

FILED  
Court of Appeals  
Division II  
State of Washington  
11/9/2018 10:16 AM  
No. 51399-4-II

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

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STATE OF WASHINGTON, Respondent

v.

JAKE BELANGER, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY  
THE HONORABLE BRYAN E. CHUSHCOFF

---

BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

A. The trial court erred when it denied Jake Belanger's CrR 3.6 motion to suppress evidence.

1. The trial court erred when it entered undisputed fact 60: "Officer Grabski knows, based on his training and experience, that offenders will keep weapons such as knives, guns, and brass knuckles on or near their persons", because that finding is not supported by substantial evidence. CP 254.
2. The trial court erred when it entered undisputed fact 61: "Officer Grabski believed, based on his training and experience, that given the defendant's behavior of reaching towards the driver's floorboard of his vehicle during the initial struggle, there was possibly a weapon the defendant was prohibited from possessing in that location" because it is not supported by substantial evidence. CP 254.
3. The trial court erred when it entered conclusion of law 4: "There was a nexus between the defendant's violations- the possession of narcotics, the attempted flight from

DOC officers and the Pierce County Sheriff's Department, the failure to appear to DOC, the apparent attempts to reach for a weapon in the driver's floorboard of the vehicle- and the place that was searched- the defendant's vehicle." CP 261.

4. The trial court erred when it entered conclusion of law 6: "The defendant's motion to suppress is denied." CP 262.

B. The trial court erred in denying Belanger's motion to dismiss the firearm enhancement for insufficient evidence.

C. Imposition of the firearm enhancements violated Mr. Belanger's Fourteenth Amendment right to due process because the evidence was insufficient to prove that he was "armed."

D. The trial court abused its discretion when it doubled the maximum sentence length for the unlawful possession with intent to deliver controlled substances convictions.

E. The DNA Database Fee and Criminal Filing Fees must be stricken.

#### ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Does a trial court err if it enters findings of fact unsupported by substantial evidence?

- B. Does a trial court err when it enters conclusions of law not supported by facts based on substantial evidence?
- C. In *State v. Cornwell* the Washington Supreme Court held the warrantless search of a probationer is only permitted where there is a nexus between the alleged probation violation and the property searched. Did the trial court err when it ruled there was a sufficient nexus between the suspected violations and the search of his vehicle?
- D. Are law enforcement officers required to obtain a warrant to search property of an individual on community custody where there is not a nexus between the property searched and the alleged DOC probation violation?
- E. An individual is armed for firearm enhancement purposes when he is within proximity of an easily and readily available firearm and when there is a nexus between the accused, the weapon, and the crime. Belanger was in a car which contained a revolver in a safe, which might have been locked, and a second gun inside of a backpack out of Belanger's reach. Did the trial court err in denying Belanger's motion to dismiss for insufficient evidence where the State failed to prove that Belanger was within proximity of the

inaccessible revolvers and there was no nexus between him, the weapon, and the crime?

- F. The court may not impose a firearm enhancement sentence unless the State proves beyond a reasonable doubt that the weapon was available for use for offensive or defensive purposes. Did the State fail to prove beyond a reasonable doubt the defendant was armed within the meaning of RCW 9.94A.533(3)?
- G. Did the trial court abuse its discretion when it doubled the maximum penalty under RCW 69.50.408?
- H. Should the DNA Database Fee and Criminal Filing Fee be stricken from the judgment and sentence?

## II. STATEMENT OF FACTS

### Charges

Pierce County prosecutors charged Jake Belanger by information with three counts of possession with intent to deliver a controlled substance: alprazolam, heroin, and methamphetamine, while armed with two firearms, and two counts of unlawful possession of a firearm first degree. CP 217-219. The prosecutor told the court that if Mr. Belanger were convicted, the State

intended to ask for the “discretionary doubler” *or* an exceptional sentence under “free crimes.” RP 5. The prosecutor told the court it would not ask the court to impose both a “doubler” *and* an exceptional sentence. RP 5.

### CrR 3.6 Hearing

In November 2016, Jake Belanger (“Belanger”) was subject to DOC community custody. RP 142. He failed to report as directed and assumed there was a warrant for his arrest. RP 144, 160.

On November 6, 2016, Deputy Huber (“Huber”) contacted an informant and learned that Belanger would be at a certain park, driving a Pontiac Grand Am, and likely in possession of narcotics and a weapon. RP 80-81. He informed Thomas Grabski (“Grabski”) who worked for DOC conducting fugitive apprehension and discovery of new violations by individuals subject to active supervision with DOC. RP 21,29-31. Huber did not testify about either the basis of the knowledge or the reliability of the informant. RP 57.

### 3. Confirmation and Details of Warrant

The testifying officers could not remember who confirmed there was a DOC warrant for Belanger, but each said he thought

the other had done it. RP 24,32, 82, 90. Huber testified he thought there was a tab on the warrant listing Belanger as a violent offender and flight risk. RP 83. He said the violent offender caution tab had an explanation box to describe the circumstances, such as being armed or a gang member. He did not remember any information listed in the explanation box for Belanger. RP 84.

#### 4. The Arrest

Grabski, his supervisor, and two deputies drove to the area they hoped to find Belanger. RP 34-35. They saw Belanger and his girlfriend sitting in a parked car. RP 35-36. The officers used two vehicles to box Belanger's car in. RP 37. Belanger panicked and put the car in reverse and then forward, bumping a police vehicle<sup>1</sup>. The deputies went to the passenger side and removed Mr. Belanger's girlfriend from the car and then assisted Grabski and his supervisor in removing Mr. Belanger from the vehicle. RP 41, 96.

Belanger did not attack or fight the officers, but Grabski testified he saw Belanger "wiggling" himself toward the floorboard of the car. RP 42-43,98. Huber described Belanger as "moving around" in the car. Huber tased Belanger three times. RP 95-98.

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<sup>1</sup> The vehicle Belanger drove that day did not have a rearview mirror. RP 128,201.

After officers handcuffed Belanger, he continued to twist his body and could not calm down for a period. RP 44,101,103.

Given Belanger's panicked reaction, Grabski guessed that Belanger was trying to "distance himself" from the car, and "it usually means there is something in the vehicle...not always...but odds are." RP 44. When asked if he was suspicious there was a weapon when he saw Belanger going toward the floorboard, Grabski answered:

I don't think that I was thinking that there was a weapon on the floorboard. I am thinking that I need to get this guy in cuffs. I mean, I'm just controlling his hands, controlling the body, getting him into custody and then I can sort out everything else after that.

RP 41.

Both Grabski and Huber testified Belanger was handcuffed and searched before Grabski searched the vehicle. RP 59, 115. The search incident to arrest recovered suspected heroin, methamphetamines, and alprazolam, and a glass pipe used to smoke methamphetamines, and \$695. RP 45, 106.

##### 5. Justifications for the Search of The Pontiac

Grabski testified there were four reasons for the search of the vehicle: (1) the possibility they would find documents with

Belanger's home address RP 46-47; (2) Belanger had narcotics on his person; (3) he thought Belanger was trying to distance himself from the vehicle; and (4) Belanger had a DOC felony warrant for failure to report. RP 48-49.

#### 6. The Search of The Pontiac

Grabski searched the vehicle and found a handgun inside of a black backpack in the backseat. RP 62. Ammunition for the gun was under clothing in a bin somewhere in the backseat. RP 49,62. Grabski found a safe on the driver's side floorboard with a handgun inside and a second safe behind the driver's seat. RP 49. The second safe contained what appeared to be heroin, baggies, and methamphetamine. RP 60.

Neither Grabski nor Huber could remember if the safes were locked when they found them. RP 60, 118. Grabski stated that for DOC clients he never obtained a warrant before prying open a safe. RP 62. Both Belanger and his girlfriend testified the officers got a crowbar and opened the locked safes. RP 135, 191. When the search was complete, officers released the car to Belanger's girlfriend. RP 204.

## 7. CrR 3.6 Findings of Fact and Conclusions of Law

The court entered its written findings of fact and conclusions of law. CP 249-262. (See Appendix).

### TRIAL

CCS Grabski testified he found the backpack on the driver's side of the backseat and Belanger could not have reached it from the front seat. RP 673. The backpack was not entered as evidence and there was no testimony it was unzipped during the search. CP 106-108.

CCS Supervisor Poston testified as he and Grabski tried to remove Belanger from the car Belanger "just did not want to be arrested." RP 697. He stated, "Basically, he was flailing back and forth quite a bit at the time. He was going down, and then he's come up...He was just flailing. He wasn't striking us or anything like that." RP 697. Poston saw nothing on the floorboard of the car. RP 697.

### MOTION TO DISMISS

After all the evidence had been presented, defense counsel moved to dismiss the two firearm sentencing enhancements on

Counts 1, 2, and 3, based on *State v. Gurske*<sup>2</sup>. RP 739. Counsel argued that officers did not present conclusive testimony whether the safe found on the floorboard was locked or unlocked. Both Grabski and Huber said they simply forgot, and neither had it documented in their official reports. RP 740, 748. The backpack holding the firearm was in the backseat, behind the driver, and according to CCS Grabski, out of Belanger's reach. There was no testimony as to whether the backpack was zipped or unzipped. RP 757. The court initially agreed to dismiss the firearm enhancements on Counts 1,2, and 3 for the firearm found in the backpack. RP 758.

The following day, the state argued that under *State v. Neff*, *State v. Eckenrode*, and *State v. O'Neal*, the burden was on the defense to prove he was not armed, and in the context of an ongoing operation, the defendant need not have the weapons readily available or easily accessible. RP 763-765. The court reconsidered its ruling and determined it would not dismiss the firearm enhancements for the backpack gun. RP 785. The jury convicted on all counts. CP 149-160.

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<sup>2</sup> *State v. Gurske*, 155 Wn.2d 134, 118P.3d 333 (2005).

## SENTENCING

At sentencing, the State argued the court should impose the "discretionary doubler" based on prior convictions for possession and/or possession with intent to deliver controlled substances, under RCW 69.50.408. RP 890. The State further argued doubling the statutory maximum would authorize the court to impose 60 months for each count with a firearm enhancement, rather than 36 months. RP 888-897. Defense counsel objected. RP 888-889. Defense counsel argued for an exceptional downward sentence because a 256 month sentence was disproportional to the nonviolent offenses. RP 902.

The court found counts I and II were the same criminal conduct but doubled the statutory maximum for both, and sentenced Belanger to 100 months to be served concurrent. The court also imposed 116 months for each unlawful possession of a firearm, to be served concurrent. CP 230. After doubling the statutory maximum, the court imposed two 60-month firearm enhancements on counts I and II. CP 230. The court imposed a 356-month term of incarceration, 240 months to be served as flat time firearm enhancements. CP 226, 230.

The court found Belanger indigent and imposed the mandatory legal financial obligations of a criminal filing fee and the DNA collection fee. CP 227-228. Belanger makes this timely appeal. CP 238.

### III. ARGUMENT

#### A. Under the Protections Of The Fourth Amendment And Washington State Constitution Article I, §7, A Search Authorized By RCW 9.94A.631(1) Must Relate To The Violation Which The Community Corrections Officer Believes Occurred.

##### 1. Standard of review

When an appellate court reviews the denial of a motion to suppress, it reviews the findings of fact used to support those conclusions for substantial evidence and the trial court's conclusions of law de novo. *State v. Fuentes*, 183 Wn.2d 149, 157, 352 P.3d 152 (2015). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a rational, fair-minded person of the truth in the finding. *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

##### 2. The Trial Courts Findings Are Not Supported By Substantial Evidence.

The trial court entered undisputed fact 60, that Grabski knew, based on this training and experience, that offenders will keep weapons such as knives, guns, and brass knuckles on or near their persons. CP 254. The words “knives” and “brass knuckles” are nowhere in the record. Grabski did *not* testify he knew offenders kept weapons on or near their persons. This finding is not supported by substantial evidence.

The trial court entered undisputed fact 61, that Grabski believed, based on his training and experience, that given Belanger’s behavior of reaching to the floorboard, there was possibly a weapon he was prohibited from possessing in that location. CP 254. Grabski testified he did *not* think there was a weapon on the floorboard of the car during the seizure. RP 41. This finding is not supported by substantial evidence.

### 3. Constitutional Guarantees Protect Individuals From Unwarranted Searches Of Vehicles.

The Fourth Amendment protects against unreasonable searches. U.S. Const. amend.IV. Even with a warrant based on probable cause, or an exception to the warrant requirement, the scope and manner of the search are limited: it must be reasonable, "balancing the need to search against the invasion which the

search entails." *Camara v. Municipal Court*, 387 U.S. 523, 536-37, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

Under *Gant*, the United States Supreme Court held that an automobile search incident to arrest exception to the Fourth Amendment's warrant requirement applies only when an arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search and when it is reasonable to believe evidence relevant to the crime of arrest\_might be found in the car. *Arizona v. Gant*, 556 U.S. 332, 12 S.Ct. 1710, 173 L.Ed.2d 485 (2009). (Emphasis added).

The Washington State Constitution Article I,§7 provides a broader protection, prohibiting any disturbance of an individual's affairs without authority of law<sup>3</sup>. *York v. Wahkiakum Sch. Distr. No. 200*, 163 Wn.2d 297, 305-06, 178 P.3d 995 (2008). There are only a "few jealously guarded" exceptions to the bar to warrantless arrests, searches, and seizures. *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (internal citations omitted).

Regarding car searches, an exception to the warrant requirement applies only where there is "a reasonable basis to

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<sup>3</sup> "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed and that these concerns exist at the time of the search.” *State v. Snapp*, 174 Wn.2d 177, 189, 275 P.3d 289 (2012) (quoting *State v. Patton*, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009)).

Where the arrestee is secured and removed from the automobile, he poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile. The arrestee’s presence does not justify a warrantless search under the search incident to arrest exception. *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). There is no “automobile exception” recognized under article I, § 7. *Snapp*, 174 Wn.2d at 192.

Here, Belanger had been removed from the car, was handcuffed, and guarded when Grabski began the search. He posed no risk of obtaining a weapon or concealing or destroying potential evidence of a crime in the car. The search of the car was not justified based on a search incident to arrest.

#### 4. Probationers And Limited Authority To Search

Under Washington law, probationers have a diminished right of privacy that makes it constitutionally permissible for a community

corrections officer to search the individual, his car, his home, and his property without a warrant. RCW § 9.94A.631(1). The authority is limited: There must be a well-founded suspicion the probationer has committed a probation violation, and there must be a nexus between that violation and the property searched. *State v. Cornwell*, 190 Wn.2d 296, 302, 306, 412 P.3d 1265 (2018). A well-founded suspicion or reasonable cause requires, as in a *Terry* stop, specific and articulable facts and rational inferences. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

While Washington law recognizes that probationers have diminished privacy rights, that expectation of privacy is constitutionally permissible only to the extent necessitated by the legitimate demands of the operation of the parole process. *State v. Jardinez*, 184 Wn.App. 518, 523, 338 P.3d 292 (2014); *State v. Parris*, 163 Wn.App. 110, 118, 259 P.3d 331 (2011); *State v. Simms*, 10 Wn.App. 75, 86, 516 P.2d 1088 (1973).

As a preliminary matter, the facts and circumstances of this case show the deputy unjustifiably used the probationer supervision process to justify a search of Belanger's car. The intended search of Belanger's property was beyond the known probation violation of failure to report.

Huber obtained information from an unnamed informant who accused Belanger of having a weapon and narcotics in his vehicle. The state presented no evidence as to the reliability or credibility of the informant. Huber did not seek a warrant, which would have required probable cause: an affidavit of facts and circumstances sufficient to establish a reasonable inference that the defendant was involved in criminal activity, and the evidence of criminal activity could be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Instead, Huber relied on the less stringent standard of “reasonable cause to believe” applicable to a probationer’s search. *Cornwell*, 190 Wn.2d at 304.

In *State v. Reichert*, 158 Wn.App. 374, 242 P.3d 44 (2010), the Court held that a search conducted by a DOC officer does not run afoul of the Fourth Amendment merely because he originally receives a tip from police that the probationer may be violating terms of his probation. *Id.* at 385.

The Court did not fully address whether Article I, § 7 of the Washington State Constitution entitled the probationer to more protection from warrantless searches than the Fourth Amendment.

But, to the extent it did address the State constitutional guarantee, the Court said “...precisely because a probationer remains in the custody of law enforcement and because a probation officer’s role is rehabilitative rather than punitive in nature, *a probation officer’s search according to his supervisory duties is distinguishable from that of a police officer competitively ‘ferreting out crime.’*” *Reichert*, 158 Wn.App. at 387. (Emphasis added).

Here, the search of Belanger’s car was meant to “ferret out crime.” The deputy brought the information to a CCS to conduct a search at the expense of Belanger’s privacy without a warrant. *Cornwell*, 190 Wn.2d at 304. The insufficient nexus between the alleged violation and the search of the vehicle rendered the warrantless search illegal.

The trial court’s basis for concluding there was a nexus between the violations and the search of the vehicle cannot satisfy Constitutional requirements and the Washington case law.

In *Cornwell*, 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. *Cornwell*, 190 Wn.2d at 306.

The State's authority governing probationers is limited and requires a CCO to have reasonable cause to believe a probation violation has occurred before conducting a search. *Id.* at 303. The "reasonable cause to believe" standard protects individuals from random suspicionless searches and invades his privacy interest only to the extent necessary to monitor compliance with the particular probation violation that gave rise to the search. *Id.* The individual's other property remains free from search. The Court did not condone probation searches being used as a "fishing expedition to discover evidence of other crimes, past or present." *Id.* at 304 (quoting *State v Combs*, 102 Wn. App. 949, 953, 10 P.3d 1101(2000)).

Here, Grabski testified he conducted the "compliance check" for four reasons:

First, Grabski cited the possibility he would find documents with Belanger's home address. RP 46-47. There was no evidence there was ever a question that Belanger was not living at his registered DOC address. This basis for a search of the car to find documents with his name and address is without merit.

Second: Belanger had narcotics on his person. RP 48-49.

Grabski testified that he arrested Belanger based on the DOC warrant for failure to report. RP 28, 45. Belanger was searched incident to arrest and the items removed from his person were suspected to be controlled substances. In *Cornwell*, as in the current case, CCO Grabski testified:

When people are in violation of probation, they're subject to search. So he's driving a vehicle, he has a felony warrant for his arrest by [DOC] which is in violation of his probation. He's driving the vehicle, he has the ability to access to enter the vehicle, so I'm searching the car to make sure there's no further violations of his probation.

*Cornwell*, 190 Wn.2d at 306.

He explained, "If there is anything in the vehicle, whether it is in a suitcase, clothing, I'm going to go through those items." *Id.*

The Court reasoned:

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

*Cornwell*, 190 Wn.2d at 306. A search of the vehicle after Belanger had been removed and handcuffed, and before officers conducted the NIK tests to confirm controlled substances, should have been conducted with a warrant. RP 115-116. There was no nexus between the arrest for failure to report and a search of the vehicle.

Third, Grabski thought Belanger was trying to distance himself from the vehicle. RP 48-49. Suspecting a probation violation because Belanger was trying to “distance himself from the vehicle” is also without merit. In *Cornwell*, the defendant had a DOC warrant. A Tacoma police officer spotted a car Cornwell was known to drive and intended to stop him because he had the warrant. He followed Cornwell into a driveway. Cornwell got out of the car despite directions to stay in the vehicle. The officer “believed Cornwell was attempting to distance himself from the car.” He ordered Cornwell to the ground and Cornwell instead tried to flee. *Cornwell*, 190 Wn.2d at 299. The CCO was called to the scene to search the car.

The Court reversed the trial court’s denial of a suppression motion, holding there was *no nexus between the search of the vehicle and the crime of failure to report*. *Id.* at 306. That Cornwell tried to “distance himself from the car” was of no account in the reasonable suspicion analysis. A defendant who does not want to be arrested and tries to get away from police does not amount to a reasonable suspicion that his vehicle contains contraband in violation of his community custody conditions.

Last, Belanger had a DOC felony warrant for failure to report. RP 48-49. The DOC felony warrant for failure to report did not justify a search of Belanger's other property. Under Washington law there is no nexus between property and the crime of failure to report. *Cornwell*, 190 Wn.2d at 306; *State v. Livingston*, 197 Wn.App. 590, 389 P.3d 753 (2017); *State v. Patton*, 167 Wn.2d 379, 395, 219 P.3d 651 (2009).

In contrast to Grabski's testimony, the court concluded there was also a nexus because of (1) the possession of narcotics (2) the attempted flight from DOC officers and Pierce County sheriffs, (3) the failure to appear to DOC, and (4) *the apparent attempts to reach for a weapon in the driver's floorboard of the vehicle*. CP 261. The first three bases, as argued above, do not support a finding of a nexus justifying a search of the vehicle. The fourth basis is without support in the record.

Grabski was clear that before the search he did *not* think Belanger was reaching for a weapon. RP 40-41. He said Belanger was "reaching" and "wiggling" around, and it was not until later when Grabski found a safe on the floorboard of the car he thought there was a weapon. RP 40.

Huber testified he saw Belanger “panicking” and his report indicated Belanger moved “around a lot”. RP 95. Huber added, “*whether it was down to the floorboard, to the glove box to the center console, it [his report] does not specify, but what it does note is that he was reaching around a lot.*” RP 95. In response to a hypothetical question about officer safety when attempting to arrest a violent felon or a “flight risk” when they are reaching around inside of the vehicle, Huber testified he was concerned that an individual might arm himself. RP 95-96.

It was speculation that as officers descended on the car and Belanger panicked, his movement and wiggling around in the car, amounted to him attempting to arm himself. Each officer agreed that Belanger wanted to escape the situation but did not fight, strike or kick them. Most significantly, Grabski definitively outlined his reasons for the search and it did not include “apparent attempts to reach for a weapon.”

The trial court erred when it entered conclusion of law 4: concluding there was a nexus between Belanger’s violations and the search of the vehicle. The trial court erred when it denied Belanger’s motion to suppress.

B. The State Failed To Prove Belanger Was Armed With a Firearm For Each Of The Four Sentence Enhancements Imposed By The Court.

1. Standard of Review

Whether a person is armed is a mixed question of law and fact. *State v. Schelin*, 147 Wn.2d 562, 565-566, 55 P.3d 632 (2002). Whether the facts are sufficient, as a matter of law, to prove the defendant was armed with a deadly weapon at the time of the offense, as a basis for a sentence enhancement in a prosecution for possession of a controlled substance is reviewed de novo. *Id.*

Because determining whether a defendant was armed for purposes of a firearm enhancement is a fact-specific decision, the Court must establish whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Neff*, 163 Wn.2d 453, 462, 181 P.3d 819 (2008); *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007).

To establish a defendant was armed, the State must prove (1) a firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon and

the crime. *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). A defendant found to be armed with a firearm at the time of the commission of his crime receives an enhancement to the standard range sentence. RCW 9.94A.533(3).

For purposes of a firearm enhancement, mere proximity to or constructive possession of a firearm is insufficient to show that the defendant was armed when the crime was committed. *Schelin*, 147 Wn.2d at 567. In applying the nexus requirement, the Court must examine the nature of the crime, the weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer.) *Schelin*, 147 Wn.2d at 570; *State v. Ague-Masters*, 138 Wn.App. 86, 104, 156 P.3d 265 (2007).

Here, the four firearm enhancements were based on Belanger's possession of the .38 and the .22 guns. The .38 was found in a safe on the driver's floorboard. The State presented no evidence the safe was unlocked. None of the officers involved remembered or noted whether it was locked or unlocked.

The State presented evidence that the .22 was found inside of a backpack that was not within Belanger's reach. The State presented no evidence the backpack was unzipped. Based on

these facts, the State failed to prove the guns were easily accessible and readily available per the firearm enhancement requirements.

The facts and circumstances are similar to those found in *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005). There defendant maintained that although there was a pistol in close proximity to him, it was not easily accessible or readily available to be used. The police found a zippered backpack behind the driver's seat of Gurske's car. Inside the backpack was a torch, which was atop the gun . *Id.* at 143. For Gurske to access the gun, he would have had to exit the truck or move into the passenger seat. The facts did not indicate whether Gurske could unzip the backpack, remove the torch and then remove the pistol all while in the driver's seat where he was sitting when officers conducted the stop. *Id.* The Court found there was no "evidence whatsoever that Gurske had used or had easy access to use the weapon against another person at any other time, i.e., when he acquired or was in possession of the methamphetamine." *Id.* at 143. The Court reversed the enhancement. *Id.* at 144.

In *State v. Van Elsloo*, ---Wn.2d ---, 425 P.3d 807 (2018), the defendant was charged with possessing and selling illegal drugs

from his car as part of an ongoing criminal enterprise. *Van Elsloo* 425 P.3d at 825. Officers found a shotgun less than a foot away from a backpack containing illegal drugs. The grip of the gun faced at an angle toward the passenger seat, making it easy for someone entering the car to grab the gun. The gun was loaded, and *unlike the revolver and semiautomatic handgun, was kept out of the locked safe.* *Id.* at 826. The revolver and semiautomatic weapon *were not subjects of the firearm enhancements in Van Elsloo* because they were not easily accessible. *Id.*

Washington courts have found that a defendant is *not* “armed” even though he, presumably, could have obtained a weapon by taking a few steps. *State v. Valdobinos*, 122 Wn.2d at 270, 282, 858 P.2d (1993); *State v. Johnson*, 94 Wn.App. 882, 894-895, 897, 974 P.2d 855 (1999); *State v. Call*, 75 Wn. App. 866, 867-69, 880 P.2d 571 (1994). Here, one gun was in a safe and a second weapon was out of reach. As in *Van Elsloo*, they should not have been the subjects of firearm enhancements.

In *Valdobinos*, the Court affirmed a conviction of possession with intent to deliver, but struck the portion of the sentence based on a firearm. Valdobinos agreed to sell drugs to an undercover agent. Officers arrested and removed him from his home, and then

executed a search warrant. *Valdobinos*, 122 Wn.2d at 273. During the search, officers recovered cocaine and a rifle. *Id.* at 274. In reversing the firearm enhancement, the Court found there was no evidence the rifle had been used or was readily available for use to facilitate the commission of a crime. At the time of the discovery, the defendant was under arrest and removed from the scene. *Id.* at 282. *Valdobinos* was not armed in the sense he had a weapon accessible or readily available for offensive or defensive purposes.

*Gurske* and *Valdobinos* are instructive for this case.

Belanger's weapons were not easily accessible, nor were they readily available. Based on the facts and circumstances, the trial court erred when it denied Belanger's motion to dismiss, and the evidence was insufficient to sustain the firearm enhancements. Without the nexus between Belanger, the guns, and the crime, the firearm enhancements must be dismissed. *See Gurske*, 155 Wn.2d at 138, 144.

C. The Trial Court Abused Its Discretion When It Doubled The Maximum Sentence Length For The Unlawful Possession With Intent To Deliver Controlled Substances Convictions.

RCW 69.50.408 doubles the maximum term to which an individual may be sentenced. It provides:

(1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(2) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(3) This section does not apply to offenses under RCW 69.50.4013.

RCW 69.50.408 (emphasis added).

“The general rule of statutory construction has long been that the word ‘may’ when used in a statute or ordinance is permissive and operates to confer discretion.” *State ex rel. Beck v. Carter*, 2 Wn.App. 974, 471 P.2d 127 (1970). The statute authorizes the trial court to exercise its discretion to double the maximum sentence length. *State v. Mayer*, 120 Wn.App. 720, 86 P.3d 217 (2004); *State v. Cameron*, 80 Wn.App. 374, 381, 909 P.2d 309 (1996).

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Lamar*, 180 Wn.2d 576, 327 P.3d 46 (2014). “A court’s decision is manifestly unreasonable if it 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.” *Grandmaster Shen-Yen Lu v. King County*, 110 Wn.App. 92,99, 38 P.3d 1040 (2002).

Here, Belanger had a prior conviction for unlawful possession of a controlled substance with intent to deliver from 2008, and a prior conviction for unlawful possession of a controlled substance in 2014. CP 226-227. At the sentencing hearing, the state argued for the court to exercise its discretion to double the statutory maximum for the drug charges. Doubling the statutory maximum required the court to impose 60 months for each firearm enhancement rather than the statutorily authorized 36 months for a Class B felony. RP 894-895. Although the court imposed only 100

months<sup>4</sup> on the possession of controlled substances, the court added 240 months for firearm enhancements. Belanger will be held in custody until he is almost 60 years old.

Belanger had no prior firearm convictions. Belanger had no history of using firearms. The street value of the drugs he possessed was approximately \$1,000. RP 596-598. Belanger admitted he had a drug addiction. RP 907. The prior drug possession and possession with intent charges were nonviolent offenses<sup>5</sup>. CP 226-227.

The court agreed 356 months was “an awful heavy sentence” but thought Belanger needed structure because he appeared to resist authority. RP 914. The court added, that while it did not take pleasure in the sentence, it felt that under the circumstances of his prior criminal history, and the current case, it was not unreasonable to double the statutory maximum for the charges. RP 914.

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<sup>4</sup> The court imposed 116 for the unlawful possession of a firearm, so the total sentence will be 356 months. CP 230.

<sup>5</sup> Belanger had a charge of assault in the second degree from 2013. He testified that in connection with an attempt to elude police to avoid being arrested on a DOC warrant, he drove over a spike strip and his car slid, head on, into a police vehicle. RP 158.

One purpose of The Sentencing Reform Act is to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history. RCW 9.94A.010(1). The "Hard Time" sentencing targets crimes involving firearm as warranting more severe levels of punishment. However, the "statutory provisions enacted as part of the [Hard Time for Armed Crime Act] 'distinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators.'" *In re Pers. Restraint of Cruze*, 169 Wn.2d 422, 431, 237 P.3d 274 (2010)(quoting Laws of 1995 ch. 129, §1(12)(c)).

Under no scenario can Belanger be considered a gun predator. By doubling the statutory maximum and imposing 240 months, the court punished Belanger as if he were a gun predator. He was not. He had no previous firearm convictions.

The trial court abused its discretion when it doubled the statutory maximum and then imposed 240 months for firearm enhancements. This sentence must be reversed.

D. The DNA Database And Criminal Fees Must Be Stricken.

The trial court found Belanger indigent and imposed only mandatory legal financial obligations for the DNA database and the criminal filing fees. RP 914; CP 228; 239-240.

Under former RCW 36.18.020(2)(h), upon conviction or a plea of guilty, an adult criminal defendant was liable for a filing fee of \$200. Under former RCW 43.43.7541, every sentence imposed for a crime specified in RCW 43.43.754 had to include a fee of \$100 for the DNA identification database.

House Bill 1783 modified Washington's system of legal financial obligations. *State v. Ramirez*, 426 P.3d 714, 2018 WL 4499761 (September 20, 2018). It amended former RCW 10.01.160(3) to expressly prohibit a court from imposing discretionary costs on defendants who are indigent at the time of sentencing. LAWS OF 2018 ch. 269 §6 (3). Costs which formerly were mandatory, the criminal filing fee has become a discretionary cost. LAWS of 2018 269 § 17 (2)(h).

Additionally, LAWS OF 2018 ch. 260 § 18 provides that for a crime specified in RCW 43.43.754 the sentence must include a DNA collection fee of one hundred *unless the state has collected the offender's DNA because of a prior conviction.*

The statute's effective date was June 7, 2018. LAWS OF 2018 at ii (see (5)(a) setting out the effective date.). Our Supreme Court held that individuals whose case was not final at the statute's effective date were entitled to the benefit from the amended criminal filing fee statute. *State v. Ramirez*, 426 P.3d 714, 2018 WL 4499761 (September 20, 2018).

The trial court found Belanger indigent. His case is on direct appeal and therefore, not final. He is entitled to the benefit of the amended statute, and the two-hundred dollar criminal filing fee should be stricken.

Belanger has prior convictions in Washington state. Therefore, his DNA is on file. He is entitled to the benefit of the amended statute, and the one-hundred-dollar fee should be stricken.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Belanger respectfully asks this Court to reverse the convictions based on an illegal search of the vehicle and an insufficiency of the evidence for the firearm enhancements. In the alternative, he asks this Court to remand with instructions to sentence him within the standard range

for a Class B felony, and reduce the firearm enhancements to 36 months from 60 months.

Respectfully submitted this 9<sup>th</sup> day of November.

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# APPENDIX



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- 3) On November 7, 2016, Pierce County Sheriff's Deputies Seth Huber and Jason Bray were working their assigned shifts.
  - 4) The deputies were part of the Community Support Team (CST), and their duties included working with DOC in order to apprehend individuals who were wanted by DOC.
  - 5) On November 7, 2016, DOC Community Corrections Specialist Thomas Grabski and DOC Community Corrections Supervisor Mike Poston were working their assigned shifts.
  - 6) Officer Grabski and Supervisor Poston were members of DOC's Fugitive Apprehension Team, and their duties included searching for individuals who were wanted by DOC.
  - 7) On November 7, 2016, Deputy Huber received information that the defendant was possibly going to be in the area of Puget Park, 3100 N. Proctor St. in Tacoma, and that he was driving a white Pontiac Grand Am and armed with a gun.
  - 8) Tacoma is located in Pierce County, Washington.
  - 9) The 3100 block of N. Proctor St is where Puget Park is located.
  - 10) Officer Grabski confirmed that the defendant had a DOC warrant for failing to report as directed.
  - 11) Deputy Huber learned that the defendant was listed as a violent offender.
  - 12) Officer Grabski and Supervisor Poston reviewed a photograph of the defendant so they could positively identify him.
  - 13) After formulating a plan to contact the defendant, all four officers proceeded to the area of the 3100 block of N. Proctor St.
  - 14) Supervisor Poston parked his vehicle, an unmarked Jeep, at the corner of 31<sup>st</sup> St and Proctor, and was there for approximately half an hour to an hour.
  - 15) After a short period of time, the defendant drove into the area.

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- 16) The defendant was driving a white Pontiac Grand Am.
  - 17) Supervisor Poston saw the defendant driving the vehicle, and positively identified him.
  - 18) The defendant parked on 31<sup>st</sup> St, which was the south side of the park, across the street from the park.
  - 19) Officer Grabski drove past the defendant in his unmarked vehicle, and also positively identified him.
  - 20) The defendant was sitting in the driver's seat.
  - 21) A female, later identified as Jennifer Owens, was sitting in the front passenger seat of the defendant's vehicle.
  - 22) As the officers attempted to contact the defendant, Deputy Huber could see that the defendant was panicking, and moving around in the vehicle.
  - 23) Officer Grabski drove past the defendant and notified the other officers that the defendant was present in the Grand Am.
  - 24) Officer Grabski and Supervisor Poston approached the defendant in their vehicles.
  - 25) They drove in at ~~high rate of speed~~ <sup>quickly.</sup> *BEL*
  - 26) Officer Grabski parked his vehicle in front of the defendant's vehicle so that the two vehicles were "nose-to-nose."
  - 27) Supervisor Poston parked his vehicle behind the defendant's vehicle.
  - 28) When the defendant saw the two officers, he placed his vehicle in drive, then in reverse, striking both Officer Grabski and Supervisor Poston's vehicle. Minor damage was done to Supervisor Poston's vehicle.
  - 29) Deputies Bray and Huber, who were both in Deputy Bray's patrol vehicle, arrived just after Officer Grabski and Supervisor Poston boxed in the defendant's vehicle.

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2 30) Deputy Bray's vehicle was an unmarked patrol vehicle, but was equipped with lights and  
3 siren.

4 31) Deputies Huber and Bray were wearing their department issued jumpsuits, each of which had  
5 a cloth badge, shoulder patches, and their names. Deputies Huber and Bray were also  
6 wearing duty belts, which contained their duty weapon, handcuffs, taser, and extra  
7 ammunition. The deputies were clearly identifiable as law enforcement.

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9 32) Officer Grabski was wearing civilian clothes and a tactical vest. His badge was affixed to his  
10 belt.

11 33) Officer Grabski and Supervisor Poston exited their vehicles and approached the driver's door  
12 of the defendant's vehicle.

13 34) Officer Grabski and Supervisor Poston were initially unable to open the defendant's door.

14 35) Deputy Huber jumped out of Deputy Bray's patrol vehicle and approached the passenger's  
15 side door of the defendant's vehicle.

16 36) Deputy Bray placed his patrol vehicle next to Supervisor Poston's vehicle.

17 37) The defendant was reaching down towards the driver's floorboard of the vehicle.

18 38) The officers could not see the defendant's hands as he was moving around inside the vehicle.

19 39) The defendant refused to comply with Officer Grabski, Supervisor Poston and Deputy  
20 Huber's instructions, which included "show me your hands," "you're under arrest," and "stop  
21 resisting."

22 40) Deputy Huber engaged the defendant at gunpoint.

23 41) The defendant refused to comply with officers' instructions, and continued to reach around in  
24 the vehicle.  
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2 42) Deputy Huber could see that the defendant was not armed, but he was extremely frightened  
3 that the defendant could become armed at any moment.

4 43) Deputy Huber removed Ms. Owens from the vehicle for her safety.

5 44) Once Ms. Owens was outside of the vehicle, Deputy Huber climbed inside the defendatn's  
6 vehicle and attempted to control the defendant from inside the vehicle.

7 45) Deputy Huber used his department-issued Taser in "drive stun" mode, and delivered one  
8 taser round/cycle of approximately five seconds to the defendant. This had no effect.

9 46) Deputy Huber delivered a second round of approximately five seconds to the defendant.  
10 This also had no effect.

11 47) It is unclear whether or not Officer Grabski and Supervisor Poston were able to open the  
12 defendant's door immediately, but ultimately, at some point during the struggle, they were  
13 able to open the defendant's door.  
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15 48) After a third application of the Taser, the defendant was removed from the vehicle.

16 49) At this point, the defendant became partially compliant with the deputies' commands.

17 50) The defendant was placed on the ground, but continued to resist, and attempted to stand up.

18 51) Officer Grabski and Supervisor Poston were able to secure the defendant in handcuffs.

19 52) Even after being handcuffed and placed on the ground, the defendant continued to struggle.

20 53) Deputy Bray had to physically keep the defendant on the ground, either by standing over him  
21 or by holding him down with his hands, in order to prevent him from fleeing.  
22

23 54) A search of the defendant's person incident to his arrest revealed a small black container.

24 Inside the container was 2.5g of methamphetamine (including package weight), 2 grams of  
25 heroin (including package weight), and five pills that were later determined to be alprazolam.  
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2 Also recovered from the defendant's person were 20 pills that were later determined to be  
3 alprazolam, a glass pipe, and \$695.00 cash.

4 55) After the defendant was searched incident to his arrest, he became compliant.

5 56) Officer Grabski testified that the defendant was in violation of his conditions on community  
6 custody by possessing the methamphetamine, heroin and pills.

7 57) Officer Grabski knows, based on his training and experience, that individuals who purchase,  
8 sell, or consume illegal narcotics will sometimes hide additional amounts of narcotics in their  
9 vehicles.

10 58) Officer Grabski knows, based on his training and experience, that offenders will keep  
11 documents that list their addresses, such as mail, vehicle registration, and DOC paperwork in  
12 their vehicles.

13 59) It is important for DOC to know where offenders that are being supervised are living in order  
14 to conduct home visits.

15 60) Officer Grabski knows, based on his training and experience, that offenders will keep  
16 weapons such as knives, guns, and brass knuckles on or near their persons.

17 61) Officer Grabski believed, based on his training and experience, that given the defendant's  
18 behavior of reaching towards the driver's floorboard of his vehicle during the initial struggle,  
19 there was possibly a weapon the defendant was prohibited from possessing in that location.

20 62) Officer Grabski believed the defendant was in violation of his conditions of community  
21 custody because of the narcotics discovered on his person, the driving actions he took with  
22 his vehicle, and the attempt to distance himself from the vehicle.

23 63) Because of the defendant's suspected violations of conditions of community custody, Officer  
24 Grabski conducted a compliance check of the defendant's vehicle.  
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- 64) During the compliance check of the defendant's vehicle, Officer Grabski located the following: 1) a black safe on the driver's side floorboard containing a loaded .38 revolver, 2) a black and grey safe behind the driver's seat containing 94.3g of heroin (including package weight); 2.3g of heroin (including package weight), 8.9g of methamphetamine (including package weight), and quarter-sized Ziploc baggies; 3) a backpack on the rear seat containing a loaded .22 caliber revolver; 4) a clothes bin on the rear seat containing men's clothing and additional .38 caliber ammunition; 5) two digital scales; and 6) three cell phones.
- 65) Once Officer Grabski completed the compliance check, he turned the items he recovered over to Deputy Huber.
- 66) Deputy Huber spoke with the defendant.
- 67) The defendant testified at the 3.5/3.6 hearing.
- 68) The defendant admitted he was on community custody on November 7, 2016.
- 69) The defendant admitted he knew of his conditions of community custody.
- 70) The defendant admitted he knew he was required to report to a CCO.
- 71) The defendant admitted he knew that he was not allowed to possess a firearm or ammunition.
- 72) The defendant admitted he knew that he was not allowed to possess or consume controlled substances without a lawfully issued prescription.
- 73) Ms. Owens testified at the 3.5/3.6 hearing.
- 74) Ms. Owens testified that she could not really see.
- 75) Ms. Owens testified that her purse was inside the Grand Am and that her purse was the only thing of hers inside the Grand am.
- 76) Ms. Owens testified that the firearms were not hers.
- 77) Ms. Owens testified that the drugs in the car was not hers.

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2 78) Ms. Owens testified that it was illegal for her to possess firearms.

3 79) Ms. Owens testified that she did not tell the officers the firearms were hers.

4 80) Ms. Owens testified that she did not tell the officers the methamphetamine, heroin, and pills  
5 were hers.

6 81) Ms. Owens testified that no one else approached the scene and said that the guns and drugs  
7 were theirs.  
8

9 **DISPUTED FACTS**

10 1) Officer Grabski testified that he was wearing a tactical vest with "DOC" printed across the  
11 chest.

12 2) Deputy Huber testified that he advised the defendant he was under arrest and advised him of  
13 his *Miranda* rights.

14 3) Deputy Huber testified that the defendant said he understood his rights.

15 4) Deputy Huber testified that the defendant did not appear to be under the influence of alcohol  
16 or drugs.

17 5) Deputy Huber testified that the defendant did not have any difficulty speaking English.

18 6) Deputy Huber testified that the defendant was oriented as to time and place.

19 7) Deputy Huber testified that the defendant did not ask for an attorney.

20 8) Deputy Huber testified that the defendant did not invoke his rights.

21 9) Deputy Huber testified that the defendant admitted he knew about his warrant and apologized  
22 for his actions, saying he had just panicked.

23 10) Deputy Huber testified that the defendant admitted the vehicle was his and that he had  
24 recently purchased it.

25 11) Deputy Huber testified that the defendant said he used to be employed and lost his job.  
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- 12) Deputy Huber testified that the defendant said he does what it takes to make ends meet and pay his bills.
- 13) Deputy Huber testified that the defendant said he was unemployed and was selling methamphetamine, heroin and pills to make money.
- 14) Deputy Huber testified that the defendant said everything found in the car was his, including the guns.
- 15) Deputy Huber testified that the defendant said the guns were for self-protection and to keep from being robbed.
- 16) Deputy Huber testified that the defendant said he knew possessing a gun was illegal for him because he is a convicted felon.
- 17) The defendant testified that he could not remember whether he was advised of his *Miranda* rights.
- 18) The defendant testified that it was possible that he was advised of his *Miranda* rights.
- 19) The defendant testified that it was possible that he was not advised of his *Miranda* rights.
- 20) The defendant testified that during the compliance check of the vehicle, he said that the car was not in his name, that he was in the process of purchasing the vehicle, and that he had just picked it up the night before.
- 21) The defendant testified that he did not recall telling Deputy Huber that he used to be employed but lost his job.
- 22) The defendant testified that he did not recall telling Deputy Huber that he did what it takes to make ends meet and pay the bills.
- 23) The defendant testified that he did not recall telling Deputy Huber that he was not employed and that he was selling methamphetamine to make money.

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- 24) The defendant testified that he did not tell Deputy Huber that everything found in the car was his, including the guns.
- 25) The defendant testified that he did not tell Deputy Huber that the guns were for self-protection.
- 26) The defendant testified that he did not tell Deputy Huber that the guns were to keep from being robbed.
- 27) The defendant testified that he did not recall telling Deputy Huber that he was a convicted felon.
- 28) The defendant first testified that he told Deputy Huber that he knew that it was illegal to possess a gun, but then testified that he did not know if he told Deputy Huber that.
- 29) Ms. Owens testified that Officer Grabski's vest read "FBI."
- 30) Ms. Owens testified that she did not hear anyone read *Miranda* warnings to the defendant.
- 31) Ms. Owens testified that the defendant did not say anything about methamphetamine, heroin or pills.
- 32) Ms. Owens testified that the defendant did not say anything about the firearms found in the car.
- 33) Ms. Owens testified that there was no conversation between the officers and the defendant.
- 34) Ms. Owens testified that the officers asked her name and whether or not she had children.
- 35) Ms. Owens testified she had no idea what was in the Grand Am. Ms. Owens testified that she did not know if the officers located anything in the Grand Am.
- 36) Ms. Owens testified that one of the officers said to the defendant that if the drugs and guns were not his, then they were Ms. Owens'.

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2 37) Ms. Owens testified that the defendant responded, "if that's what you're saying, then it's  
3 mine."

4 38) Ms. Owens testified that the officers made threats to take her children.

5 39) Ms. Owens testified that the officers dropped the issue at the point the defendant admitted the  
6 Grand Am was his.

7 40) Ms. Owens testified that she did not know anything about the methamphetamine, heroin and  
8 pills that were found on the defendant's person.

9 41) Ms. Owens testified that the defendant did not tell the police where he got the Grand Am.

10 42) Ms. Owens testified that she did not hear the defendant say much of anything.

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12 **FINDINGS AS TO DISPUTED FACTS**

13 1) Officer Grabski was wearing civilian clothes, but was also wearing a tactical vest with  
14 "DOC" printed across the chest.

15 2) The defendant was advised of his *Miranda* rights.

16 3) Deputy Huber advised the defendant he was under arrest and advised him of his *Miranda*  
17 rights.

18 4) The defendant said he understood his rights.

19 5) The defendant did not appear to be under the influence of alcohol or drugs.

20 6) The defendant did not have any difficulty speaking English.

21 7) The defendant was oriented as to time and place.

22 8) The defendant did not ask for an attorney.

23 9) The defendant did not invoke his rights at that time.

24 10) No threats or promises were made by any of the officers to the defendant in order to get him  
25 to answer questions.  
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- 11) Deputy Huber made no threats to the defendant to get him to answer his or anyone else's questions.
  - 12) Deputy Huber made no promises to the defendant to get him to answer his or anyone else's questions.
  - 13) Deputy Bray made no threats to the defendant to get him to answer his or anyone else's questions.
  - 14) Deputy Bray made no promises to the defendant to get him to answer his or anyone else's questions.
  - 15) Officer Grabski made no threats to the defendant to get him to answer his or anyone else's questions.
  - 16) Officer Grabski made no promises to the defendant to get him to answer his or anyone else's questions.
  - 17) Supervisor Poston made no threats to the defendant to get him to answer his or anyone else's questions.
  - 18) Supervisor Poston made no promises to the defendant to get him to answer his or anyone else's questions.
  - 19) The defendant admitted to Deputy Huber that he knew about his warrant and apologized for his actions, saying he had just panicked.
  - 20) The defendant admitted to Deputy Huber that the vehicle was his and that he had recently purchased it.
  - 21) The defendant admitted to Deputy Huber that the vehicle was his.
  - 22) The defendant admitted to Deputy Huber that he had just bought the vehicle recently.
  - 23) The defendant said he used to be employed and lost his job.

1  
2 24) The defendant admitted he does what it takes to make ends meet and pay his bills.

3 25) The defendant said he was unemployed and was selling methamphetamine, heroin and pills  
4 to make money.

5 26) The defendant said everything found in the car was his, including the guns.

6 27) The defendant said the guns were for self-protection and to keep from being robbed.

7 28) The defendant said he knew possessing a gun was illegal for him because he is a convicted  
8 felon.

9  
10 **CONCLUSIONS OF LAW**

11 1) Officer Grabski had reasonable cause to believe the defendant was in violation of his  
12 conditions of community custody.

13 2) The defendant was in violation of his conditions of community custody by possessing  
14 methamphetamine, heroin and pills. He was also in violation of his community custody  
15 conditions by possessing firearms. He was also in violation of his community custody  
16 conditions by failing to appear as directed by his DOC officer.

17 3) Officer Grabski had authority to search the defendant's vehicle pursuant to RCW 9.94A.631.

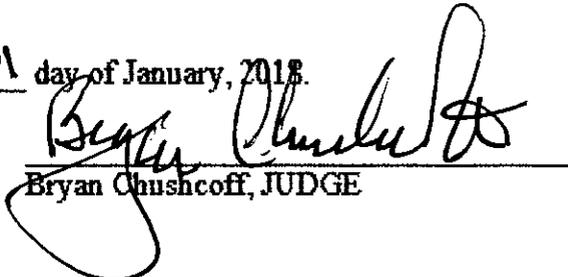
18 4) There was a nexus between the defendant's violations – the possession of narcotics, the  
19 attempted flight from DOC officers and the Pierce County Sheriff's Department, the failure  
20 to appear to DOC, the apparent attempts to reach for a weapon in the driver's floorboard of  
21 the vehicle – and the place that was searched – the defendant's vehicle.

22 5) Information provided to the officers about the defendant's location and what he was driving  
23 was corroborated by the officers, and the officers developed information during their  
24 investigation that was independent of the information provided to them prior to the incident.  
25

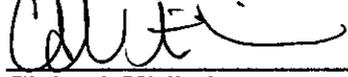
26 //

6) The defendant's motion to suppress is DENIED.

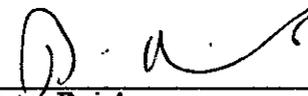
DONE IN OPEN COURT this 31 day of January, 2018.

  
Bryan Chushcoff, JUDGE

Presented by:

  
Claire A Vitikainen  
Deputy Prosecuting Attorney  
WSB# 39987

Approved as to Form:

  
Peter Reich  
Attorney for Defendant  
WSB# 37926

cav



## CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on November 9, 2018, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Pierce County Prosecuting Attorney at [pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us) and to Jake Belanger/DOC#895545, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

*Marie Trombley*  
Marie Trombley  
WSBA 41410  
PO Box 829  
Graham, WA 98338

**MARIE TROMBLEY**

**November 09, 2018 - 10:16 AM**

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**Appellate Court Case Title:** State of Washington, Respondent v Jake Michael Belanger, Appellant  
**Superior Court Case Number:** 16-1-04440-1

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