

FILED  
Court of Appeals  
Division II  
State of Washington  
2/7/2019 2:17 PM  
NO. 51399-4

---

---

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

STATE OF WASHINGTON, RESPONDENT

v.

JAKE MICHAEL BELANGER, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chushcoff

No. 16-1-04440-1

---

**Brief of Respondent**

---

MARY E. ROBNETT  
Prosecuting Attorney

By  
MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

## Table of Contents

A.	ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....	1
1.	After the defendant fought with police and drugs were found on the defendant's person following a lawful arrest, was there a sufficient nexus for the CCO to search the defendant's vehicle? (Appellant's Assignment of Error A).....	1
2.	When viewed in the light most favorable to the State, was there sufficient evidence to establish that the firearms in the defendant's vehicle were easily accessible and readily available as part of his ongoing criminal enterprise? (Appellant's Assignment of Error B and C) .....	1
3.	Did the trial court properly exercise its discretion in applying RCW 69.50.408 and doubling the statutory maximum for counts I and II? (Appellant's Assignment of Error D).....	1
4.	Should the criminal filing fee and DNA collection fee be stricken? (Appellant's Assignment of Error E) .....	1
B.	STATEMENT OF THE CASE.....	2
1.	Procedure .....	2
2.	Facts .....	3
C.	ARGUMENT.....	10
1.	AFTER DRUGS WERE FOUND ON THE DEFENDANT'S PERSON FOLLOWING A LAWFUL ARREST AND THE CCO WAS AWARE THAT THE DEFENDANT WAS NOT PERMITTED TO POSSESS DRUGS, A SUFFICIENT NEXUS EXISTED FOR THE CCO TO SEARCH THE DEFENDANT'S VEHICLE....	10

2.	WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS PRESENTED TO ESTABLISH THAT THE DEFENDANT WAS ARMED WITH TWO FIREARMS AT THE TIME OF THE INCIDENT.....	17
3.	THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN APPLYING RCW 69.50.408 AND LAWFULLY DOUBLING THE STATUTORY MAXIMUM FOR THE DEFENDANT’S OFFENSES IN COUNTS I AND II.....	23
4.	THE STATE AGREES THAT THE DNA COLLECTION FEE AND THE CRIMINAL FILING FEE BE STRICKEN FROM THE JUDGMENT AND SENTENCE.....	25
D.	CONCLUSION.....	26

## Table of Authorities

### State Cases

<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	17
<i>State v. Barnes</i> , 153 Wn.2d 378, 383, 103 P.3d 1219 (2005).....	19
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988).....	17
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .....	18
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987) .....	18
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	18
<i>State v. Cornwell</i> , 190 Wn.2d 296, 412 P.3d 1265 (2017).....	7, 14, 15
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	18
<i>State v. Dye</i> , 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) .....	23
<i>State v. Echenrode</i> , 159 Wn.2d 488, 493, 150 P.3d 1116 (2007).....	18
<i>State v. Gurske</i> , 155 Wn.2d 134, 118 P.3d 333 (2005).....	19, 20, 21
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	17
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	17
<i>State v. Kennedy</i> , 107 Wn.2d 1, 12, 726 P.2d 445 (1986) .....	16
<i>State v. Lampman</i> , 45 Wn. App 228, 234-35, 724 P.2d 1092 (1986).....	16
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	17
<i>State v. Mayer</i> , 120 Wn. App. 720, 86 P.3d 217 (2004) .....	23
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	17

<i>State v. O’Neill</i> , 148 Wn.2d 564, 571, 62 P.3d 489 (2003).....	10
<i>State v. Patton</i> , 167 Wn.2d 379, 388, 219 P.3d 651 (2009).....	16
<i>State v. Ramirez</i> , __ Wn.2d __, 426 P.3d 714 (2018).....	25, 26
<i>State v. Rooney</i> , 190 Wn. App. 653, 659, 360 P.3d 913 (2015).....	13
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	17
<i>State v. Schelin</i> , 147 Wn.2d 562, 55 P.3d 632 (2002) .....	17, 19
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981) .....	17
<i>State v. Van Elsloo</i> , 191 Wn.2d 798, 425 P.3d 807 (2018) .....	20, 21, 22
<i>State v. Watkins</i> , 76 Wn. App. 726, 731, 887 P.3d 492 (1995) .....	16
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009).....	13
Federal and Other Jurisdictions	
<i>Griffin v. Wisconsin</i> , 483 U.S. 868, 875, 107 S. Ct. 3164 (1987) .....	13
<i>Samson v. California</i> , 547 U.S. 843, 126 S. Ct. 2193 (2006).....	12, 13
<i>United States v. Conway</i> , 122 F.3d 841, 842-43 (9 <sup>th</sup> Cir. 1997) .....	13
<i>United States v. Knights</i> , 534 U.S. 112, 122 S. Ct. 587 (2001) .....	12
Statutes	
House Bill 1783 .....	25
RCW 43.43.7541 .....	26
RCW 69.50.4013 .....	23
RCW 69.50.408 .....	1, 3, 23, 25
RCW 9.94A.631.....	12

RCW 9.94A.631(1).....	13
RCW 9.94A.716(4).....	13

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

1. After the defendant fought with police and drugs were found on the defendant's person following a lawful arrest, was there a sufficient nexus for the CCO to search the defendant's vehicle?  
(Appellant's Assignment of Error A)
2. When viewed in the light most favorable to the State, was there sufficient evidence to establish that the firearms in the defendant's vehicle were easily accessible and readily available as part of his ongoing criminal enterprise? (Appellant's Assignment of Error B and C)
3. Did the trial court properly exercise its discretion in applying RCW 69.50.408 and doubling the statutory maximum for counts I and II? (Appellant's Assignment of Error D)
4. Should the criminal filing fee and DNA collection fee be stricken? (Appellant's Assignment of Error E)

B. STATEMENT OF THE CASE.

1. Procedure

On November 8, 2016, JAKE MICHAEL BELANGER, hereinafter “defendant” was charged by information with three counts of possession of a controlled substance with the intent to deliver (heroin, methamphetamine, and alprazolam) and two counts of unlawful possession of a firearm in the first degree. CP 1-3. The drug charges also included an allegation that the defendant was armed with a firearm at the time of the offenses. *Id.* A corrected information was later filed, but the charges remained the same. CP 217-219.

A CrR 3.6 hearing was conducted prior to trial. CP 20. At issue was whether there was a reasonable nexus between the alleged probation violation and the items searched. CP 12-25 (page 5). The motion also alleged that there was insufficient probable cause to justify the search of the defendant’s personal effects and that the information provided by an unidentified informant was unreliable. *Id.* The State filed a response, asserting that the search of the defendant’s vehicle was lawful and that a sufficient nexus existed. CP 27-42. At the conclusion of the hearing, detailed below, the trial court agreed with the State and found that there was a sufficient nexus between the community custody violations and the search of the defendant’s vehicle. CP 249-262.

On November 15, 2017, the defendant was found guilty as charged. CP 223-237. The trial court exercised its discretion under RCW 69.50.408 and doubled the statutory maximum. *Id.* The defendant was sentenced to 116 months with all of his base crimes running concurrently, and to 240 months of firearm sentencing enhancements for a total of 356 months. *Id.* The trial court found the defendant to be indigent and imposed legal financial obligations including a filing fee and DNA collection fee. *Id.*

2. Facts

CrR 3.6 Hearing

Thomas Grabski, a community corrections officer (CCO) with the Department of Corrections (DOC), was working on fugitive apprehension on November 7, 2016. RP 21. He is commissioned to arrest individuals who are on active supervision with DOC. RP 22. On November 7<sup>th</sup>, CCO Grabski was working with Pierce County Sheriff's deputies. RP 30. CCO Grabski was notified by Deputy Huber that the defendant, who was on active DOC supervision, was going to be at a specific location and that he may have been armed with a firearm. RP 30. At the time, the defendant was under conditions that prohibited him from having controlled substances and firearms. RP 27-28. The defendant had an outstanding

DOC warrant, which is issued when an offender fails to report to his CCO as directed. RP 28, 30, 82.

Deputy Huber had learned that the defendant might be in the Proctor area where he often goes to sell drugs. RP 80-81. Deputy Huber also learned that there was high likelihood that the defendant would be armed with a firearm. *Id.*

CCO Grabski, CCO Poston, Deputy Huber, and Deputy Bray responded to the 3100 block of North Proctor Street and observed the vehicle that they believed the defendant was driving. RP 31, 32. CCO Grabski observed the defendant in his vehicle. RP 34-35. CCO Grabski parked his vehicle facing the defendant's vehicle. RP 36. CCO Poston parked his vehicle behind the defendant. *Id.* The defendant put his car in reverse, striking CCO Poston's vehicle more than once. RP 37. CCO Grabski and CCO Preston jumped out of their vehicles and attempted to remove the defendant from his vehicle. RP 38.

As they attempted to take the defendant into custody, he was reaching and lunging toward the floorboard of his vehicle. RP 40, 97. Deputy Huber saw the defendant "moving around a lot" in the car. RP 95. CCO Grabski indicated that he was concerned for officer safety. RP 41, 43. The defendant refused verbal commands that were given. RP 96. Deputy Huber utilized his taser on the defendant to attempt to get control

of him. RP 96-97. Deputy Huber used the taser on the defendant three times and he continued to reach within the vehicle and toward the floorboard. RP 98.

After the CCOs and deputies removed the defendant from his car, he continued to try to get away. RP 42. Even after he was placed in handcuffs, the defendant continued to twist his body and stand up. RP 101. Deputy Bray had to physically keep contact with the defendant. *Id.* The defendant was searched incident to arrest. RP 45. Methamphetamine, heroin, pills, a well-used glass pipe, and \$695.00 were found on the defendant's person. RP 45, 101, 145. Possession of the methamphetamine, heroin and pills were a violation of the defendant's community custody violations. RP 46. CCO Grabski believed that offenders who have drugs on their person also may have drugs in their vehicles. RP 47-48. The defendant was also prohibited from having any weapons in his possession. RP 48.

CCO Grabski conducted a compliance search of the defendant's vehicle. RP 49. The defendant admitted the vehicle was his. RP 106. The search of the defendant's vehicle occurred after the search of his person had been completed. RP 59. On the driver's side floorboard was a safe, containing a loaded Colt .38 revolver. RP 49, 107. It was recovered from an area where the defendant had been trying to reach. RP 107. A

second safe was recovered behind the driver's seat. RP 49, 107. The second safe contained heroin, methamphetamine, and baggies for packaging. *Id.* Finally, a backpack was found on the rear seat of the vehicle. *Id.* The backpack contained a Colt .22 revolver, ammunition, and men's clothing. *Id.* The defendant admitted that everything in the vehicle was his and that he sells drugs to make money. RP 110-111.

The defendant testified on his own behalf. RP 125. He stated that a vehicle was coming directly at him and he became scared. RP 127. He stated that he hit something behind him and was trying to get around the vehicle that had boxed his vehicle from moving. RP 128. He stated that an individual got out of the vehicle and pointed a gun at him. RP 130. The defendant testified that his vehicle was searched at the same time he was being searched. RP 133. The defendant acknowledged that he had an outstanding DOC warrant at the time of the incident and that he had methamphetamine, heroin and alprazolam on his person, in violation of his community custody conditions. RP 143-145. The defendant admitted he was trying to get away from the deputies because he had a DOC warrant. RP 149. He admitted that he fought with the deputies, even after being tased. RP 150.

At the conclusion of testimony for the CrR 3.6 hearing, the court heard argument. Defense presented argument first and conceded that the

active DOC warrant was a violation of the defendant's community custody conditions and also conceded that the drugs recovered from the defendant's person also constituted a violation of his community custody conditions. RP 234. The court, while not having the benefit of *State v. Cornwell*, 190 Wn.2d 296, 412 P.3d 1265 (2017), which was issued after this case went to trial, still nevertheless conducted a nexus analysis. In so doing, the court held, in part:

It seemed to me that given that the drugs had been in the car, which were taken out, that were on his person, there is some reasonable suspicion that the vehicle may contain drugs. Given the searching around, which I think did—reaching around in the vehicle for various things as opposed to Mr. Belanger getting out—it is not clear what he is looking for there, but it's not unreasonable to believe that it could have been weapons or contraband. They were entitled to look to see what it was.

RP 270.

The trial court denied the defendant's motion to suppress the evidence from his vehicle. CP 249-262. The trial court entered findings of fact and conclusions of law memorializing its ruling. *Id.*

a. Trial facts

At trial, testimony was that Deputy Huber had received information that on November 7, 2016, he became aware that the defendant had a possible outstanding DOC warrant. RP 488. The defendant was on community custody at the time, and his conditions

included no drug possession, no gun possession, and that he must report as to DOC as directed. RP 645. Deputy Huber had learned from a source that the defendant would be at the 3100 block of North Proctor in Tacoma. RP 488. Deputy Huber met with CCO Grabski, CCO Poston and Deputy Bray to formulate a plan of how to contact the defendant and attempt to arrest him. RP 490-491. They were able to contact the defendant, who began to drive in both forward and reverse, striking both CCO Grabski and CCO Poston's vehicles. RP 493-494, 649.

Multiple witnesses observed the defendant reaching around the interior of his vehicle. RP 494. Deputy Huber described the defendant reaching toward the driver's side floorboard. RP 494-495. CCO Grabski observed him thrashing around the vehicle and reaching toward the floorboard. RP 650.

The defendant was ordered out of his vehicle and he refused commands. RP 495. Deputy Huber deployed his taser in order to gain control of the defendant. RP 502. Deputy Huber described a fight to get the defendant into custody. RP 506. The defendant twisted his body and attempted to stand up. *Id.* The defendant resisted for several minutes. RP 507. Even after being handcuffed the defendant continued to resist. RP 508.

After he was taken into custody, the defendant was searched incident to arrest. RP 513. On his person was methamphetamine, heroin, pills, a used glass pipe and \$695.00. RP 513, 518.

CCO Grabski then conducted a search of the defendant's vehicle. RP 658. On the driver's floorboard area was a safe containing a black loaded handgun. RP 658, 661. Behind the driver's seat was a second safe containing heroin, methamphetamine and baggies for packaging. On the rear seat was a backpack containing a silver handgun. *Id.* A clothing bin was also on the backseat. *Id.* The bin contained men's clothing and ammunition for one of the handguns. *Id.* Also recovered were four cell phones and digital scales. RP 541, 592, 658.

The defendant made admissions to Deputy Huber. He stated that he was unemployed and that he was selling methamphetamine, heroin and pills to make money. RP 548-549. The defendant stated that the two firearms were for self protection and that he knew he was not allowed to possess them. *Id.* The defendant admitted that everything in the vehicle belonged to him. *Id.*

C. ARGUMENT.

1. AFTER DRUGS WERE FOUND ON THE DEFENDANT'S PERSON FOLLOWING A LAWFUL ARREST AND THE CCO WAS AWARE THAT THE DEFENDANT WAS NOT PERMITTED TO POSSESS DRUGS, A SUFFICIENT NEXUS EXISTED FOR THE CCO TO SEARCH THE DEFENDANT'S VEHICLE.

a. Substantial evidence supports undisputed finding of fact #60

Challenged factual findings are reviewed to determine if they are supported by substantial evidence. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). In this case, the defendant alleges that undisputed finding of fact #61 is factually unsupported. Brief of Appellant, page 13. It states, "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." CP 249-262. When read with the context of his testimony at the CrR 3.6 hearing, this finding is supported by substantial evidence. CCO Grabski testified as followed:

Question: Based on your training and experience over the last 15 years, do offenders keep documents that list their addresses in their vehicles?

Answer: Sometimes, yes, ma'am.

Question: What kinds of documents might those be?

Answer: Their mail.

Question: What about vehicle registration?

Answer: Vehicle registrations, the mail. Sometimes, their DOC paperwork, things like that.

Question: Based on your training and experience, have you found many offenders who keep controlled substances on their person?

Answer: Yes. I've found people with narcotics on them, yes.

Question: What are some examples of narcotics and contraband that you've found on offenders' persons?

Answer: **Guns**, meth, heroin, pills, cocaine. Back in the day, marijuana. **Things of that nature**.

Question: And based on your training and experience over the past 15 years, do offenders who have drugs—or is it possible that offenders who have drugs on their person **or contraband** on their person also have other contraband in their vehicles?

Answer: Yes.

RP 47-48 (emphasis added).

When reviewed in context, the court's finding is supported by substantial evidence. CCO Grabski testified that offenders keep "contraband"—which includes guns and "things of that nature" on their person. Finding of fact #60 summarizes that testimony. The State agrees that the terms "knives, guns and brass knuckles" do not appear in the

testimony. However, such language is, at best, surplus language that adds nothing of substance but rather provides examples. Substantial evidence supports undisputed finding of fact #61, but in the event it does not, any error in the court including the surplus language is harmless and does not change the conclusion that the search of the defendant's vehicle was lawful.

- b. The search of the defendant's vehicle was lawful when it occurred after the defendant fought with police and drugs were located on the defendant's person, which constituted a separate violation of his community custody conditions.

“The recidivism rate of probationers is significantly higher than the general crime rate.” *United States v. Knights*, 534 U.S. 112, 120, 122 S. Ct. 587 (2001). “And [they] have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because [they] are aware ... they may be subject to supervision and face revocation ..., and possible incarceration ....” *Id.* “As the recidivism rate demonstrates, most [of them] are ill prepared to handle the pressures of reintegration. Thus most ... require intense supervision.” *Samson v. California*, 547 U.S. 843, 854-55, 126 S. Ct. 2193 (2006). It is clear RCW 9.94A.631 facilitates such supervision by permitting rapid detection of a noncompliant offender's contraband and criminal activity. *United States v. Conway*, 122 F.3d 841, 842-43 (9<sup>th</sup> Cir.

1997) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 875, 107 S. Ct. 3164 (1987)).

"RCW 9.94A.631(1) operates as a legislative determination [offenders] do not have a reasonable expectation of privacy in their residences, vehicles, or personal belongings ... and provides CCO's lawful authority to search that property when a violation is reasonably suspected. *State v. Rooney*, 190 Wn. App. 653, 659, 360 P.3d 913 (2015), *State v. Winterstein*, 167 Wn.2d 620, 628-29, 220 P.3d 1226 (2009); RCW 9.94A.631(1), .716(4). "[T]echnically [it] does not create an exception to the warrant requirement. Instead, it requires the [offender] to consent to a search, and consent is an exception to the ... warrant requirement." *Rooney*, 190 Wn. App. 653 at 659. These constitutional searches are far less intrusive than the suspicionless searches upheld by the United States Supreme Court to serve the same legitimate purpose of combatting recidivism by depriving offenders the ability to anticipate searches and conceal criminality. *Samson*, 547 U.S. at 855.

Defendant has never challenged the violation underlying the DOC warrant that prompted his arrest. And he does not renew his challenge to the arresting officer's probable cause to believe the warrant existed. Defendant was being supervised by DOC and he admitted that a DOC warrant was outstanding at the time of his arrest. Defendant's conditions

included the requirement he obey all laws, which he violated by having controlled substances on his person and by resisting arrest. RP 45, 101, 145. More importantly, CCO Grabski testified that one of the defendant's community custody conditions was that he not be in possession of controlled substances. RP 46. Before a compliance search was done on the defendant's vehicle, controlled substances were located on the defendant's person. Defense did not challenge the search of the defendant's person at trial and does not do so now. The State concedes that the DOC warrant in this case was issued for a failure to report. However, at the time of the search of the defendant's vehicle, not only did CCO Grabski have evidence that he was resisting arrest, but also had direct evidence that he was unlawfully possessing controlled substances<sup>1</sup>. The initial violation—failure to report—morphed into a search to include compliance for the condition of not possessing narcotics.

*State v. Cornwell*, 190 Wn.2d 296, 412 P.3d 1265 (2018), a case heavily relied upon by the defendant, is factually distinguishable from the case at bar. In *Cornwell*, the defendant was on DOC supervision. *Id.* at 298. A DOC warrant issued when Cornwell failed to report as directed. *Id.* Police observed Cornwell driving a car and initiated a stop based on

---

<sup>1</sup> At trial, CCO Grabski testified consistent with this as well. He indicated that both possession of controlled substances and the failure to report constituted violations of probation. RP 657-658.

the outstanding warrant. *Id.* Cornwell ignored officer commands that he stay inside his vehicle and ran from the officers. *Id.* at 299. Officers had to utilize their tasers to apprehend Cornwell. *Id.* There was no allegation that Cornwell actively fought with law enforcement, unlike the defendant.

Officers called a CCO to the scene and the CCO searched Cornwell's vehicle in a compliance search. *Id.* Inside the defendant's vehicle was a bag containing drugs. *Id.* The court held that a nexus was required between the property searched and the alleged probation violation. *Id.* at 306. Applying the nexus requirement to Cornwell's case, the court held that insufficient nexus existed, because the only probation violation supported by the record was failure to report. *Id.* at 306.

In this case, the violation of failure to report was not the only probation violation supported by the record. On the contrary, controlled substances and drug paraphernalia were found during a lawful search incident to arrest of the defendant, and only after such evidence was found was a compliance search of the vehicle conducted. Also, the defendant had just fought the police and resisted arrest. At the time of the vehicle search, the additional probation violation of possessing controlled substances was also present. CCO Grabski consequently had reason to suspect the violation underlying the DOC warrant as well as the one that developed when the defendant was taken into custody. The latter violation

is critical finding sufficient facts present to authorize a compliance search of his car. *State v. Lampman*, 45 Wn. App 228, 234-35, 724 P.2d 1092 (1986); *State v. Patton*, 167 Wn.2d 379, 388, 219 P.3d 651 (2009).

Finally, the defendant's furtive movements give rise to additional suspicion. *See generally, State v. Watkins*, 76 Wn. App. 726, 731, 887 P.3d 492 (1995) (officers had the authority to have defendant exit the car and search the area in his immediate control based on the defendant's furtive movements). The defendant also had a passenger, Jennifer Owens, in the car with him. CP 249-262 (Finding of Fact #21). Court's have held that the presence of a passenger is a factor that may allow a police officer to expand a protective search, and therefore should have relevance here as well. *See State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986).

Defendant rightly does not assign error to the trial court's finding that the defendant was reaching down toward the floorboard of his vehicle or that he was "reaching around" inside the vehicle. CP 249-262 (Findings of Fact #37, #41). Defendant also does not assign error to the finding that the searched car belonged to him. *Id.* (Findings as to Disputed Facts #21). The requirements of a statutorily authorized DOC compliance search were met, so the convictions based on the fruits of that search should be affirmed.

2. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS PRESENTED TO ESTABLISH THAT THE DEFENDANT WAS ARMED WITH TWO FIREARMS AT THE TIME OF THE INCIDENT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). Whether a person is armed is a mixed question of law and fact. *State v. Schelin*, 147 Wn.2d 562, 565-66, 55 P.3d 632 (2002). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. See *Camarillo*, *supra*. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. See *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

*Id.* (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

For purposes of a firearm sentencing enhancement, there must be a nexus between the defendant, the weapon, and the crime. *State v. Echenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007), citing *State v.*

*Barnes*, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005). A person is considered “armed” if a weapon is easily accessible and readily available for either offensive or defensive purposes. *Id.*, see also *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002). “Easily accessible and readily available” means that the weapon is there to be used, not necessarily in the hands of the defendant. *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005).

In *Gurske*, a case relied upon by the defendant, the court found that possession of an inaccessible weapon was insufficient for a finding that the defendant was “armed.” *Gurske*, however, is factually distinguishable from the case at bar. In *Gurske*, the firearm was in a backpack behind the driver’s seat, which the police pulled forward before accessing the backpack. *Id.* at 143. The backpack was zipped and the firearm itself had a torch on top of it inside the backpack. *Id.* The facts in *Gurske* did not indicate whether the defendant could access the backpack from the driver’s seat. *Id.* On the contrary, the court specifically found that the backpack could not be removed by the driver unless the driver exited the truck or moved into the passenger seat. *Id.* The present case, as argued below, is distinguishable from *Gurske* because there was testimony that both firearms were accessible to the defendant from his position in the driver’s seat. Additionally, there was testimony that the defendant was

reaching in the area of one of the firearms during the struggle. RP 98, 107.

*State v. Van Elsloo*, 191 Wn.2d 798, 425 P.3d 807 (2018), a case also relied on by the defendant, the court recently upheld<sup>2</sup> the firearm enhancements. In *Van Elsloo*, the defendant argued that the shotgun was too far away from him to make it easily accessible and readily available. *Id.* at 827. The defendant argued that he, like *Gurske*, would have had to exit his vehicle or move to the backseat to reach the shotgun. *Id.* The court held:

[W]hen the crime is of a continuing nature, such as a drug operation, a nexus exists if the firearm is “there to be used” in the commission of the crime. *Id.* at 138, 118 P.3d 333. Applying that standard in *Gurske*, we found that no nexus existed between the weapon and the crime because the State had presented no evidence that Gurske had used or had access to the weapon during the commission of a crime, such as when he acquired or was in possession of the methamphetamine. *Id.* at 143, 118 P.3d 333. Sassen Van Elsloo argues that his case cannot be distinguished from *Gurske*. However, as the Court of Appeals pointed out, the present case is more closely aligned with those cases in which we found that reasonable juries could infer that guns kept at the site of ongoing drug crimes were easily accessible during and had a sufficient nexus to the commission of the crime.

---

<sup>2</sup> In the opening brief, the defendant seems to suggest that the court in *Van Elsloo* did not uphold the firearm enhancements. (“The revolver and semiautomatic weapon were not subjects of the firearm enhancements in *Van Elsloo* because they were not easily accessible.”) In fact, the court in *Van Elsloo* upheld the firearm enhancements and specifically found that the firearms in that case were easily accessible and readily available. *Van Elsloo*, 191 Wn.2d 798 at 829.

*Van Elsloo*, 191 Wn.2d 798, 828, 425 P.3d 807 (2018). The State presented evidence that Van Elsloo was engaged in selling drugs from his vehicle as part of an ongoing criminal enterprise. *Id.* As evidence of this, the court pointed to the fact that Van Elsloo and his associate were selling drugs, the car contained a locked bank bag holding controlled substances separated and packaged in a style consistent with personal use and sales, there were multiple burner cell phones, glassine envelopes, small “baggies,” a digital scale, and a locked safe containing a roll of bills and a revolver. *Id.* Also recovered was a semiautomatic handgun in the back of the vehicle. *Id.*

The case at bar is similar to *Van Elsloo*. The defendant admitted to police that he was selling drugs to make money. RP 548-549. He stated that the firearms were for self protection. On his person was methamphetamine, heroin, pills, and cash. RP 513, 518. Also, like *Van Elsloo*, the defendant had other drugs inside his car and baggies for packaging. RP 658. Digital scales and multiple phones were recovered from the defendant, just like *Van Elsloo*. RP 541, 592, 658. All of the evidence that the defendant was engaged in an ongoing criminal enterprise makes his case similar to *Van Elsloo*, a 2018 case, and dissimilar to *Gurske*, a case from 2005.

The gun on the driver's floorboard was clearly easily accessible and readily available. The defendant was attempting to access it when he was about to be arrested by police. He had it at his feet to use it for self-protection—which is exactly what he told police he used it for. Second, the gun in the backpack in the backseat was also easily accessible and readily available, just as Van Elsloo's firearm was. CCO Grabski testified that the bag containing the firearm in the back seat was within the defendant's reach when he was seated in the driver's seat. RP 659. While he testified at times inconsistent with that statement, the jury was free to reject it. The jury clearly found such statement by CCO Grabski to be credible and this court cannot make credibility determinations based on the written record. There was no testimony that the firearm in the backseat was buried under anything else or that the defendant had to physically exit his vehicle to access it. On the contrary, the fact that his additional drug merchandise was also in the back area of the car suggests that he could access it easily in order to replenish the stock of drugs on his person. This court should follow the analysis of *Van Elsloo* and affirm the firearm enhancements in this case.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN APPLYING RCW 69.50.408 AND LAWFULLY DOUBLING THE STATUTORY MAXIMUM FOR THE DEFENDANT'S OFFENSES IN COUNTS I AND II.

By its plain language, RCW 69.50.408 authorizes the trial court to exercise its discretion and double the statutory maximum when an offender has a prior drug conviction:

- (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.

*See also, State v. Mayer*, 120 Wn. App. 720, 86 P.3d 217 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

In this case, the trial court was clearly aware of its discretion and carefully exercised it. The trial court's ruling is as follows:

If it was a single mistake, it would be far more understandable. It is a whole series of mistakes, and it is—and for instance, you've talked about the eluding charge. That kind of messed you up. Isn't that what you were trying to do here? I mean, what did you learn from that?

You ran the risk by moving your car back and forth and hitting other vehicles. Someone is going to get hurt and serious property damage is going to occur. Even after you were taken out of the car by these officers, you were looking for an exit even then. If memory serves, you also had a prior resisting arrest as a misdemeanor several years ago, too, down in Linn County in 2007.

Well, I have—there is a certain part of me that says, by gosh, Mr. Reich has a point about this being an awful heavy sentence, especially if we double it, double the statutory maximum, so we wind up adding 40 years based on the firearm enhancements. But, there is another part of me that thinks, you really are—structure would be good, but you also strike me as the kind of person that resists all authority and all structure. I'm not sure how useful that would actually be in practice, Mr. Belanger. I wish that you worked that way. It does seem to me that that is not who you are.

Here's what I'm going to do, I don't have any pleasure in this, but nonetheless, I will—I do feel, under all the circumstances here of your prior criminal history and the events of this particular case, that it's not unreasonable to double the statutory maximum for those charges.

RP 913-914.

Clearly, the trial court engaged in a careful consideration of the facts of the case and the defendant's history before exercising its discretion. The defendant appears to argue that simply because he has no prior gun convictions, the trial court somehow abused its discretion in

applying RCW 69.50.408. Brief of Appellant, page 32. Such argument is contrary to the express language of the statute and if the legislature had wanted to make a prior firearm conviction a prerequisite before the statutory maximum could be doubled, it could have done so. The defendant cites to no authority for the proposition that an offender must be considered a “gun predator” before RCW 69.50.408 applies, because no such authority exists. The defendant in this case had a prior qualifying drug offense. CP 223-237. The trial court properly had discretion to double the statutory maximum for these current drug offenses and exercised that discretion. The defendant cannot establish that the trial court’s ruling was unreasonable or untenable.

4. THE STATE AGREES THAT THE DNA COLLECTION FEE AND THE CRIMINAL FILING FEE BE STRICKEN FROM THE JUDGMENT AND SENTENCE.

In this case, the trial court found the defendant to be indigent. CP 223-237 (paragraph 2.5). The defendant’s direct appeal is still pending. House Bill 1783, effective March 27, 2018, prohibits the imposition of the \$200.00 filing fee on defendants who were indigent at the time of sentencing. As the court held in *State v. Ramirez*, \_\_ Wn.2d \_\_, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not yet final. The State agrees that the criminal filing fee of \$200.00 that was imposed in this case should be stricken.

The appellant in this case also appeals the imposition of a \$100 DNA-collection fee in the judgment and sentence, asserting that a DNA sample was previously submitted to the state as a result of a prior qualifying conviction. A legislative amendment to RCW 43.43.7541, which took effect June 7, 2018, requires imposition of the DNA-collection fee “unless the state has previously collected the offender’s DNA as a result of a prior conviction.” The amendment applies to defendants whose appeals were pending — i.e., their cases were not yet final — when the amendment was enacted. *State v. Ramirez*, \_\_\_ Wn.2d \_\_\_, 426 P.3d 714, (2018).

The State has reason to believe that a DNA sample has been taken from the defendant on a separate case, and therefore does not dispute this court striking the imposed DNA fee. The State respectfully asks this Court to remand this case to the superior court to amend the judgment and sentence to strike the imposition of the \$100 DNA collection fee.

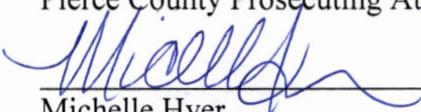
D. CONCLUSION.

For the above stated reasons, the State requests that this court affirm the defendant’s conviction and sentence and remand only for the

deletion of the LFOs indicated above. All other aspects of the defendant's convictions should be affirmed.

DATED: February 7, 2019.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

  
Michelle Hyer  
Deputy Prosecuting Attorney  
WSB # 32724

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.

2-7-19 Therese K  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**February 07, 2019 - 2:17 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51399-4  
**Appellate Court Case Title:** State of Washington, Respondent v Jake Michael Belanger, Appellant  
**Superior Court Case Number:** 16-1-04440-1

**The following documents have been uploaded:**

- 513994\_Briefs\_20190207141659D2087778\_2716.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Belanger Response Brief.pdf*

**A copy of the uploaded files will be sent to:**

- marietrombley@comcast.net
- rsand@co.pierce.wa.us
- valerie.marietrombley@gmail.com

**Comments:**

---

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

**Filing on Behalf of:** Michelle Hyer - Email: PCpatcecf@co.pierce.wa.us (Alternate Email: )

Address:  
930 Tacoma Ave S, Rm 946  
Tacoma, WA, 98402  
Phone: (253) 798-7400

**Note: The Filing Id is 20190207141659D2087778**