

NO. 47563-4-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

JASON SCHWARTZ,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	IV
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	3
D. ARGUMENT	
I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT 9 AND 10 AS WELL AS THE FACTUAL FINDING IN CONCLUSION OF LAW 5 BECAUSE THEY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.....	7
II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION TO SUPPRESS BECAUSE TROOPER HICKS’ WARRANTLESS SEARCH OF THE DEFENDANT’S VEHICLE VIOLATED THE DEFENDANT’S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT	9
<i>(1) Trooper Hicks Exceeded Her Permission to Enter the Vehicle to Retrieve the Defendant’s Cell Phone When She Used Her Flashlight While in the Vehicle to Search for Other Items ..</i>	<i>10</i>
<i>(2) Trooper Hicks’ Action Picking up an Item in the Defendant’s Vehicle She Thought Might Contain Illegal Drugs Violated the Defendant’s Right to Privacy</i>	<i>13</i>
E. CONCLUSION	16

F. APPENDIX

1. Washington Constitution, Article 1, § 7 17

2. United States Constitution, Fourth Amendment 17

G. AFFIRMATION OF SERVICE 18

TABLE OF AUTHORITIES

Page

Federal Cases

Horton v. California,
496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) 13

State Cases

State v. Agee, 89 Wn.2d 416, 573 P.2d 355 (1977) 7

State v. Dempsey, 88 Wn.App. 918, 947 P.2d 265 (1997) 7

State v. Ford, 110 Wn.2d 827, 755 P.2d 806 (1988) 7

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994) 7

State v. Lair, 95 Wn2d 706, 630 P.2d 427 (1981) 13

State v. Monaghan, 165 Wn. App. 782, 266 P.3d 222 (2012) 10, 12

State v. Murray, 84 Wn.2d 527, 527 P.2d 1303 (1974) 13, 15

State v. Myers, 148 Wn.2d 583, 815 P.2d 761 (1991) 13

State v. Nelson, 89 Wn.App. 179, 948 P.2d 1314 (1997) 7

State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980) 9

Constitutional Provisions

Washington Constitution, Article I, § 7 9

United States Constitution, Fourth Amendment 9, 13

Other Authorities

R. Utter, *Survey of Washington Search and Seizure Law:
1988 Update*, 11 U.P.S. Law Review 411, 529 (1988) 9

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it entered Findings of Fact 9 and 10 as well as the factual finding in Conclusion of Law 5 because they are not supported by substantial evidence.

2. The trial court erred when it denied the defendant's motion to suppress because Trooper Hicks' warrantless search of the defendant's vehicle violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment because (1) Trooper Hicks exceeded her permission to enter the vehicle to retrieve the defendant's cell phone when she used her flashlight while in the vehicle to search for other items, and (2) Trooper Hicks' action picking up an item in the defendant's vehicle she thought might contain illegal drugs violated the defendant's right to privacy.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it enters findings of fact that are not supported by substantial evidence?

2. Does a police officer violate a defendant's right to privacy if she (1) exceeds the scope of her permission to enter a vehicle to retrieve an item and then uses her flashlight while in the vehicle to search for other items, or (2) if she picks up an item while in the vehicle because she suspects that it might be contraband?

STATEMENT OF THE CASE

At about 5:12 pm on January 29, 2015, Washington State Trooper Tara Hicks was on routine patrol near mile post 69 on SR 12 in Lewis County. RP 5-6.¹ While near mile post 69 she saw the defendant pull up, stop at a sign, and then proceed onto the highway. RP 7-8. As he stopped she noted that his middle brake light was not working. *Id.* Based upon this fact she pulled behind the defendant and stopped his vehicle when he got to the first area where it was safe to pull over. RP 8. After making the stop, Trooper Hicks obtained the defendant's license, determined that it was suspended in the third degree and placed him under arrest. RP 8-9. At this point she got the defendant out of the vehicle, put him in handcuffs and placed him in the rear of her patrol vehicle. *Id.*

As Trooper Hicks was arresting the defendant she asked if he had anyone who could come get the vehicle so she would not have to have it towed. RP 9. The defendant responded by asking her to retrieve his cell phone so he could make some calls to attempt to get a person to their location. *Id.* Trooper Hicks later stated that the defendant told her his cell

¹The record on appeal includes two volumes of verbatim reports of proceedings. The first, which includes the transcript of the Suppressing Motion held on April 1, 2015, is referred to herein as "RP [page #]." The second, which includes the transcripts of the sentencing hearings held on April 22, 2015, and May 6, 2015, are referred to herein as "RPS [page #]."

phone was “in the front” of the car. *Id.* After securing the defendant, Trooper Hicks entered the passenger’s compartment of the vehicle via the driver’s side. RP 11-14. Upon doing this she used her flashlight to illuminate items in the passenger compartment. *Id.* One of these was a straw like item which appeared to have residue outside each end. *Id.* Upon seeing this Trooper Hicks suspected that the straw was drug paraphernalia and that it had drug residue on it. *Id.* Based upon this suspicion Trooper Hicks picked up the straw, examined it and determined that it did have methamphetamine residue in it. RP 18. She then set it back down where she had originally found it. *id.*

Trooper Hicks later obtained a search warrant, seized the straw, sent it to the state crime lab for analysis, and later determined that it did contain methamphetamine residue. RP 14. Based upon this information the Lewis County Prosecutor charged the defendant Jason Schwartz with possession of methamphetamine. CP 1-2. He later moved to suppress all evidence Trooper Hicks seized upon an argument that she had illegally seized the straw. CP 4-8. The trial court later denied this motion and entered the following findings of fact and conclusions of law on the matter:

Findings of Fact

1. On January 29, 2015, Trooper Hicks of the Washington State Patrol initiated a traffic stop for a defective middle brake light on a vehicle operated by the defendant, Jason Paul Schwartz.

2. Trooper Hicks was driving a fully marked Washington State Patrol car equipped with a dash camera.

3. The defendant pulled over in a gas station parking lot.

4. Trooper Hicks approached the vehicle, advised the defendant the stop was being audio/video recorded and the reason for the stop.

5. After a Department of Licensing Driver's check, Trooper Hicks arrested the defendant for driving with a suspended license.

6. Trooper Hicks asked the defendant to step out of the vehicle, placed him in handcuffs, searched him incident to arrest and put the defendant in the back of her patrol car.

7. Trooper Hicks read the defendant his Miranda warnings, which the defendant indicated he understood.

8. While the defendant was in the back of the patrol car, Mr. Schwartz asked Trooper Hicks to get his cell phone out of the front of the vehicle and close the driver's door of the vehicle that had been left open.

9. Trooper Hicks approached the vehicle and immediately upon looking in the driver's side, Trooper Hicks saw a hard plastic straw, with a white powdery substance on the outside and inside of the straw.

10. Trooper Hicks immediately recognized the straw as drug paraphernalia and what she believed was methamphetamine based on her training and experience before Trooper Hicks touched the object.

11. Trooper Hicks later obtained a search warrant before continuing the search of the vehicle and seizing the straw with the white powdery substance.

Conclusions of Law

1. Trooper Hicks' stop of the vehicle Mr. Schwartz was operating was justified based on the vehicle not having a working high center brake light.

2. Under Article 1, section 7 of the Washington Constitution, a warrantless search is per se unreasonable and unconstitutional, unless the State proves an exception to the warrant requirement applies. *State v. Byrd*. 178 Wn.2d 611, 616, 310 P.3d 793(2013).

3. Plain view is a valid exception to a warrantless search.

4. Plain view requires the trooper to immediately recognize the object without further manipulation.

5. Trooper Hicks immediately recognized the straw and white powdery substance as drug paraphernalia and a controlled substance without further manipulation.

6. The defense motion to suppress is denied.

CP 27-29.

Following entry of these findings the defendant submitted to conviction upon stipulated facts and received a sentence within the standard range. RP 34-37, 41-52. The defendant then filed timely notice of appeal.

CP 55-71.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT 9 AND 10 AS WELL AS THE FACTUAL FINDING IN CONCLUSION OF LAW 5 BECAUSE THEY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

By contrast, an appellant need not assign error to a specific conclusion of law by number in order to preserve the issue on appeal because this argument presents an issue of law that the appellate court reviews de novo. *State v. Dempsey*, 88 Wn.App. 918, 947 P.2d 265 (1997). However, when a conclusion of law contains an assertion of fact, it functions as a finding of

fact and is reviewed under the substantial evidence rule and requires an assignment of error for consideration on review. *Estes v. Bevan*, 64 Wn.2d 869, 395 P.2d 44 (1964).

In the case at bar, appellant assigns error to those portions of the following findings of fact and conclusions of law shown in bold and italics:

9. Trooper Hicks approached the vehicle ***and immediately upon looking in the driver's side, Trooper Hicks saw a hard plastic straw, with a white powdery substance on the outside and inside of the straw.***

10. ***Trooper Hicks immediately recognized the straw as drug paraphernalia*** and what she believed was methamphetamine based on her training and experience before Trooper Hicks touched the object.

. . . .

Conclusions of Law

. . . .

5. ***Trooper Hicks immediately recognized the straw and white powdery substance as drug paraphernalia and a controlled substance without further manipulation.***

CP 28-29 (emphasis added).

A careful review of Trooper Hicks testimony from the suppression motion reveals that she did not claim that she “immediately recognized the straw and powder residue as drug paraphernalia.” Rather, as her testimony and the portion of Finding of Fact 10 to which appellant does not assign error reveals, (1) Trooper Hicks first illuminated the item with her flashlight after

putting her body in the passenger compartment via the open driver's door before she even saw it, (2) she could not see what was in the straw until she picked it up for closer inspection and looked inside it, and (3) Trooper Hicks only suspected or "believed" the item was drug paraphernalia with drug residue on it until she picked up the item, looked inside and confirmed her suspicion. Thus, the portions of findings of fact 9 and 10 and conclusions of law 5 shown above are not supported by substantial evidence. As a result, the trial court erred when it entered them.

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE TROOPER HICKS' WARRANTLESS SEARCH OF THE DEFENDANT'S VEHICLE VIOLATED THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless search unless the prosecution meets its burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). Two of these "jealously and carefully drawn" exceptions to the

warrant requirement are (1) searches made with the valid consent of the defendant, and (2) seizures made of items in plain view. *See State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998) (consent exception); *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994) (plain view exception).

In the case at bar defendant argues that the trial court erred when it denied his motion to suppress because Trooper Hicks exceeded the scope of her permission to enter the defendant's vehicle when she used her flashlight to view other items, and when she picked up an item in an attempt to determine whether or not it contained drugs. The following sets out these arguments.

(1) Trooper Hicks Exceeded the Scope of Her Permission to Enter the Defendant's Vehicle to Retrieve a Cell Phone When She Used Her Flashlight While in the Vehicle to Search for Other Items.

As was mentioned above, a warrantless governmental entry into or search of an area in which a defendant has a privacy interest may be valid if the defendant (1) has voluntarily given consent, and (2) the governmental intrusion does not exceed the scope of the consent given by extending the duration, area or intensity of the permission given. *State v. Hastings*, 119 Wn.2d 229, 234, 830 P.2d 658 (1992).

For example, in *State v. Monaghan*, 165 Wn. App. 782, 266 P.3d 222 (2012), the police stopped the defendant for a traffic infraction and then

arrested him for obstructing when he gave a false name for his passenger in an attempt to help her avoid being arrested on an outstanding warrant. The police then obtained the defendant's consent to look in the passenger compartment and the trunk for weapons. The officers later used a key they found in the passenger compartment of the car to open a locked safe they found in the trunk. Inside the safe they found methamphetamine.

The state later charged the defendant with possession of the methamphetamine the officers found in the safe in the trunk. The defendant responded with a suppression motion arguing that the officer had exceeded the scope of the permission he had been given to search the trunk. However, the trial court denied the motion and the defendant appealed following a stipulated facts trial. On review the Court of Appeals reversed, holding as follows:

As the trial court in this case correctly stated at the suppression hearing, the parties agreed that there was no request by either deputy to search the inside of the locked container. This is significant in Washington. In *State v. Stroud*, the supreme court gave "locking articles within a container" of a vehicle "additional privacy expectations" under article 1, section 7.37 This is in marked contrast to the federal standard under the Fourth Amendment, which permits a warrantless search of both locked and unlocked containers.

Furthermore, this additional privacy expectation of the Washington Constitution has withstood the test of time. For example, in *State v. Vrieling*, the supreme court stated that "officers may not unlock and search a locked container or locked glove compartment without obtaining a warrant." We note that the recent overruling of *Stroud* on other grounds did nothing to diminish the additional

privacy expectation in locked containers within vehicles that our courts have consistently recognized.

We conclude that Monaghan had an additional privacy expectation in the locked container discovered in the search of the trunk in this case. This search and seizure was without a warrant and without Monaghan's consent. Thus, it was without the authority of law that the Washington Constitution requires.

State v. Monaghan, 165 Wn. App. at 791.

In the case at bar the findings of fact the court entered on the suppression motion as well as Trooper Hicks' testimony at that motion reveal that the defendant invited Trooper Hicks to enter the vehicle he was driving for the sole purpose of retrieving his cell phone. The defendant did not license or invite her to get into the vehicle and use her flashlight to illuminate items she found suspicious. However, this is precisely what she did. Instead of simply retrieving the cell phone, she used her flashlight to illuminate a straw like device that she believed might be drug paraphernalia. By taking this action she exceeded the scope of the permission she had received to intrude into an area (the passenger compartment of the vehicle) in a manner for which she was not licensed. Thus, in the same manner that the officer in *Monaghan* exceeded the scope of his consent to search by opening a safe he found in the trunk of the defendant's vehicle, so Trooper Hicks in the case at bar exceeded the scope of her consent to search by entering the passenger compartment of the vehicle and using her flashlight to illuminate the straw.

As a result, in the same manner that the trial court erred when it denied the motion to suppress in *Monaghan*, so the trial court in this case erred when it denied the defendant's motion to suppress.

(2) Trooper Hicks' Action Picking up an Item in the Defendant's Vehicle She Thought Might Contain Illegal Drugs Violated the Defendant's Right to Privacy.

The "plain view" doctrine is another exception to the warrant requirement that applies after police have intruded with permission into an area in which there is a reasonable expectation of privacy. *State v. Myers*, 148 Wn.2d 583, 815 P.2d 761 (1991). Under this exception, if the police had prior justification for the intrusion and if they then saw an item sitting in plain view, then the seizure or viewing of the item does not offend the privacy interests protected in Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment. *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); *State v. Lair*, 95 Wn2d 706, 630 P.2d 427 (1981)). The key to the exception is that the officer must have had a legal right to be where he or she was when the item in "plain view" was seen. *Id.*

For example, in *State v. Murray*, 84 Wn.2d 527, 527 P.2d 1303 (1974), police officers obtained permission to search the defendant's apartment for stolen typewriters and video equipment. During the search, one of the officers turned a television around and wrote down the serial number

because he suspected it was stolen. The police later determined from the serial number that the television set had indeed been stolen. They then obtained a search warrant based upon this information, seized the stolen television and arrested the defendant. The defendant later moved to suppress the evidence seized but the trial court denied the motion.

Following conviction, the defendant appealed arguing that the trial court should have suppressed the evidence seized because the police exceeded the scope of the original permission to enter and search when they turned the television around and wrote down the serial number. The Washington Supreme Court agreed, stating that the police had exceeded the scope of the permission given when they physically manipulated the television in order to get a view of it that they could not get from their original position. In making the determination, the court looked to the facts surrounding the conversation in which the consent was given to determine that the police only had permission to look for specific items, items that did not include the television set in question.

In the case at bar Trooper Hicks entered the defendant's vehicle with permission for the sole purpose of retrieving the defendant's cell phone. Upon entry, the Trooper used her flashlight to illuminate a straw like item she suspected was drug paraphernalia, given the fact that it appeared to have some residue on either end. In order to confirm her suspicions she picked up

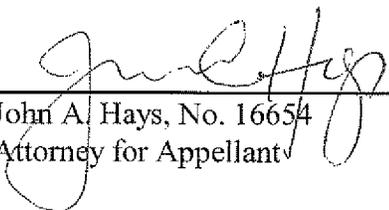
the straw to get a better look at it. Once she did this she was able to confirm her suspicions and determine that the straw like item had methamphetamine residue in it. Thus, in the same matter that the officers in *Murray* acted illegally when they touched the television set there at issue and turned it around so they could see the serial number, so Trooper Hicks in this case acted illegally when she picked up the straw like item and put it closer to her face so she could see what was in it. Consequently, in the same manner that the trial court erred in *Murray* when it denied the defendant's motion to suppress, so the trial court in the case at bar erred when it denied the defendant's motion to suppress.

CONCLUSION

The trial court erred when it entered findings of fact unsupported by substantial evidence and when it denied the defendant's motion to suppress evidence. As a result, this court should reverse the defendant's conviction and remand with instructions to grant the motion to suppress.

DATED this 13th day of August, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 47563-4-II

vs.

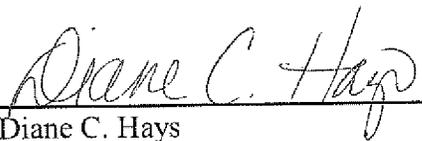
**AFFIRMATION
OF SERVICE**

JASON SCHWARTZ,
Appellant.

The undersigned states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Jonathan Meyer
Lewis County Prosecuting Attorney
345 West Main Street
Chehalis, WA 98532
appeals@lewiscountywa.gov
2. Jason Schwartz
60 East Emerald Lake Dr.
Grapeview, WA 98546

Dated this 13th day of August, 2015, at Longview, WA.



Diane C. Hays

HAYS LAW OFFICE

August 13, 2015 - 3:49 PM

Transmittal Letter

Document Uploaded: 4-475634-Appellant's Brief.pdf

Case Name: State v. Jason Schwartz

Court of Appeals Case Number: 47563-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

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: Diane C Hays - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

appeals@lewiscountywa.gov