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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DARIAN LIVINGSTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable G. Helen Whitener

No. 14-1-02112-9

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court on remand properly hear evidence on the issue of the required nexus when it was within the scope of the mandate of the Court of Appeals?
2. Did the court properly find the required nexus where Grabski had a reasonable expectation of finding evidence of the violation of failure to report based on his experience, and alternatively, under the collective knowledge doctrine, where the law enforcement system as a whole possessed facts constituting probable cause for the search?
3. Should the court affirm the challenged findings which are supported by substantial evidence and conclusions which flow from the findings, with the exception of Undisputed Fact 5, which should be corrected to clarify that the record shows Grabski knew what defendant was on supervision for, UPCS?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On May 29, 2014, Darian Livingston, hereinafter “defendant,” was arrested pursuant to a warrant issued by the Department of Corrections (DOC). 4/6/17 RP 19, 22. A search of defendant’s vehicle revealed narcotics and a firearm. 8/11/15 RP 169; 4/6/17 RP 61. On the ride to jail, defendant admitted he also had cocaine on his person and surrendered it to the arresting officers. 8/11/15 RP 61.

Subsequently, on March 15, 2015, the Pierce County Prosecuting Attorney’s Office charged defendant with unlawful possession of a firearm in the first degree (Count I), unlawful possession of a controlled substance (cocaine) (Count II), bail jumping (Count III), unlawful possession of a controlled substance (oxycodone) (Count IV), and unlawful possession of a controlled substance hydrocodone/dihydrocodeinone) (Count V), by amended information. CP 1-3.

On August 11, 2015, the trial court heard a 3.6 Motion to Suppress evidence collected from a search of defendant’s vehicle by community corrections officer (CCO) Thomas Grabski. 8/11/15 RP 41. Defendant argued the vehicle search was unlawful because the law enforcement officers lacked the required articulable suspicion of an ongoing probation

violation or evidence of the crime for which offender is being arrested for in order to justify a search of his or her property. 8/11/15 RP 128. Because the TPD officers testified none of them knew what the particular violation was, defendant argued, they lacked a well-founded suspicion based on the particular violation that is required. *Id. See also*, 8/11/15 RP 70-71.

The trial court noted that the relevant statute, RCW 9.94A.631, authorizes community corrections officers to arrest or cause the arrest of and to search an offender's person, residence, automobile, or other personal property, if there is reasonable cause to believe the offender has violated a condition of community custody. 8/11/15 RP 149. The CCO, Grabski, testified that he recognized defendant as being under DOC supervision and thought he had a warrant. 8/11/15 RP 65-66. Grabski then requested assistance from TPD officers who contacted the defendant and confirmed defendant had a DOC escape warrant for his arrest. 8/11/15 RP 73, 103.

The trial court found Grabski had authority to search defendant's vehicle based on a reasonable cause to believe a community custody violation, namely, failure to report to DOC, had occurred. 8/11/15 RP 152. The court reasoned that a property search in such a situation relates to "the reduced expectation of privacy that goes along with being on probation." 8/11/15 RP 153. Defendant's motion to suppress was denied. 8/11/15 RP

154. Defendant was subsequently found guilty on all five counts. CP 58-59.

The Court of Appeals reversed the trial court's ruling and remanded the case in an opinion filed January 18, 2017. *State v. Livingston*, 197 Wn. App. 590, 389 P.3d 753 (2017). On appeal, defendant had argued that following *State v. Jardinez*, 184 Wn. App. 518, 338 P.3d 292 (2014), to justify a search, the property searched must relate to the particular violation that was violated. *Livingston*, 197 Wn. App. at 595. The court agreed, holding that RCW 9.94A.361 requires a nexus between the suspected community custody violation and searched property, which the trial court failed to consider. *Id.* at 592.

The Court of Appeals remanded for the trial court to address the nexus question. *Id.* at 599. The court also remanded to allow the State to pursue the alternative theory that the vehicle search was an inventory search following impound. *Id.* at 599-600. The court, however, noted that defendant's charges for bail jumping (count III) and unlawful possession of a controlled substance (cocaine) (count II) were entirely independent of the vehicle search and affirmed those convictions. *Id.* at 600.

On remand, the State conceded that because the vehicle was never impounded, the alternative theory of an inventory search failed. The State also argued, however, that the vehicle search was nonetheless lawful

because the required nexus existed, based on Grabski's knowledge about probation violations and the warrants issued in response to them. 4/6/17 RP 73-74. Grabski knew that the violation was for failure to report. 4/6/17 RP 35, 48. Grabski testified that in his experience, DOC escape warrants are only issued when an individual fails to report. 4/6/17 RP 35. Grabski knew the defendant was on supervision for unlawful possession of a controlled substance, so he knew defendant's reporting for supervision would include urinalysis testing and verifying his place of residence. 4/6/17 RP 28-29. Evidence related to his failure to report could therefore include evidence of narcotics use and where he is living. *Id.*; 4/6/17 RP 38.

Defendant argued on remand that the required nexus did not exist between the search and the violation because a violation of failure to report simply means defendant did not show up to DOC, so no additional evidence is needed to prove that violation. 4/6/17 RP 68. It would be unreasonable, defendant argued, for police to believe they would find additional evidence of the violation of failure to report in defendant's vehicle. *Id.*

The trial court found that the required nexus existed, reasoning that based on his experience, Grabski was reasonable to search for evidence of defendant's narcotics use and place of residence in his vehicle as it relates to requirements of supervision when an individual is directed to report.

4/6/17 RP 82. Although the court noted the nexus was “minimal,” it found the search was lawful and affirmed defendant’s convictions. *Id.* Defendant subsequently filed this appeal. CP 48.

2. FACTS

Thomas Grabski is a CCO who does fugitive apprehension for the DOC. 4/6/17 RP 12. In this position, Grabski looks for fugitives from the DOC in the community and looks into violations of individuals who are on probation. 4/6/17 RP 13. On May 29, 2014, Grabski recognized defendant at a car wash in Tacoma and recalled that defendant was on DOC supervision based on a prior encounter. 4/6/17 RP 17.

Grabski believed the defendant had a warrant, so he sought assistance from Tacoma Police Department (TPD) officers to confirm the suspected warrant and contact the defendant. *Id.* TPD officers Boyd and Young responded and contacted defendant, who admitted he had a DOC warrant. 4/6/17 RP 55. Defendant was detained and a records check confirmed he had a warrant. *Id.* A large sum of cash bills was found during a search of defendant’s person. 8/11/15 RP 91.

When the officers initially approached, defendant was standing next to a vehicle that he claimed belonged to his girlfriend who was at a nearby store. 4/6/17 RP 58. Defendant eventually admitted that while the vehicle did belong to a girlfriend, she was not in town or coming to

retrieve it, and he often drives the vehicle. 4/6/17 RP 59, 77. Grabski, assisted by the TPD officers, then conducted a compliance search of defendant's vehicle, looking for evidence of his alleged violation. 4/6/17 RP 19.

From the search of defendant's vehicle, the officers found a white pill, a bottle with prescription pills inside, a loaded handgun, ammunition, as well as various paperwork with the defendant's name on it. 4/6/17 RP 61. Defendant was placed under arrest and transported to the Pierce County Jail. 4/6/17 RP 96. Later that day, defendant's sister retrieved the vehicle from the car wash. 4/6/17 RP 64-65.

Before arriving at the jail, the officers asked defendant if he had any additional contraband on his person that the officers did not find, encouraging defendant to admit possession of such items to avoid an additional charge for introducing contraband to a correctional facility. 8/11/15 RP 97. Defendant admitted he had a little bit of cocaine, and the officers retrieved it from his person. 4/6/17 RP 59-60.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY HEARD EVIDENCE ON THE NEXUS ISSUE WHEN IT WAS WITHIN THE SCOPE OF THE MANDATE OF THE COURT OF APPEALS.

An appellate court's mandate is binding on the lower court and must be strictly followed. *Bank of Am., N.A. v. Owens*, 177 Wn. App.

181, 189, 311 P.3d 594 (2013). While a remand “for further proceedings” “signals this court's expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case,” the trial court cannot ignore the appellate court's specific holdings and directions on remand. *Id.*

Defendant wrongly claims the trial court relitigated matters already decided on appeal, specifically, whether there was a nexus between the search and the violation. Brief of Appellant, 15-18. The appellate court did not decide the nexus issue. The Court of Appeals held,

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 order denying Livingston’s motion to suppress and remand for further proceedings.

Livingston, 197 Wn. App. at 599. Therefore, consistent with that opinion, on remand the trial court considered whether there was a nexus between the violation and the property, which it erred in failing to do before. 4/6/17 RP 10.

At the start of the remand hearing, the parties agreed that the nexus question was one of the issues before the court. 4/6/17 RP 7-10. The trial court specifically asked the parties to clarify what they thought the issue on remand was. 4/6/17 RP 7. The State responded,

As I understand it from reviewing the appellate court decision, Division II of the Court of Appeals essentially created a new requirement... That new requirement is to

establish a nexus between the violations and the area to be searched... so as I understand it, the Court can listen to testimony from the witnesses and determine whether or not the State has, in fact, established a nexus between the violation and the searched property.

Id.

Counsel for defendant agreed that the nexus question was at issue, responding to the court's question,

The Court specifically was saying that there needed to be a nexus and, essentially, was saying that there needed to be a showing of a specific reason in order to have the search, that essentially—or a search just for the point of having a search is not enough.

4/6/17 RP 8-9. When the court then stated, “the first issue, of course, is going to be whether or not there’s a nexus,” counsel for defendant responded, “mm-hmm.” 4/6/17 RP 10. The Court of Appeals remanded for the nexus question to be considered, and the parties on remand agreed that was one of the issues. The court did not exceed the remand when it visited the nexus issue.

Similarly, defendant is incorrect in stating that remand was limited to “development of the record on the alternative legal argument of an impound inventory.” Br. of App. 17. The reviewing court *also* allowed the State to develop the alternative argument that the search was a good faith inventory search following a lawful vehicle impoundment. *Livingston*,

197 Wn. App. at 600. After the court discussed the nexus issue, it then addressed the alternative argument, stating,

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.

Id.

On remand, the State explained that given the opportunity to develop the alternative argument, it determined the car was not impounded and conceded that the search was not an inventory search. 4/6/17 RP 70. Although this alternative theory was unsuccessful, the State was still permitted to make its argument on the nexus issue, which the appellate court unambiguously mandated to be considered on remand. *Livingston*, 197 Wn. App at 599. The trial court followed the mandate of the appellate court to consider both whether there was a nexus between the violation and the searched property and the alternative argument of a good faith inventory search. *Id.* at 599-600; 4/6/17 RP 9-11. Reversal on this basis is not warranted.

2. THE COURT PROPERLY FOUND THE REQUIRED NEXUS WHERE GRABSKI HAD A REASONABLE EXPECTATION OF FINDING EVIDENCE OF THE VIOLATION OF FAILURE TO REPORT BASED ON HIS EXPERIENCE, AND ALTERNATIVELY, UNDER THE COLLECTIVE KNOWLEDGE DOCTRINE, WHERE THE LAW ENFORCEMENT SYSTEM AS A WHOLE POSSESSED FACTS CONSTITUTING PROBABLE CAUSE FOR THE SEARCH.

Article I, §7 of the Washington Constitution states that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law, which is generally a warrant, “subject to ‘a few jealously and carefully drawn exceptions.’” *State v. Cornwell*, 190 Wn.2d 296, 301, 412 P.3d 1265 (2018), (citing *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999)). Individuals on probation have reduced expectations of privacy because they are ““serving their time outside the prison walls.”” *Id.*, (citing *Jardinez*, 184 Wn. App. at 523). Accordingly, it is constitutionally permissible for a CCO to search an individual based on only a “well-founded or reasonable suspicion of a probation violation,” rather than a warrant supported by probable cause. *Id.*, citing *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); *See*, RCW 9.94A.631.

On March 15, 2018, the Supreme Court of Washington in *Cornwell* reversed a defendant’s conviction based on an unlawful CCO search, where the community custody violation was failure to report to

DOC. *Cornwell*, 190 Wn.2d 296. The court held that “a CCO must have ‘reasonable cause to believe’ a probation violation has occurred...[and,] the individual's privacy interest may be diminished only to the extent necessary for the State to monitor compliance with the *particular* probation condition that gave rise to the search.” *Id.*, See RCW 9.94A.631(1) (*emphasis added*). The court established that for a search to be lawful, there must be a nexus between the search and the suspected probation violation. *Cornwell*, 190 Wn.2d at 306.

Cornwell fell short of showing the required nexus because the testimony there failed to show that the CCO expected to find evidence of the particular violation of failure to report through the vehicle search. On the contrary, the court called the search a “fishing expedition,” because it was unlimited in scope and the CCO explicitly testified he was looking for “further violations,” rather than evidence of the suspected violation of failure to report. *Cornwell*, 190 Wn.2d at 306-307.

- a. The required nexus in this case was established through Grabski’s testimony from experience with the violation of failure to report to DOC.

Cornwell does not stand for the proposition that a nexus could *never* be found between a violation of failure to report and a property search. Although the court in *Cornwell* stated, “this court has already determined there is no nexus between property and the crime of failure to

report,” (citing *State v. Patton*, 167 Wn.2d 379, 395, 219 P.3d 651 (2009)), that statement can be classified as dicta. *Cornwell*, 190 Wn.2d at 306. A statement is dicta when it is not necessary to the court's decision in a case. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 8-9, 977 P.2d 570 (1999). Dicta is not binding authority. *Hildahl v. Bringolf*, 101 Wn. App. 634, 650–51, 5 P.3d 38 (2000).

The cited authority, *Patton*, concerned the crime of failure to appear to court, for which the court concluded evidence would not be found in a vehicle. 167 Wn.2d at 395. The holding in *Patton* is inapplicable to both *Cornwell* and this case, because failing to appear to court is an entirely different violation than failing to report to DOC. Although *Patton* held that evidence of a failure to report *to court* would not be found in a property search, it did not hold that evidence of failure to report *to DOC* could not. 167 Wn.2d at 395. (*emphasis added*). In *Cornwell*, the nexus was not established because the CCO's testimony in that case did not show he had an expectation of finding evidence of the particular violation through the search, and on the contrary, his search was unlimited in scope and therefore a “fishing expedition.” 190 Wn.2d at 306-307 (*emphasis added*).

Here, the facts are distinguishable from those in *Cornwell*. Unlike in *Cornwell*, here Grabski's testimony shows he had a reasonable

expectation that he would find evidence of the suspected violation, failure to report to DOC, in the vehicle. First, although the TPD officers who looked up the warrant did not inform Grabski of the particular violation, Grabski testified that he knew what the nature of the violation was, because DOC Secretary warrants are only issued when an individual fails to report. 8/11/15 108; 4/6/17 RP 35, 48. Furthermore, from his experience, Grabski knows that reporting to DOC when an individual is on supervision for a narcotics offense entails additional directives, including providing urinalysis testing, getting a chemical dependency evaluation and verifying place of residence. 4/6/17 28-29, 36-38.

Grabski knew defendant was on supervision for unlawful possession of a controlled substance, a narcotics offense. 4/6/17 RP 18, 35. Accordingly, he testified, evidence of narcotics use and place of residence in defendant's vehicle would directly relate to the suspected violation of failure to report. 4/6/17 RP 38-40.

Evidenced by Grabski's testimony from experience, reporting to DOC entails more than simply showing up. 4/6/17 RP 28-29, 36-38. In fact, "failure to report" is a shorthand reference to a violation of the statutorily mandated community custody condition that reads, "[i]f the offender is supervised by the department, the department shall at a minimum instruct the offender to: (a) Report *as directed* to a community

corrections officer.” RCW 9.94A.704 (*emphasis added*). In this case, the condition was phrased on the judgement and sentence order as “report *as directed* to CCO,” and “report to and be available...*as directed*.” CP 67. The qualifying phrase “as directed” suggests the meaning of “report” varies based on the specific directives given to an offender.

When an offender violates this condition, DOC issues a warrant for “escape,” which means “willful failure to *be available for supervision* by the department while in community custody,” “by making his or her whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer.” RCW 9.94A.030(25). RCW 72.09.310. The statutory language suggests failing to report entails more than simply showing up because it prevents the offender from being “available for supervision.” Supervision includes monitoring the numerous requirements of an offender’s sentence and undoubtedly requires more than simply showing up to DOC. *See*, RCW 9.94A.704 (Community custody conditions supervised by DOC).

The language used in both the community custody statute and the judgement and sentence order here show that reporting to DOC entails not simply showing up, but rather, reporting “as directed by the CCO” and being “available for supervision.” Grabski knows what the additional directives to reporting and being supervised are from his experience, and

his testimony gave examples of them, *i.e.* urinalysis and verifying residence. 4/6/17 RP 28-29, 36-38.

Grabski's testimony here establishes the nexus that *Cornwell* lacked, because Grabski had a reasonable expectation that he would find evidence of the suspected violation of failure to report in defendant's vehicle, based on his knowledge of what failing to report actually means. 4/6/17 RP 38-40. Furthermore, his search here was not a "fishing expedition," because his testimony explains how the evidence he was searching for relates directly to the suspected violation. *Id.* Accordingly, this Court should deny suppression of the evidence collected in the vehicle search and affirm defendant's convictions.

- b. Alternatively, a nexus exists based on separate violations for failure to notify the court or CCO in advance of any change in address and failure to complete substance abuse treatment, knowledge of which was imputed to Grabski from the DOC documents under the collective knowledge doctrine.

Under the collective knowledge doctrine, or fellow officer rule, "[w]here one officer knows facts constituting reasonable suspicion or probable cause (sufficient to justify action under an exception to the warrant requirement), and he communicates an appropriate order or request, another officer may conduct a warrantless stop, search, or arrest without violating the Fourth Amendment." *United States v. Ramirez*, 473

F.3d 1026, 1037 (9th Cir. 2007). Furthermore, a police department “hot sheet” bulletin may justify an arrest if the police agency issuing the bulletin has sufficient information to provide probable cause. *State v. Mance*, 82 Wn. App. at 542, 918 P.2d 527 (1996).

An officer who acts in good-faith reliance upon a bulletin does not need to have personal knowledge of the evidence supplying good cause for the stop, so long as the issuing agency has the necessary information to support it. *State v. O’Cain*, 108 Wn. App. 542, 551–52, 31 P.3d 733, 738 (2001), (citing *U.S. v. Robinson*, 536 F.2d at 1299-1300 (9th Cir.1976)). “The fellow officer rule is applicable to situations involving all modes of communication, including radio, telephone, teletype and face-to-face contact.” *State v. Maesse*, 29 Wn. App. 642, 646, 629 P.2d 1349 (1981).

Courts apply this doctrine “regardless of whether [any] information [giving rise to probable cause] was actually communicated to” the officer conducting the stop, search, or arrest. *Ramirez*, 473 F.3d at 1032, (citing *United States v. Bertrand*, 926 F.2d 838, 844 (9th Cir.1991) (*emphasis added*); *See also United States v. Bernard*, 623 F.2d 551, 560-561 (9th Cir.1980) (looking to collective knowledge “even though some of the critical information had not been communicated to” the arresting officer); *United States v. Sutton*, 794 F.2d 1415, 1426 (9th Cir. 1986) (same).

“The question legitimately is whether the law enforcement system as a whole had complied with the requirements of the Fourth Amendment, which means that the evidence should be excluded if facts adding up to probable cause were not in the hands of the officer or agency which gave the order or made the request.” *Maesse*, 29 Wn. App. at 646.

Here, the law enforcement agency had sufficient facts to constitute probable cause to search defendant’s vehicle on two bases. First, the “court special supervision closure” document revealed that defendant had violations for not only failing to report, or “absconding supervision,” but also for “fail[ure] to complete substance abuse treatment.” 4/6/17 RP 31. These violations were the basis of the issuance of the warrant. *Id.* Second, the “chronos”¹ documenting defendant’s supervision detailed multiple violations of his community custody. 4/6/17 RP 21-25.

In addition to the violation for failure to report on 5/21, the chronos also evidence a violation of the condition that defendant “notify the court or community corrections officer in advance of any change in defendant’s address or employment.” 4/6/17 RP 23-24, *See also*, CP 66. On 4/26, a CCO visited defendant’s last reported address, his mother’s home. 4/6/17 RP 24. Defendant’s alleged bedroom consisted of a futon

¹ A “chrono” report is a chronological case summary for an offender who is in DOC custody or is under its jurisdiction. *See*, 4/6/17 RP 21.

with no bedding and a closet with two shirts hanging in it. *Id.* at 25.

Defendant was not present and did not arrive while the CCO was there. *Id.*

These facts, documented in the chronos, give rise to a reasonable suspicion that defendant violated the address reporting condition.

Employing the collective knowledge doctrine, the information in both the court special supervision closure and the chronos were imputed to Grabski, giving him probable cause to search defendant's vehicle. *See*, RCW 9.94A.361. The court special supervision closure lists violations for absconding from supervision and failing to complete substance abuse treatment, and the chronos detail a reasonably suspected violation for notifying of change in address, giving rise to the authority under RCW 9.94A.361 to search defendant's property for evidence of those violations.

Evidence of narcotics use would directly relate to defendant's violation for substance abuse treatment. Furthermore, since defendant's place of residence was unclear, and at one point he was homeless, it was reasonable to expect to find evidence of where he is living in his vehicle. Such evidence, including mail and receipts with defendant's name on them, was indeed found in the vehicle. 8/11/15 RP 120.

On remand, defendant objected to the admission of the chronos and court special supervision closure. 4/6/17 31-32. The State argued, citing *State v. O'Cain*, 108 Wn. App. 542, 31 P.3d 733 (2001),

an officer who acts in good faith reliance upon the bulletin does not need to have personal knowledge of the evidence supplying good cause for the stop, so long as the issuing agency has the necessary information.

4/6/17 RP 33.

The trial court sustained the objection because,

[t]his witness has not testified, which is what I believe the objection was, that this officer was aware of the information in the exhibits that you're proffering at the time he searched the vehicle... You have not laid or made a record that this officer relied on that information.

4/6/17 RP 34.

Here, the trial court misstated the rule of law. Firstly, Grabski did rely on the information in the documents because it was the basis for the warrant, which he testified gave rise to the search. 4/6/17 RP 35. Grabski testified he is familiar with both DOC documents. 4/6/17 RP 21, 30. Furthermore, although he had yet to view the documents at the time of the search, the facts giving rise to probable cause were in the hands of “the agency which gave the order or made the request,” DOC, and, therefore, the imputed knowledge of them gave Grabski the authority to search on this basis. *Maesse*, 29 Wn. App. at 646. The collective knowledge doctrine applies “regardless of whether [any] information [giving rise to probable cause] was actually communicated to” the officer conducting the stop, search, or arrest.” *Ramirez*, 473 F.3d at 1032.

Grabski acted under the authority of the DOC, the agency that issued the warrant, court special supervision closure, and chronos. 4/6/17 22, 30. Communication of the specific facts in the documents that constitute reasonable suspicion under RCW 9.94A.361 was not required to impute to Grabski knowledge thereof. *See, Ramirez*, 473 F.3d at 1032; *Bernard*, 623 F.2d 560–61 (looking to collective knowledge “even though some of the critical information had not been communicated to” the arresting officer); *Sutton*, 794 F.2d at 1426 (same).

Accordingly, the vehicle search was lawful, and the evidence collected from it need not be suppressed. This Court should affirm defendant’s convictions.

3. THE COURT SHOULD AFFIRM THE CHALLENGED FINDINGS AND CONCLUSIONS WHERE THE FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE CONCLUSIONS OF LAW FLOW FROM THE FINDINGS, WITH THE EXCEPTION OF UNDISPUTED FACT 5, WHICH SHOULD BE CORRECTED TO CLARIFY THAT THE RECORD SHOWS GRABSKI KNEW WHAT DEFENDANT WAS ON SUPERVISION FOR, UPCS.

When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011). “Substantial evidence is a

quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true.” *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 63-64, 277 P.3d 18 (2012) (internal quotation marks omitted). This is a deferential standard, which views reasonable inferences in the light most favorable to the prevailing party. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995).

“If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently.” *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). Reviewing courts also defer to the trial court on issues of conflicting evidence, witness credibility, and persuasiveness of the evidence. *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The party challenging a finding of fact bears the burden of showing that the record does not support it. *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000). Courts review conclusions of law de novo. *Sunnyside Valley Irrig. Dist.*, 149 Wn.2d at 880.

- a. The court's findings of fact are supported by substantial evidence in the record.

Defendant assigns error to findings of fact, labeled “undisputed facts,” 2, 5, 8, 12, and 13, arguing these findings are not supported by substantial evidence.

Defendant first challenges “Undisputed fact 2, ‘[t]he alleged violation in this case was Failure to Report to the Department of Corrections. The issue therefore is what does failure to report mean,’” arguing this finding unnecessarily complicated the analysis. CP 43. Grabski testified that reporting to DOC entails more than just showing up, including urinalysis and verifying residence. 4/6/17 RP 28-29, 36-38. Furthermore, the community custody conditions that require offenders to “report *as directed*” and “be available *for supervision*” suggest reporting and being supervised can include additional directives to merely showing up. RCW 9.94A.704; CP 67. Considering the evidence, to determine whether evidence of a violation of this condition could be found in a property search, the court was reasonable to seek to define what failure to report means.

Defendant then challenges “Undisputed 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. Although the State concedes that Officer

Young testified he did not know what the underlying charge was when he confirmed the warrant existed, there is nonetheless evidence that Grabski knew this fact. 8/11/15 RP 108.

Grabski never testified he did *not* know what the underlying charge was. In 2015, Grabski testified he had no knowledge of crimes defendant was committing “*beyond* a DOC warrant,” not that he did not know what the charge underlying the warrant was. 8/11/15 RP 73. In fact, Grabski testified multiple times that he knew defendant was on supervision for UPCS. 4/6/17 RP 18, 19, 28, 35. Although the record is void as to how Grabski knew that fact, it is reasonable to infer that he likely knew it based on his prior knowledge of defendant. Grabski undoubtedly knew information about defendant that the officers did not tell him.

For example, Grabski was the person who initiated the incident, because he recognized defendant as being on supervision by DOC and suspected he had a warrant. 8/11/15 RP 65-66; 4/6/17 RP 17. He unambiguously testified at multiple points that he knew defendant was on supervision for UPCS, which informed his inferences about the community custody conditions. 4/6/17 RP 18, 19, 28, 35. Here, the court likely misstated how Grabski got that information.

Nonetheless, the record does not show the Grabski did not know what offense defendant was on supervision for. Viewing the evidence in

the light most favorable to the State, one could reasonably conclude that Grabski knew defendant was on supervision for UPCS because he testified that he did several times and he had knowledge about the defendant based on a prior encounter.

Next, defendant challenges:

Undisputed Fact 8, '[s]ome of the other conditions of supervision which are imposed on defendants who are under supervision for narcotics offenses include reporting to 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 first two sentences of Fact 8 are based on Grabski's testimony from his experience with community custody supervision. 4/6/17 RP 36-37. The court was free to believe his testimony. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

As for the finding as to the nature of the violations, the trial court had a basis to make that finding, namely the DOC generated "court special supervision closure." This document should have been admitted under the collective knowledge doctrine, because it gave rise to probable cause to

search defendant's property. In particular, the document evidences not only failing to report, but also failing to complete substance abuse treatment, so Grabski had a basis to search for evidence of those violations. 4/6/17 RP 21-25, *See*, RCW 9.94A.361. Under the collective knowledge doctrine, the evidence should only be excluded if the facts adding up to probable cause were not in the hands of the officer or agency which gave the order or made the request. *Maesse*, 29 Wn. App. at 646.

Here, the facts were in the hands of DOC, which issued the court special supervision closure and the warrant. 4/6/17 RP 21. The law enforcement system as a whole had complied with the requirements of the Fourth Amendment, because it had facts constituting probable cause for the search, so the DOC document should have been admitted. *Maesse*, 29 Wn. App. at 646. Accordingly, the court had a valid basis for relying on the court special supervision closure when it made the finding as to the nature of the violations.

Defendant also challenges "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.'" CP 45. The court found the search and its scope met the requirements of RCW 9.94A.631 because there was a nexus between the search and the suspected violation. Substantial evidence supports this finding.

Officer Grabski testified that he conducted the warrantless search of the vehicle for evidence of the suspected community custody violation, failure to report, which would include evidence of narcotics use and place of residence, because verifying those things is part of reporting to DOC. 4/6/17 RP 28-29, 36-38. The court reasonably concluded that Grabski's search met the nexus requirement where it was directly related to the particular suspected violation.

Defendant next challenges:

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.'" CP 45. The court made this finding based on Grabski's testimony that in direct relation to the violation of failure to report, he believed he would find evidence of narcotics use and place of residence.

4/6/17 RP 38-39.

He testified that "due to the fact that [defendant] was not reporting," the DOC could not verify whether he was using drugs or where he was living. 4/6/17 RP 28-29. His belief that he would find the evidence in the car was based on his knowledge from experience of what it means when an individual fails to report. 4/6/17 RP 30, 35, 38-39. The court apparently found his testimony credible and accordingly made these

findings. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *Camarillo*, 115 Wn.2d at 71.

- b. The conclusions of law flow from the findings.

Defendant challenges conclusions of law, labeled “reasons for admissibility or inadmissibility of the evidence,” 3, 5, 8, 9, 11, and 12.

First defendant argues “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,’” is an error as a matter of law, because it circumvents the holding in *Cornwell*. CP 46. *Cornwell* held that a nexus must exist between the suspected violation and search. 190 Wn.2d at 306. *Cornwell* did not hold that a CCO’s experience and knowledge could never give rise to the required nexus. *Id.*

Here, the court reasonably based its analysis on Grabski’s knowledge from experience. Grabski’s testimony evidenced that he knew from experience what evidence of the suspected violation could consist of, and accordingly, that he expected to find it through the vehicle search. 4/6/17 RP 38-39. This was not the “fishing expedition” that the court in *Cornwell* took issue with, because here, Grabski explained exactly how the evidence he was searching for related to the suspected violation of failure to report. He knew from experience that monitoring narcotics use

and place of residence are part of reporting to DOC. 4/6/17 28-29. His experience informed for his reasonable expectation as required by RCW 9.94A.361.

Next defendant challenges, “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. This conclusion logically flows from the finding, based on Grabski’s testimony, that failing to report can include failing to do urinalysis testing and failing to verify place of living. 4/6/17 RP 28-29, 36-38. Grabski testified that evidence of those things directly relates to defendant’s failing to report. 4/6/17 28-29. Here, Grabski knew the violation was failure to report. *Id.*, 4/6/17 RP 35, 48. Therefore, the court was reasonable to conclude that the compliance check was conducted to verify those two things.

Furthermore, defendant challenges:

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.

CP 46.

The court here concluded that a compliance check is broader for failure to report, which means absconding from supervision, not merely

failing to appear. As explained, the citation in *Cornwell* to *Patton* which states, “courts have determined there is no nexus between property and the failure to report,” is inapplicable here because *Patton* dealt with a failure to appear to court. See, *Cornwell*, 190 Wn.2d at 306 (citing *Patton*, 167 Wn.2d at 395).

Here, the failure to report to DOC was much different, because as Grabski testified, reporting to DOC includes things beyond simply showing up, such as urinalysis and verifying place of residence. 4/6/17 RP 28-29, 36-38. Accordingly, a compliance check for failure to report could reasonably include searching for evidence of those things. This conclusion flows directly from the court’s finding based on Grabski’s experience of what failure to report can entail.

Similarly, defendant challenges “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. Defendant wrongly argues this conclusion is error under *Cornwell* and *Patton*. As explained above, the holding in *Patton* is inapplicable here because *Patton*’s failure to appear to court is an entirely different issue than the defendants’ failure to report to DOC here and in *Cornwell*. See, *Patton*, 167 Wn.2d at 395; *Cornwell*, 190 Wn.2d 296.

What *Cornwell* actually stands for is this: there must be a nexus between the property searched and the suspected violation. 190 Wn.2d at 306. *Cornwell* does not hold that a nexus could *never* exist in the case of a failure to report to DOC. *Id.* Here, the court reasonably concluded the required nexus existed, based on Grabski's testimony from his experience. This conclusion flows directly from the finding that failure to report includes directives in addition to simply showing up, of which Grabski expected to find evidence in the search of defendant's vehicle.

Finally, defendant challenges "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.'" CP 47. Again, the nexus requirement established in *Cornwell* means there must be an expectation that evidence of the suspected violation will be found to support a property search. 190 Wn.2d at 306. As explained above, *Cornwell* nor *Patton* do not hold that a nexus can never exist when the violation is a failure to report to DOC. *See, Cornwell*, 190 Wn.2d at 306; *Patton*, 167 Wn.2d at 395.

Here, the court found the required nexus existed because it concluded, based on Grabski's testimony about his experience as a CCO,

that his expectation that he would find evidence related to failure to report in defendant's vehicle was reasonable. The court was free to believe Grabski's testimony. The court's conclusion relies on a determination that Grabski's testimony was credible, which will not be overturned on appeal. *See, Camarillo*, 115 Wn.2d at 71. This conclusion is supported by the court's findings as to the meaning of failing to report to DOC.

Where the court's findings are supported by substantial evidence and its conclusions flow from the findings, as here, the reviewing court should affirm the trial court's findings of fact and conclusions of law, with the exception of "Undisputed Fact 5." The court should remand to correct this finding to clarify that although Officer Boyd did not relay defendant's underlying charge when he confirmed the warrant, the record nonetheless shows Grabski knew what defendant was on supervision for, UPCS.

4/6/17 RP 18, 19, 28, 35.

D. CONCLUSION.

The court here followed the mandate of the Court of Appeals to consider whether the required nexus existed and alternatively, whether the search was an inventory search following vehicle impound. The required nexus was established, because based on Grabski's experience, he had a reasonable expectation that evidence of the violation of failure to report would be found in the vehicle. Alternatively, Grabski had probable cause

to search the vehicle based on two additional reasonably suspected violations for failure to notify of address change and failure to complete substance abuse treatment, knowledge of which was imputed to Grabski under the collective knowledge doctrine.

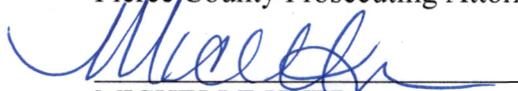
The challenged findings of fact are supported by substantial evidence, and the conclusions of law flow from the findings and therefore, should be affirmed, with the exception of Undisputed Fact 5. The State concedes Undisputed Fact 5 should be corrected to clarify that although Officer Boyd did not relay defendant's underlying charge when he confirmed the warrant, the record nonetheless shows Grabski knew what defendant was on supervision for, UPCS.

Accordingly, defendant's convictions for unlawful possession of a firearm (Count I), unlawful possession of a controlled substance (oxycodone) (Count IV), and unlawful possession of a controlled substance (hydrocodone/dihydrocodeinone) (Count V) should be affirmed. Defendant's convictions for unlawful possession of a controlled substance (cocaine) (Count II) and bail jumping (Count III) were entirely

independent of the vehicle search and should be affirmed irrespective of the issues raised in this appeal.

DATED: November 9, 2018.

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Pierce County Prosecuting Attorney



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BRENNA QUINLAN
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11-9-18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

November 09, 2018 - 3:55 PM

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