorporated herein. The facts supporting the issuance of the search warrant are set forth in the declaration in support of the search warrant. A copy of the declaration in support of the search warrant is attached to this declaration and is incorporated herein.

After the blood samples were collected from the suspect on the 31st day of March, 2013, the vials were transported to the WSP District 5 office where the vials were secured in the WSP Property/Evidence system.

The vials were transferred to the Washington State Patrol Toxicology Laboratory on the 3rd day of April, 2013 for testing. The Washington State Patrol Toxicology Laboratory assigned the following specimen number to the blood vials: ST-13-03103. The Washington State Patrol Toxicology Laboratory tested the vials for alcohol and drugs. These tests were performed without a warrant based upon the belief that once the samples were collected pursuant to a search warrant that a separate warrant was not required for forensic testing.

Upon completion of testing, the Washington State Patrol Toxicology Laboratory maintained custody of the vials and the vials currently remain in their custody and control.

On July 21, 2014, the Washington Court of Appeals issued its opinion in *State v. Martines*, COA No. 69663-7. The *Martines* decision holds that the State may not conduct tests on a lawfully procured blood sample without first obtaining a warrant that authorizes testing and specifies the types of evidence for which the sample may be tested. I am requesting this search warrant to comply with the holding of *Martines*.

The blood test results that have already been obtained without a warrant are disclosed in my application so that the Court may consider them to the extent they may be exculpatory. I am asking the Court in ruling upon the existence of probable cause to base its decision upon the lawfully collected evidence. See, e.g., *State v. Gaines*, 154 Wn.2d 711, 719-20, 116 P.3d 993 (2005) (if an affidavit in support of a search warrant contains illegally obtained statements or information obtained pursuant to an illegal entry onto property, the search warrant may still be upheld if the remaining information in the warrant affidavit independently establishes probable cause); *State v. Coates*, 107 Wn.2d 882, 888, 735 P.2d 64 (1987) (same). This means that the Court may consider the test results only to the extent they vitiate probable cause.

While the *Martines* decision prompted the decision for this search warrant, I would have sought permission to test the blood vials in the first warrant if I had knowledge of the requirement. The Washington State Patrol Toxicology Laboratory's report played no part in my decision to seek a search warrant to obtain the blood sample. See *State v. Miles*, 159 Wn. App. 282, 244 P.3d 1030, review denied, 171 Wn.2d 1022 (2011) (while the supreme court's decision invalidating the administrative subpoena prompted the request for a search warrant, the independent source doctrine will allow the records obtained pursuant to the search warrant to be admitted in court if the officers would have sought a warrant if they had not seen the documents initially obtained by the administrative subpoena).

This search warrant is being requested within 13 months of the blood being extracted from the suspect.

The Legislature has specified that the Washington State Patrol Toxicology Laboratory has the duty to "perform all necessary toxicologic procedures requested by all coroners, medical examiners, and prosecuting attorneys." RCW 68.50.107. Therefore, I request authority to submit vials described herein to the Washington State Patrol Toxicology Laboratory for that laboratory to conduct forensic testing upon the blood to determine whether any alcohol, marijuana or any drug as defined in RCW 46.61.540 that could have impaired the suspect's ability to drive or operate a motor vehicle can be detected and/or quantified.

While charges are currently pending against the defendant, the Washington Supreme Court held in *State v. Kalakosky*, 121 Wn.2d 525, 533-37, 852 P.2d 1064 (1993), that search warrants may be obtained after charges have been filed. No prior notice must be given to the defense before obtaining or serving the search warrant. *Id.* The issuance of a search warrant does not preclude the defendant from filing a motion to suppress any evidence that may be collected pursuant to the search warrant.

CrR 2.3(c) and CrRLJ 2.3(c) specify that the search warrant shall command the officer to search within a specified period of time not to exceed 10 days. The actual testing will occur promptly thereafter based upon staffing levels and the number of samples submitted to the laboratory. Cf. *State v. Grenning*, 142 Wn. App. 518, 174 P.3d 706 (2008) (a forensic examination of information stored on copies of a hard drive may extend beyond the 10-day deadline specified in CrR 2.3(c), provided the computer is seized within the 10-day period).

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief.

SIGNED this 23rd day of Sept., 2014, at 12:43,
Washington.

Law Enforcement Officer's Signature: Jeffrey J. Heath

Law Enforcement Officers' Full Name: Jeffrey J. Heath

Agency Badge/Serial or Personnel Number: 551

Agency Name: Washington State Patrol

SUBSCRIBED AND SWORN to before me this 23rd day of Sept., 2014.

[Signature]
JUDGE

Distribution if warrant obtained in person—Original (Court Clerk); 1 copy (Prosecutor), 1 copy (Officer).
Distribution if warrant obtained telephonically—If search warrant was obtained telephonically, this complaint must be read in its entirety to the judge. The judge *should* place the officer under oath prior to the reading. Original (Prosecutor); 1 copy (Officer).
Distribution if warrant obtained by e-mail—If search warrant was obtained by e-mail, this entire complaint must be sent to the judge for the judge to read. A printout of all e-mails related to this warrant must be distributed with the warrant. Original (Prosecutor); 1 copy (Officer).

DOYLE LAW OFFICE

May 22, 2015 - 3:37 PM

Transmittal Letter

Document Uploaded: 4-469031-Appellant's Brief.pdf

Case Name: State v. Cox

Court of Appeals Case Number: 46903-1

Is this a Personal Restraint Petition? Yes No

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Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: ted9@me.com

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