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Court of Appeals
Division II
State of Washington
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No. 50236-4-II

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

STATE OF WASHINGTON, Respondent

v.

DARIAN LIVINGSTON, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Judge Helen G. Whitener

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred when it exceeded the remand by hearing evidence on matters already decided by the Court of Appeals.
- B. The trial court erred when it found there was a nexus between the DOC warrant and the search of the vehicle.
- C. The trial court erred when it relied on information found in exhibits that witnesses had never seen and the contents of which they did not know.
- D. The trial court erred when it entered Fact 5: "...Officer Young confirmed the DOC warrant and informed Officer Grabski of the warrant and that the defendant was on supervision for unlawful possession of a controlled substance." CP 44.
- E. The trial court erred when it entered Fact 8:
"Some of the other conditions of supervision which are imposed on defendants who are under supervision for narcotics offenses include reporting to the DOC, providing a valid address, a chemical dependency evaluation and follow up treatment along with not using or possessing controlled substances. In Officer Grabski's experience, these conditions are imposed on 100% of offenders who are being supervised

for narcotics offenses. The violation for which the DOC secretary warrant was issued for defendant's arrest was failure to report to DOC (absconding from supervision) and failure to complete substance abuse treatment." CP 44.

F. The trial court erred when it entered Fact 13:

"Officer Grabski believed that he would find documents inside the vehicle that would provide a current address where defendant was residing or staying. Officer Grabski also believed that he would find evidence that would verify whether or not defendant was using controlled substances such as controlled substances themselves and/or paraphernalia." CP 44.

G. Reasons for Admissibility or Inadmissibility of Evidence 2:

"The alleged violation in this case was Failure to Report to the Department of Corrections. The issue therefore is what does failure to report mean?" CP 46.

H. The trial court erred when it entered Reasons for

Admissibility or Inadmissibility of Evidence 3: "The court focuses its analysis on what did Officer Grabski know and when did he know it based on Officer Grabski's experience." CP 46.

- I. The trial court erred when it entered Reasons for Admissibility or Inadmissibility of Evidence 5: “Officer Grabski knew defendant was on supervision for a narcotics violation.” CP 46.
- J. The trial court erred when it entered Reasons for Admissibility or Inadmissibility of Evidence 8: “The violation in this case was failure to report, not failure to appear. This type of DOC secretary’s warrant issues when someone has absconded from supervision. A compliance check is broader when a warrant is issued for this type of violation as the violation encompasses multiple issues.” CP 46.
- K. The trial court erred when it entered Reasons for Admissibility or Inadmissibility of Evidence 9: “The compliance check was conducted to verify defendant’s residence and verify whether or not defendant had been using narcotics.” CP 46.
- L. The trial court erred when it entered Reasons for Admissibility or Inadmissibility of Evidence 11: “Based on the evidence the court finds that there is a nexus between the alleged violation (of failure to report/absconding from supervision) and the search of the vehicle.” CP 46.

M. The trial court erred when it entered Reasons for Admissibility or Inadmissibility of Evidence 12: “Given the information known to Officer Grabski and taking into consideration Grabski’s experience, there was reasonable cause to believe that evidence of the violation of failure to report would be found in the vehicle. The search of the vehicle was therefore proper.” CP 47.

N. The trial court erred when it entered Reasons for Admissibility or Inadmissibility of Evidence 14: “Defendant’s convictions on Counts I, IV, and V are affirmed.” CP 47.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Holding that for a warrantless search to be valid under RCW 9.94A.631(1), the State must establish a nexus between the alleged probation violation and the searched property. The Court of Appeals found the State did not show the required nexus and reversed the trial court’s order denying Mr. Livingston’s motion to suppress. The Court remanded the matter to the trial court to allow the State to develop a record on the alternative argument of an impound inventory search, which it had raised for the first time on appeal. Did the trial

court exceed the scope of the directive by allowing the state to relitigate matters already decided on appeal?

- B. In *State v. Cornwell*, 412 P.3d 1265,1270 (2018), the Washington Supreme Court held the warrantless search of a probationer is permitted only where there is a nexus between *the* property searched and *the* alleged probation violation. Did the trial court err when it ruled there was a sufficient nexus between Mr. Livingston's DOC warrant and the search of his vehicle?
- C. A trial court's findings of fact must be based on substantial evidence. Did the trial court err when it entered findings of fact not supported by the record and unsupported legal conclusions?

II. STATEMENT OF FACTS

A. Prior History and Ruling By Court of Appeals

In 2014 Pierce County prosecutors charged Mr. Livingston with first degree unlawful possession of a firearm (count I), unlawful possession of a controlled substance with intent to deliver (cocaine)(count II), bail jumping (count III), unlawful possession of a controlled substance (oxycodone)(count IV), and unlawful

possession of (hydrocodone/dihydrocodeinone)(count V). CP 1-3. Before trial, Livingston moved to suppress the evidence discovered during a vehicle search that resulted from arrest on a DOC warrant.

¹ The State presented the following evidence at the 2015 CrR 3.6 hearing.

Community Corrections Specialist (CCS) Thomas Grabski apprehended fugitives from the Department of Corrections (DOC) and investigated new violations of probation. 1RP 52². Grabski testified that on May 29, 2014, he recognized Mr. Livingston as on active DOC probation and thought there might be a DOC warrant out for him. 1RP 52-54. He called for and received assistance from police officers Young and Boyd to meet him at the car wash where Mr. Livingston was washing a vehicle. 1RP 54. The officers confirmed there was a DOC warrant and they arrested Mr. Livingston. 1RP 59, 84, 98.

The officers testified that at the time of the arrest they had no information about the alleged violation that triggered the issuance

¹ Unless otherwise noted, facts recited in the Prior History section are taken directly from *State v. Livingston*, 197 Wn.App. 590, 389 P.3d 753 (2017).

² The CrR3.6 hearing held on 8/11/15 will be referred to as 1RP and the CrR 3.6 hearing held on 4/6/17 will be referred to as 2RP.

of the DOC warrant. 1RP 70,73,108, *Livingston*, 197 Wn.App. at 594. Grabski was specifically asked whether at the time of the vehicle search he had any information about a potential violation *other than* the DOC warrant. He answered: “ **No. All I know is he had – or I believed that he had a DOC warrant** when I had the officers make contact with him...”. 1RP 73. Grabski testified he had not seen the warrant issued for Mr. Livingston. 1RP 71.

Officer Young testified he confirmed the DOC warrant, but he had no idea what Mr. Livingston’s underlying charges were. 1RP 84, 108. He testified he had no probable cause to search the vehicle, but as a CCO, Grabski was authorized to search it. 1RP 106.

Officers testified they intended to wait for Mr. Livingston’s girlfriend to retrieve the vehicle, so they did not have to impound it. 1RP 93. Young said that while they were searching the vehicle, looking for probation violations, Mr. Livingston’s sister arrived with keys to take the car. 1RP 95;107-108;119. They directed her to wait across the street while they searched the car. 1RP 107-08. Officers did not impound the vehicle. 1RP 95.

Grabski testified he searched the vehicle, because he wanted to “conduct a compliance check of the vehicle” and he was

looking for “further violations of probation.” 1RP 60, 71. He and Boyd searched the entire vehicle, including the locked trunk and its contents. 1RP 61. They collected mail addressed to Mr. Livingston, 9 prescription pills, and a loaded handgun. 1RP 61, 120.

The State’s position was that because there was a warrant for Mr. Livingston’s arrest, the search of his person and vehicle was justified. 1RP 137.

The defense position was that because CCS Grabski and the officers only knew there was a violation that precipitated the warrant, the search was not justified under RCW 9.94A.631(1).

1RP 128-132. Defense counsel specifically argued:

They confirmed a warrant for his arrest based upon a DOC violation. At that point all of the officers testified that they had no information about what the actual violation was. They had no information saying that it was for a positive UA. They had no information saying that he believed he was selling drugs. All they knew at that point was that there was a DOC arrest warrant. Based upon the information of having a DOC arrest warrant, Officer Grabski decided to search the vehicle.

1RP 128.

Over defense objection, the trial court upheld the warrantless search under RCW 9.94A.631(1). Mr. Livingston was convicted on all charges and appealed his convictions. *Livingston*, 197 Wn.App. at 590.

In the published part of the opinion by this Court, the Court held that for a warrantless search to be valid under RCW 9.94A.631(1), the State had to establish there was a relationship between *the alleged violation* and *the searched property*. *Livingston*, 197 Wn.App. at 592. The Court found “When they [officers] conducted the search of the vehicle, the officers did not have any information about the nature of the violation that triggered the issuance of the DOC warrant.” *Livingston*, 197 Wn.2d at 594. The Court held the trial court erred when it did not properly apply RCW 9.94A.631(1). The Court reversed the order denying Mr. Livingston’s motion to suppress. *Livingston*, 197 Wn.App. at 599-600.

The opinion noted that for the first time, on appeal, the State raised an alternative ground to justify the vehicle search using the good faith inventory search exception, which follows a lawful impoundment of the vehicle. *Livingston*, 197 Wn.App. at 599. Relying on *State v. Bliss*, 153 Wn.App. 1967, 207-08, 222 P.3d 107 (2009), the Court remanded to allow the State to develop the record on the alternative basis of impound/inventory search. *Livingston*, 197 Wn.App. at 600.

B. Testimony and Argument at Remand Hearing

At the remand hearing, the State did not present evidence of a good faith inventory search, admitting there was no basis for the argument as officers did not impound the vehicle. 2RP 70.

Instead, the prosecutor again elicited testimony to establish there was a nexus between the DOC warrant and the search of the vehicle. The following testimony was given which in significant part contradicted the earlier testimony.

Grabski testified he looked for probationers with fugitive warrants and investigated for new probation violations. 2RP 12-13. On May 29, 2014, Grabski noticed Mr. Livingston washing a car at a car wash facility. 2RP 14. He said the car wash was in an area known as one of the drug areas of Tacoma and he had personally witnessed and arrested people buying and selling drugs in that area of town. 2RP 15. He did not report he saw any indication that Mr. Livingston used, bought or sold drugs at the car wash.

Similar to his earlier testimony, Grabski testified he called for assistance, not knowing if there was a DOC warrant for Mr. Livingston. Officers Boyd and Young arrived and confirmed there was a warrant. 2RP 17,60. Grabski testified **he did not access any DOC records** regarding Mr. Livingston at the time of the

encounter. 2RP 17. However, he added that in his experience warrants are issued by DOC “mostly for failure to report”. 2RP 14.

The prosecutor asked Grabski:

Q. What information do you recall Officer Young provided to you with respect to the DOC warrant?

In contradiction to the testimony given by Officer Young in 2015, Grabski answered:

A. That he did have a DOC warrant and what he was on DOC for.

Q. Okay. And that was for what?

A. UPCS.

2RP 18.

After officers arrested Mr. Livingston, Grabski testified he searched the vehicle under DOC authority, doing a “compliance check.” 2RP 19. The state sought to introduce the DOC Chronos notes into evidence to justify the search. 2RP 22-30. The Chronos notes detailed the record of Mr. Livingston’s reporting to DOC, having clean UA tests, and the CCO visit to his listed residence. 2RP 24-26. The trial court denied admission of the notes because Grabski did not know the contents of the Chronos report before searching Mr. Livingston’s vehicle. 2RP 32.

Similarly, the court denied admission of the “court special supervision closure” report, which detailed Mr. Livingston’s alleged violation of failure to report. 2RP 31. The court held there was no evidence Grabski had seen or reviewed the report before he conducted the vehicle search. 2RP 34.

Although Grabski testified he did not know why Mr. Livingston was on community supervision, and had not seen the Chronos notes or the court special supervision report, and had previously testified he did not know the reason for the violation, the prosecutor asked:

Q. And before you began your compliance search, what were you aware of with respect to the specific type of offense that the defendant was being supervised for?

A. He was on supervision for UPCS, which is narcotics.

Q. And before you began your compliance check, were you aware of the requirements that the defendant would have been under with respect to providing UAs?

A. Yes. Because when you're on supervision for narcotics whether it's for UPCS with intent or just UPCS for possession of narcotics, I believe it's a hundred percent of the time, you are required to provide a UA.

Q. When someone is on supervision for a UPCS or a UPCS with some type of narcotic-related violation, in addition to

providing UAs, what other requirements are placed upon the offender?

A. Other requirements that can be placed on an offender is his treatment.

2RP 35-37.

Q. Okay. When you began your search of the defendant's vehicle, what did you believe you may find inside of that vehicle related to violation of failing to report or absconding from supervision?

A. I believe that we would be able to locate possibly where Mr. Livingston resided at or if he truly was living in his car or however you want to say that because he was homeless at the time, and then the other way -- also, the other one is to verify that he is not using narcotics which is, also, a condition of his supervision.

2RP 38.

Q. Your reasonable cause to believe that evidence showing where the defendant was living and where he might be living and that he was not using narcotics or was using narcotics in violation of his condition, what reasonable cause did you have to believe that evidence of those two violations would be found inside his vehicle?

A. He had possession of the vehicle.

2RP 38.

On cross-examination, Grabski said he searched the vehicle based on the violation of failure to report. 2RP 48. He admitted his

information was limited to the fact of the warrant, but believed that Mr. Livingston had to provide UAs, was in a known drug area, and “was trying to distance himself” from the vehicle³. 2RP 44. *Grabski admitted that at the time of the search he had not seen the Chronos notes, or the special closure of supervision notes.* 2RP 44.

In making its oral findings, the court acknowledged that Officer Grabski did not have access to DOC records before the search. 2RP 81. The trial court reasoned:

And the Court has to look at what did Officer Grabski know and when did he know it based on his experience and, in this case, as a community correction specialist?

Failure to report to DOC was the reason for the issuance of the warrant, and given that Mr. Livingston is a probationer, and there is a lessened expectation of privacy, a compliance check has a wide range, it appears, as to what a DOC Officer can do when that type of warrant is issued. Officer Grabski indicates the compliance check can entail verifying a residence. It can entail verifying the use of narcotics. It is usually issued when someone has absconded from supervision. Based on his experience, it entails, as he indicated, use of narcotics in a number of possible different locations. In this instance, it happened to be a vehicle; but he testified it can be a residence or a storage unit.

³ The “distance himself” from the vehicle appears to refer to the fact that Mr. Livingston originally told officers the vehicle belonged to his girlfriend, and he used it, but later stated it actually belonged to his “sugar mama” and he used it. 2RP 58-59.

Did the State show a nexus between failure to report to DOC this fugitive warrant, and what was known to Officer Grabski; and when did he know it? It does, in fact, appear, even though it appears minimal, that the connection between the failure to report to the Department of Corrections is related. *There is a nexus between that and the search of Mr. Livingston's vehicle as the compliance check required for probationers when such a warrant, a fugitive warrant, is issued is rather broad.* Given the information and the experience of Officer Grabski, he did have reasonable cause to believe that the evidence of a violation of failure to report to DOC would be found inside Mr. Livingston's vehicle.

2RP 82.

The court entered its written findings and conclusion of law and affirmed the convictions. CP 43-47. Mr. Livingston makes this timely appeal. CP 48.

III. ARGUMENT

A. The Trial Court Erred When It Failed To Follow The Mandate Of The Reviewing Court And Allowed The State To Present Evidence On An Issue Raised And Resolved On Appeal.

When the reviewing Court issues a mandate for further proceedings, the trial court must comply with that mandate. *Kruger-Willis v. Hoffenburg*, 198 Wn.App. 408, 414, 393 P.3d 844 (2017). Similarly, under the law of the case doctrine, the parties, the trial court and the appeals court should not revisit issues already determined in a prior appeal on the same case, absent a

conclusion that the first appellate decision was clearly erroneous. *State v. Worl*, 129 Wn.2d 416, 424, 918 P.2d 905 (1996) (citing to *Greene v. Rothschild*, 68 Wn.2d 1, 10, 402 P.2d 356, 414 P.2d 1013 (1965)). While the rule is discretionary, it presumes that rulings on a prior appeal will not be reviewed again. *First Small Business Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 333, 738 P.2d 263 (1987).

Relying on *State v. Jardinez*, 184 Wn.App. 518, 338 P.3d 292 (2014) the reviewing Court determined that RCW 9.94A.631(1) required a nexus must exist between the alleged probation violation and the property to be searched. *Livingston*, 197 Wn.App. at 598. The Court found the trial court erred because it misapplied the law. It reversed the trial court's ruling denying the motion to suppress.

Further, the Court found the trial court made no finding as to the nature of the violation on which the warrant was based. Generally, where a trial court does not make a finding of fact, the reviewing Court presumes a finding against such a fact. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The Court also noted, based on the record, that prior to conducting the search, the officers had no information about the violation that triggered the issuance of the DOC warrant. *Livingston*, 197 Wn.App. at 594. The

facts and the court's failure to properly apply the law resulted in a reversal of the denial of the suppression motion. *Livingston*, 197 Wn.App. at 592.

The matter was remanded for the State to develop the record on the *alternative basis*, that of impoundment and the attendant inventory search. *Livingston*, 197 Wn.App. at 599-600.

A trial court's compliance with a mandate for further proceedings is reviewed for an abuse of discretion. *Kruger-Willis v. Hoffenburg*, 198 Wn.App. at 414. The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.* A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Id.*

Here, the trial court abused its discretion. The mandate had been issued, reversing the suppression motion. The Court limited the remand to development of the record on the alternative legal argument of an impound inventory.

At the 2017 hearing the State conceded it had no basis for the alternative argument of impoundment and inventory search. Based on the concession and the mandate, this Court should not entertain the findings or conclusion that the requisite nexus existed based on evidence already deemed insufficient by this Court. This Court should again reverse the denial of the suppression motion and vacate Mr. Livingston's convictions.

B. Under *Cornwell* The Trial Court Erred When It Ruled There Was A Sufficient Nexus Between The Alleged Violation Of Failure To Report And The Search Of Mr. Livingston's Vehicle.

Article 1, §7 of the Washington Constitution permits a warrantless search of the property of a person on probation only where there is a nexus between the property searched and the alleged probation violation. *State v. Cornwell*, 190 Wn.2d 296, 412 P.3d 1265 (2018) .

In *Cornwell*, the Washington Supreme Court considered the virtually the exact same set of facts, including the same CCS, as occurred in the current case. There, Cornwell failed to report to the DOC in violation of his probation and DOC issued a warrant for his arrest. *Id.* at 298. Officer Frisbie and CCS Grabski observed a car outside of a home suspected of being a site for drug sales and

prostitution. Grabski spoke with the registered owner of the car, who said she had lent it to Cornwell, but wanted the car returned. A record check revealed that Cornwell was on probation and had an outstanding warrant. *Id.*

Sometime later Frisbie saw the car, believed Cornwell was driving it, and intended to arrest him based on the outstanding warrant. Cornwell stopped the car but ran as the officer approached him. Frisbie called Grabski, who later testified, as in this case, that his job was to “apprehend fugitives of [DOC] as well as to look into violations of people that are on probation.” *Id.* at 299. Grabski testified Cornwell’s warrant was for failure to report to DOC because “that’s pretty much why there’s a warrant.” *Id.* The search of Cornwell’s vehicle yielded controlled substances, sim cards, small spoons, and a cell phone. *Id.*

On review, the Supreme Court applied a nexus requirement to RCW 9.94A.631(1)⁴ ruling “...that article I, section 7 permits a

⁴ RCW 9.94A.631(1): If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or by the department. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search

warrantless search of the property of an individual on probation only where there is a nexus between the property searched and the alleged probation violation.” *Cornwell*, 190 Wn.2d at 306. The Court concluded Grabski’s search of Cornwell’s car exceeded its lawful scope and had become a “fishing expedition” not permitted by Article 1, § 7. The Court succinctly stated:

While CCO Grabski may have *suspected* Cornwell violated other probation conditions, *the only probation violation supported by the record is Cornwell’s failure to report.*

Id. at 306. (emphasis added). The Court reversed the Court of Appeals and Cornwell’s convictions. *Id.* at 307.

Similarly, here, the record supports that Grabski only knew there was a DOC warrant, likely for failure to report. At the 2015 CrR 3.6 hearing, the Young testified he had no idea what the underlying charges were and both officers testified they did not know the alleged violation that triggered the DOC warrant. At the 2017 hearing Grabski testified:

Sir, the only thing that I was aware of was that he had the warrant -- he has to give UAs, he was in a known drug area, and he was distancing himself from that vehicle; that was it.

and seizure of the offender’s person, residence, automobile, or other personal property.

4/6/17 RP 44.

The State's attempt to link the DOC warrant to the search for other probation violations is without merit. The State argued the investigatory search of the vehicle could show whether Mr. Livingston was using drugs. 2RP 73-77

First, Grabski testified, along with Officer Young, that they had no idea of the violation that precipitated the warrant. Grabski did not access any DOC records at the time of the search that would have provided him with other information. 2RP 17.

Second, Grabski guessed the warrant was based on a failure to report. Even assuming it was a failure to report, it was mere speculation that Mr. Livingston failed to report because he would have to take a UA which would indicate the presence of drugs. The speculations do not create a reasonable cause for the investigatory search.

Although the trial court wrongly relied on the inadmissible exhibits produced at the 2017 hearing, the DOC notes documented that Mr. Livingston had taken a UA and it did not indicate the presence of illicit substances. Based on his probation history, there was no reasonable suspicion that Mr. Livingston failed to report to hide drug use.

The trial court also wrongly relied on the Chronos notes, which it ruled inadmissible because Grabski had never seen them. The notes detailed a “compliance check” at Mr. Livingston’s registered address some time prior to the vehicle search. Mr. Livingston was not there at the time but was in contact with the CCO by phone and said he would be there in about 15 minutes. 2RP 24-25. The CCO wrote in the notes he went through Livingston’s bedroom and saw a minimal amount of clothing there. The State used this inadmissible information to justify a search of the car for evidence of where Mr. Livingston was living. 2RP 25.

The *Cornwell* ruling does not support stringing together tenuous assumptions and guesses to establish a nexus between the failure to report and a search of a probationer’s vehicle. In *Cornwell*, as here, the DOC warrant likely issued for failure to report. The car *Cornwell* used was seen outside of a known prostitute and drug house. Here, the car wash was in a geographical area of Tacoma where drug sales occur. There was no evidence that Mr. Livingston was using, buying, or selling drugs while he washed his car.

Cornwell ran when an officer pulled him over to arrest him. Mr. Livingston did not try to leave when officers made their social contact. 2RP 63.

The *Cornwell* Court held that such “facts” could not warrant a full vehicle search, calling the search a “fishing expedition”. *Cornwell*, 190 Wn.2d at 307. The Court found Grabski searched the vehicle to find other violations of probation. *Id.* at 299. Similarly, the facts here cannot justify the investigatory search; the search of Mr. Livingston’s vehicle was a fishing expedition to look for new violations of probation. 2RP 13; 1RP 60.

Just as in *Cornwell*, CCO Grabski may have *suspected* that Mr. Livingston violated other probation conditions, but the only probation violation supported by the record was failing to report. Under *Cornwell*, a search of the vehicle on that basis was unconstitutional, and the trial court should have granted the suppression motion. This matter should be reversed, and the convictions vacated.

C. The Trial Court’s Findings of Fact Are Not Supported By Substantial Evidence.

Without conceding the above arguments, Mr. Livingston argues that the trial court's findings are not supported by substantial evidence.

Appellate review of a trial court's denial of a suppression motion is to determine whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn. 2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Sunnyside Valley Irr. Dist. V. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003).

Conclusions of law are "determinations made by a process of legal reasoning from facts in evidence." *State v. Niedergang*, 43 Wn.App. 656, 658-59, 719 P.2d 576 (1986). Conclusions of law mislabeled as finding of fact are reviewed as conclusions of law. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555-56, 132 P.3d 789 (2006). Conclusions of law are reviewed *de novo*. *Mendez*, 137 Wn.2d at 214.

Here, the trial court made findings of fact not supported by substantial evidence, and which do not support its conclusions of law. The court labeled its written findings as “Undisputed Facts” and labeled written conclusions of law “Reasons for Admissibility or Inadmissibility of Evidence”. They will be referred to by their label but analyzed as findings or conclusions.

- a. Undisputed Fact 2: “The alleged violation in this case was Failure to Report to the Department of Corrections. The issue therefore is what does failure to report mean?”

The trial court unnecessarily complicated the nexus analysis, and its finding there was a question of definition is not supported by substantial evidence. The phrase “failure to report” is self-explanatory: it means the probationer is alleged to have not reported to DOC as directed. Extending its analysis to an irrelevant question, the trial court relied on inadmissible evidence and untethered speculation. This finding is not supported by substantial evidence and led to erroneous conclusions of law. (addressed below).

- b. Reasons for Admissibility or Inadmissibility of Evidence 3: “The court focuses its analysis on what did Officer Grabski know and when did he know it based on Officer Grabski’s experience.”

This conclusion is error as a matter of law because it circumvents the constitutional issue decided in *Cornwell*. It substitutes the necessary “*reasonable cause* to believe that an offender has violated a condition or requirement” found in RCW 9.94A.631(1) for the experience of an individual CCS who suspects probationers might violate their community custody conditions and is tasked with investigating probation violations. It allows a CCS to conduct a warrantless full search of a probationer’s property because his experience leads him to guess the search might yield a new probation violation.

In *Cornwell*, the Court limited the scope of the CCS search to property reasonably believed to have a nexus with the suspected probation violation; this limitation protects the privacy and dignity of individuals on probation, while allowing the State ample supervision. *Cornwell* 190 Wn.2d at 306. The Court specifically reasoned the CCS may have *suspected* other probation violations, but the only violation supported by the record was Cornwell’s failure to report. *Id.* at 306.

Grabski knew there was a DOC warrant. He was not authorized to conduct ‘a fishing expedition’ search of Mr. Livingston’s car based on a hunch that Mr. Livingston failed to

report because he was using drugs and drugs might be found in his car. *Cornwell*, 190 Wn.2d at 306.

- c. Fact 5: "...Officer Young confirmed the DOC warrant and informed Officer Grabski of the warrant and that the defendant was on supervision for unlawful possession of a controlled substance." CP 44.

CCO Grabski and Officer Young testified at the 2015 hearing they did not know the alleged violation which precipitated the warrant. They only knew there was a warrant. In 2015 Young testified he did not know the underlying crime.

At the 2017 hearing Grabski said that Young told him that Mr. Livingston was on probation for unlawful possession of a controlled substance. However, at the same hearing Officer Young did not testify that he told Grabski anything other than there was a warrant. 2RP 55,60. And Grabski admitted on cross-examination at the 2017 hearing that the only things he knew was there was a warrant, Mr. Livingston had to give a UA, and that he was in a known drug area washing his vehicle.

The court's finding that Grabski knew that Mr. Livingston was on supervision for unlawful possession of a controlled substance is not supported by substantial evidence.

For the same reason, the court's Reasons for Admissibility or Inadmissibility of Evidence 5: "Officer Grabski knew defendant was on supervision for a narcotics violation" is not supported by the record.

- d. Undisputed Fact 8: "Some of the other conditions of supervision which are imposed on defendants who are under supervision for narcotics offenses include reporting to the DOC, providing a valid address, a chemical dependency evaluation and follow up treatment along with not using or possessing controlled substances. In Officer Grabski's experience, these conditions are imposed on 100% of offenders who are being supervised for narcotics offenses. The violation for which the DOC secretary warrant was issued for defendant's arrest was failure to report to DOC (absconding from supervision) and failure to complete substance abuse treatment." CP 44.

The record does not support this finding. The information about substance abuse treatment was contained in the special closure notice which the trial court ruled inadmissible because Grabski had not seen it at the time of the search. 2RP 32, 35.

Where it affirmatively appears that inadmissible evidence induced the court to make an essential finding which would not otherwise have been made, an appellate Court can reverse the ruling. *State v. Read*, 147 Wn.2d 238, 246, 53 P.3d 26 (2002).

The court erroneously relied on inadmissible information to make this essential finding. This Court should not consider the finding as it is unsupported by the record.

- e. Undisputed Fact 12: “Officer Grabski conducted a warrantless search of the vehicle pursuant to DOC’s authority to conduct compliance searches under RCW 9.94A.631.

And Reasons for Admissibility or Inadmissibility of Evidence 9: “The compliance check was conducted to verify defendant’s residence and verify whether or not defendant had been using narcotics.”

The trial court’s continual reference to a “compliance check” is a conflation of an authorized probation monitoring in the community with the requirement of a well-founded or reasonable suspicion of a probation violation in order to conduct a search. *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009). They are different. Grabski did not perform a compliance check. He conducted a warrantless search based on a DOC warrant for which there was no nexus between the property and the suspected violation. The suspected violation was failure to report. Failure to report does not support a search of property. The finding is not supported by substantial evidence and the conclusion of law is erroneous.

- f. Reason for Admissibility or Inadmissibility 8: “The violation in this case was failure to report, not failure to appear. This type of DOC secretary’s warrant issues when someone has absconded from supervision. *A compliance check is broader when a warrant is issued for this type of violation as the violation encompasses multiple issues.*”

There is no basis in law to conclude that a “compliance check” is broader when a warrant is issued for failure to report. The *Cornwell* holding directly contradicts such legal reasoning. The Court reasoned there is “no compelling argument that the ‘legitimate demands of the probation system require open-ended property searches.’” *Cornwell*, 190 Wn.2d at 305. The Court held that “Article I § 7 permits a warrantless search of the property of an individual on probation only where there is a nexus between the property searched and the alleged probation violation.” *Id.* at 306. The individual's other property, which has no nexus to the suspected violation, remains free from search.

This was not a compliance check it was an unauthorized intrusive search; the courts have determined there is no nexus between property and the failure to report. *State v. Patton*, 167 Wn.2d 379, 395, 219 P.3d 651 (2009). *A suspicion* of other violations does not justify a search where the alleged violation is failure to report.

- g. Reasons for Admissibility or Inadmissibility of Evidence 11: “Based on the evidence the court finds that there is a nexus between the alleged violation (of failure to report/absconding from supervision) and the search of the vehicle.”

Under *Cornwell* and *Patton*, failure to report does not support a search of property. This conclusion of law is error.

- h. Undisputed Fact 13: “Officer Grabski believed that he would find documents inside the vehicle that would provide a current address where defendant was residing or staying. Officer Grabski also believed that he would find evidence that would verify whether or not defendant was using controlled substances such as controlled substances themselves and/or paraphernalia.”

The record does not support this finding. The trial court denied admission of the Chronos notes and the notes of supervision closure because Grabski did not see them at the time of the search.

In the first hearing, Grabski specifically testified he searched the car looking for “further violations of probation.” 1RP 60. At the second hearing he testified he had not seen the warrant or checked DOC records at the time of the search. His testimony that the warrant was for absconding from supervision and failure to complete substance abuse treatment was not within his knowledge. 2RP 31.

Last, Grabski's latter testimony he "knew" Mr. Livingston's underlying crime had been possession of a controlled substance does not support an investigatory search based on a DOC warrant. The connection is untethered and does not support the trial court's finding.

- i. Reasons for Admissibility or Inadmissibility of Evidence 12: "Given the information known to Officer Grabski and taking into consideration Grabski's experience, there was reasonable cause to believe that evidence of the violation of failure to report would be found in the vehicle. The search was therefore proper."

This legal conclusion conflicts with the Washington Supreme Court opinion in *Cornwell*. Grabski knew there was a DOC warrant, and that being on community custody meant Mr. Livingston had to provide UAs when directed to do so. His suspicions, based on his experience, but not found in the record, do not support a conclusion that evidence of the violation of failure to report would be found in the vehicle.

"The search was therefore proper" is not supported by the findings or the law. The court's denial of the suppression motion should be reversed and remanded with direction to vacate the convictions.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Livingston respectfully asks this Court to reverse the trial court's ruling and remand with direction to vacate the convictions.

Respectfully submitted this 20th day of June 2018.

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APPENDIX

January 18, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DARIAN DEMETRIUS LIVINGSTON,

Appellant.

No. 48118-9-II

PART PUBLISHED OPINION

JOHANSON, J. — Darian Demetrius Livingston appeals his bench trial convictions for three counts of unlawful possession of a controlled substance and one count each of first degree unlawful possession of a firearm and bail jumping. He argues that the trial court erred (1) by denying his motion to suppress the evidence discovered during the search of his vehicle following his arrest on a Department of Corrections (DOC) warrant and (2) by concluding that he did not establish that uncontrollable circumstances caused his failure to appear. In the published portion of this opinion, we agree with *State v. Jardinez*,¹ which requires that a nexus between the community custody violation and the searched property must exist before a search under RCW 9.94A.631(1) is proper. Because the trial court did not apply this law when it considered Livingston’s suppression motion, we reverse the order denying the motion to suppress and remand. In the unpublished portion of

¹ 184 Wn. App. 518, 338 P.3d 292 (2014).

this opinion, we hold that the trial court did not err when it concluded that Livingston failed to establish that uncontrollable circumstances prevented his appearance at the court date he missed because he was in custody on another matter. Finally, we decline to address the issues Livingston raises in his statement of additional grounds for review² (SAG). Accordingly, we affirm the bail jumping conviction and the unlawful possession of a controlled substance conviction charged as count II³ and remand for further proceedings consistent with this opinion.

FACTS

I. BACKGROUND

ARREST AND SEARCH⁴

On May 29, 2014, DOC Officer Thomas Grabski observed a person, later identified as Livingston, who he recognized as having an outstanding DOC arrest warrant; Livingston was washing a vehicle alone at a car wash. Officer Grabski called for assistance, and two more officers arrived to assist him.

When the additional officers arrived, Livingston was talking with a person on a motorcycle. The person on the motorcycle drove away when the officers approached. Livingston was the only

² RAP 10.10.

³ Count II, the conviction for unlawful possession of cocaine, was based on the discovery of additional controlled substances on Livingston's person during the booking process and was not related to the vehicle search that he is challenging on appeal. Although Livingston does not distinguish this conviction from his other convictions and asks that all of his convictions be reversed, none of the arguments he raises on appeal relate to this conviction, and we affirm it.

⁴ Unless otherwise noted, the facts in this subsection are based on the unchallenged findings of fact and conclusions of law from the suppression hearing. *See State v. Rooney*, 190 Wn. App. 653, 658, 360 P.3d 913 (2015) (“Unchallenged findings of fact are verities on appeal.”), *review denied*, 185 Wn.2d 1032 (2016).

person near the vehicle. After confirming Livingston's identity and the warrant, the officers arrested Livingston.

The officers then asked Livingston about the vehicle he had been washing. Livingston first told them that it belonged to his girlfriend who had gone to a nearby store, but he later admitted that his girlfriend was in Seattle and could not pick up the vehicle. Livingston also admitted that he regularly drove the vehicle and that he had placed the key on the motorcycle when he first saw the officers.

At the time of his arrest, Livingston was on active DOC probation. The DOC warrant issued in his name stated that there was "reasonable cause to believe [Livingston] ha[d] violated a condition of community custody." Clerk's Papers (CP) at 113. The trial court made no finding as to the nature of the violation that the warrant was based on. Nor, based on the record before us, was there any evidence presented at the suppression hearing establishing what the violation was. DOC Officers Grabski and Joshua Boyd conducted a "compliance search" of the vehicle.⁵ CP at 113. When they conducted the search of the vehicle, the officers did not have any information about the nature of the violation that triggered the issuance of the DOC warrant.

Inside the vehicle, the officers found mail and other documents with Livingston's name on them, a single pill, and a prescription bottle containing eight pills. In the vehicle's trunk, the officers found a black backpack containing scented oils, a loaded .40 caliber handgun, a box of

⁵ Livingston assigns error to the trial court's finding that this was a "compliance search," but he does so in the context of arguing that the search was not a lawful search because it was not related to the alleged violation that resulted in the arrest warrant. Thus, we do not address this assignment of error separately as a challenge to the trial court's finding of fact.

ammunition, and more mail addressed to Livingston. During booking, Livingston revealed that he was also carrying a baggie of cocaine on his person.

II. PROCEDURE

SUPPRESSION MOTION

The State filed an amended information charging Livingston with first degree unlawful possession of a firearm⁶ (count I), unlawful possession of a controlled substance with intent to deliver (cocaine)⁷ (count II), bail jumping⁸ (count III), unlawful possession of a controlled substance (oxycodone)⁹ (count IV), and unlawful possession of a controlled substance (hydrocodone/dihydrocodeinone)¹⁰ (count V). Before trial, Livingston moved to suppress the evidence discovered during the vehicle search.

Livingston argued, in part, that the existence of the DOC warrant did not “give[] rise to reasonable suspicion justifying a search of a vehicle they believed him to have control over” and that the officers had to have a well-founded suspicion that a violation had occurred that justified this search. CP at 67. The State argued that the search was lawful because the officers had reasonable cause to believe that Livingston had violated a condition or requirement of his sentence because of the DOC warrant.

⁶ RCW 9A.04.040(1)(a).

⁷ RCW 69.50.401(1), (2)(a). This charge relates to the drugs discovered when the officers were booking Livingston.

⁸ RCW 9A.76.170(1), (3)(c).

⁹ RCW 69.50.4013(1).

¹⁰ RCW 69.50.4013(1).

The trial court denied the motion to suppress. Its findings of fact are described above. Based on these facts and the parties' arguments, the trial court concluded that the vehicle search was proper because (1) Officer Grabski had reasonable cause to believe that Livingston had "violated a condition or requirement of his or her sentence," (2) the search of the vehicle was therefore authorized under RCW 9.94A.631, and (3) the search was "a true probationary search and not an investigatory search." CP at 116.

ANALYSIS

DENIAL OF SUPPRESSION MOTION

Livingston first argues that the trial court erred when it concluded that the vehicle search was lawful under RCW 9.94A.631(1) because the officers had a reasonable belief that he had violated *a* community custody condition or sentencing requirement. He asks that we follow the decision of Division Three of this court in *Jardinez* and hold that to justify such a search, the property searched must relate to the violation that the community custody officer (CCO) believed had occurred. The State argues that we should decline to follow *Jardinez* and, instead, hold that the plain language of RCW 9.94A.631(1) does not impose a nexus requirement and follow our prior decision in *State v. Parris*, 163 Wn. App. 110, 259 P.3d 331 (2011). We agree with Livingston and hold that for the warrantless search to be valid under RCW 9.94A.631(1), the State had to establish that there was a relationship between the alleged violation and the searched property.

A. LEGAL PRINCIPLES

We review a trial court’s conclusions of law de novo. *State v. Rooney*, 190 Wn. App. 653, 658, 360 P.3d 913 (2015), *review denied*, 185 Wn.2d 1032 (2016). This issue requires us to construe RCW 9.94A.631(1).

In construing a statute, our objective is to determine the legislature’s intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). “[I]f the statute’s meaning is plain on its face, then [we] must give effect to that plain meaning as an expression of legislative intent.” *Jacobs*, 154 Wn.2d at 600 (first alteration in original) (quoting *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). We discern the “plain meaning” of a statutory provision from the ordinary meaning of the language and from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Jacobs*, 154 Wn.2d at 600. If a statute is susceptible to more than one reasonable interpretation, it is ambiguous. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011). We may resort to legislative history for guidance in discerning legislative intent. *Anthis v. Copland*, 173 Wn.2d 752, 756, 270 P.3d 574 (2012).

B. NEXUS REQUIRED

Both article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution prohibit warrantless searches unless an exception exists. *Rooney*, 190 Wn. App. at 658. Washington law recognizes, however, that probationers and parolees have a diminished right of privacy that permits warrantless searches based on reasonable cause to believe that a violation of probation has occurred. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); *Jardinez*, 184 Wn. App. at 523.

This reduced expectation of privacy is recognized in RCW 9.94A.631(1), which states,

If there is reasonable cause to believe that an offender has violated *a* condition or requirement of the sentence, a [CCO] may require an offender to submit to a search and seizure of the offender’s person, residence, automobile, or other personal property.

(Emphasis added.) The question we must answer here is the scope of RCW 9.94A.631(1)—specifically whether the statute’s reference to a violation of “*a*” condition or requirement of the sentence allows officers to conduct searches regardless of whether there is any nexus between the violated condition and the searched property.

In *Jardinez*, Division Three examined this issue and held that RCW 9.94A.631(1) was ambiguous because it could be read to allow either “an unlimited scope of the search” or “to limit the search to areas or property about which the [CCO] has reasonable cause to believe will provide incriminating evidence.” 184 Wn. App. at 526. We agree with the *Jardinez* court that the phrase “has violated *a* condition or requirement of the sentence” is ambiguous.¹¹ RCW 9.94A.631(1) (emphasis added). Because this statute is ambiguous, we next examine the legislative history of this statute to determine the legislative intent.

In *Jardinez*, Division Three examined the following official comment from the Sentencing Guidelines Commission (Commission) on RCW 9.94A.631(1):

“The Commission intends that [CCOs] exercise their arrest powers sparingly, with due consideration for the seriousness of the violation alleged and the impact of confinement on jail population. Violations may be charged by the [CCO] upon notice of violation and summons, without arrest.

The search and seizure authorized by this section should relate to the violation which the [CCO] believes to have occurred.”

¹¹ Furthermore, if the legislature had intended to allow any violation to justify a search of any property, the legislature could have referred to the violation of *any* condition or requirement, which it did not do.

Jardinez, 184 Wn. App. at 529 (quoting David Boerner, *Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981*, at app. 1-13 (1985)). Noting that Washington courts “have repeatedly relied on the Commission’s comments as indicia of the legislature’s intent,” Division Three concluded that the italicized portion of this comment “demands a nexus between the searched property and the alleged crime.” *Jardinez*, 184 Wn. App. at 529-30.

We agree with Division Three’s conclusion that the Commission’s comment is strong evidence that the legislature intended that there must be a nexus between the suspected violation and the searched property. Accordingly, we adopt the approach in *Jardinez* and hold that a valid search under RCW 9.94A.631(1) requires that there be a nexus between the alleged violation and the searched property.

The State argues that we should instead adopt the approach we previously took in *Parris*. We disagree.

In *Parris*, our focus was on a probationer’s reasonable expectation of privacy in personal property and not on whether RCW 9.94A.631(1) was ambiguous or the legislative intent underlying RCW 9.94A.631(1). *See Parris*, 163 Wn. App. at 123. We held that *Parris* did not have a reasonable expectation of privacy in his effects and personal property because, as a probationer and sex offender, his belongings and effects were “continuously subject to searches and seizures under RCW 9.94A.631(1).” *Parris*, 163 Wn. App. at 123. And we further stated that “RCW 9.94A.631(1) operates as a legislative determination that probationers do not have a reasonable expectation of privacy in their residences, vehicles, or personal belongings (including closed containers) for which society is willing to require a warrant. The statute itself diminishes the probationer’s expectation of privacy.” *Parris*, 163 Wn. App. at 123 (footnotes omitted).

But at no point did we examine whether RCW 9.94A.631(1) was ambiguous or, if it was, whether the legislative history supported such a broad reading of the statute. *Parris*, 163 Wn. App. at 123. And our sole supporting citation was to *United States v. Conway*, 122 F.3d 841, 843 (9th Cir. 1997), a case that merely, without citation to authority or any analysis of RCW 9.94A.631(1), stated that CCOs did not have to have a reasonable belief that they would find evidence related to Conway's violation in the searched property. Thus, our decision in *Parris* does not persuade us that *Jardinez* was incorrectly decided.

Accordingly, we hold that the trial court erred when it failed to consider whether there was a nexus between the violation and the searched property, and we reverse the ruling denying Livingston's motion to suppress and remand for further proceedings.

C. PROPOSED ALTERNATIVE GROUNDS AND REMAND

In the alternative, the State argues for the first time that the vehicle search was valid as a good faith inventory search following a lawful impoundment of the vehicle, and it asks us to affirm the trial court on this basis. Remand is appropriate. For two reasons, through no fault of the State, it had no incentive to establish the existence of a lawful alternative basis for the vehicle search. *See State v Bliss*, 153 Wn. App. 197, 207-08, 222 P.3d 107 (2009). First, the trial court agreed with the State's original argument and denied Livingston's suppression motion. Second, the State reasonably believed that they stood on solid legal ground in defending the suppression motion as they did because it is only now that we clarify for the first time that a nexus between the violation and the searched property is required. Because the State reasonably did not present this argument in the trial court, the record before us is insufficiently developed to allow review of the State's alternative argument. Thus, remand is appropriate.

Should the trial court find that the search was proper, the convictions on counts I, IV, and V, which are based on the drugs and firearm discovered in the vehicle, will stand. If, on the other hand, the trial court determines that this was not a proper search, the trial court should vacate and dismiss those convictions.¹²

We affirm Livingston's bail jumping conviction, count III, and his unlawful possession of a controlled substance conviction charged as count II. But we reverse the order denying Livingston's motion to suppress the evidence discovered in the vehicle search and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

I. BAIL JUMPING CONVICTION

A. FAILURE TO APPEAR

The State initially charged Livingston with first degree unlawful possession of a firearm and unlawful possession of a controlled substance with intent to deliver (heroin). At a preliminary hearing, Livingston signed a scheduling order setting an August 25 omnibus hearing and advising him that he was required to be present at this hearing. When he failed to appear on August 25, the trial court entered a bench warrant. On August 27, Livingston signed a scheduling order for a hearing to quash the bench warrant. The bench warrant quashed on September 4.

¹² We note that the remaining drug conviction and the bail jumping conviction were entirely independent of the vehicle search.

B. BENCH TRIAL

Livingston waived his right to a jury trial. At the bench trial, Officer Grabski testified that DOC documentation showed that Livingston had been in custody for failing to report to the DOC from August 6 to August 26, 2014. Officer Grabski also testified that it was Livingston's failure to report that caused him to be taken into custody during that time period.

Livingston testified that on August 25, he was in custody in another jurisdiction because he had reported to the DOC late. He testified that he was booked into the custody facility at 12:38 PM on August 6, that he had received a 20-day sanction, and that he was not released until 8:26 AM on August 26. He also testified that although he was released on August 26, the DOC actually held him an "extra day" because he had to be transferred to another facility before he was released. 4 Report of Proceedings at 396.

The trial court found Livingston guilty of first degree unlawful possession of a firearm, three counts of unlawful possession of a controlled substance (cocaine, oxycodone, and hydrocodone/dihydrocodeinone), and bail jumping. As to the bail jumping charge, the trial court entered the following findings of fact:

10. Defendant was able to secure his release by posting a bail bond on July 3, 2014.
11. On July 29, 2014, defendant signed a Scheduling Order, which set an Omnibus Hearing for August 25, 2014 at 8:45 a.m. The document ordered the defendant to be present at the hearing and informed the defendant that failure to appear will result in a warrant being issued for his arrest. The Order also provided the address of the courthouse and particular courtroom where defendant was to appear.
12. Defendant did not appear in court as ordered on August 25, 2014 and a warrant was issued for his arrest.
13. Defendant was incarcerated from August 6 until August 26, 2014 at the SCORE jail due to violations of the conditions of his community custody with the Department of Corrections.

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CP at 104-05.

The trial court rejected Livingston's uncontrollable circumstances defense, concluding that

[d]efendant has not shown that his incarceration in the SCORE jail for violating his conditions of DOC supervision meets the definition of uncontrollable circumstances. The probation violation which resulted in defendant's incarceration was not an act of God. Defendant's own actions resulted in the probation violation which caused him to be incarcerated and thus fail to personally appear in court.

CP at 108.

Livingston appeals the denial of his suppression motion and his convictions.

Livingston argues that the trial court erred when it concluded that he failed to establish his uncontrollable circumstances defense to the bail jumping charge. We disagree.

To establish this defense, Livingston had to prove that (1) "uncontrollable circumstances prevented [him] from appearing or surrendering," (2) he "did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender," and (3) he "appeared or surrendered as soon as such circumstances ceased to exist." RCW 9A.76.170(2). Livingston now contends that (1) the facility that was holding him released him a day late, (2) he did not contribute to the creation of these circumstances in reckless disregard of the requirement to appear because he "had every reason to believe that he would be released in time to attend the scheduled hearing," and (3) he appeared as soon as circumstances allowed. Br. of Appellant at 18-19.

As to his contention that he was released a day late, suggesting that he had expected to be released on August 25 and, therefore, did not contribute to the creation of the circumstances that caused him to miss his court date, his own testimony belies this assertion. Although Livingston

testified that he was released a day late, he also testified that he was booked on August 6 and that he received a 20-day sanction. His release on August 26 is consistent with the 20-day sanction.

As to his assertion that he appeared in court as soon as circumstances allowed, we need not address this element because the trial court properly concluded that Livingston failed to establish the other elements of this defense. Accordingly, Livingston does not show that the trial court erred in concluding that he failed to establish the uncontrollable circumstances defense, and we affirm his bail jumping conviction.

II. SAG

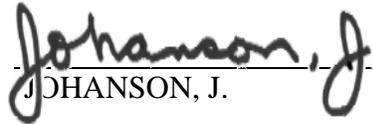
Livingston also filed a SAG. His SAG contains no argument and identifies no issues. It consists entirely of a list of citations to case law related to (1) sufficiency of evidence of constructive possession, (2) unwitting possession, and (3) warrantless searches.

Because Livingston was convicted of four possessory offenses, the citations relating to constructive possession and unwitting possession are not specific enough to inform us of the nature and occurrence of any specific errors. RAP 10.10(c). Accordingly, we do not address the cases relating to constructive possession or unwitting possession. And because Livingston's appellate counsel has challenged the vehicle search and Livingston does not present any additional search-related issues that justify independent review, we do not address the search-related cases that Livingston cites.

In summary, we affirm Livingston's bail jumping conviction and his unlawful possession of a controlled substance conviction charged as count II. But we reverse the order denying

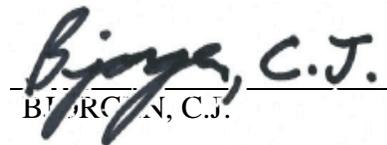
No. 48118-9-II

Livingston's motion to suppress the evidence discovered in the vehicle search and remand for further proceedings consistent with this opinion.



JOHANSON, J.

We concur:



BLYER, C.J.



MELNICK, J.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Darian Livingston, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent on June 20 2018, to:

Darian Livingston
c/o Marie Trombley at marietrombley@comcast.net

And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Pierce County Prosecuting Attorney (at pcpatcecf@co.pierce.wa.us).

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