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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

COURT OF APPEALS BY \_\_\_\_\_  
DIVISION TWO DEPUTY  
OF THE STATE OF WASHINGTON

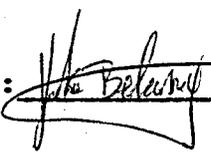
STATE OF WASHINGTON )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 JAKE BELANGER, )  
 )  
 Appellant. )

No. 51399-4-II

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

I, Jake Belanger, have received and reviewed the opening brief prepared by my attorney. Summarized on the attached pages are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

DATE: 1-7-19

SIGNATURE: 

ADDITIONAL GROUND 1 - THE TRIAL COURT ERRED WHEN IT DENIED BELANGER'S CrR 3.6 MOTION TO SUPPRESS EVIDENCE BECAUSE THE JUDGE FAILED TO RECOGNIZE THAT THE SEARCH OF THE AUTO WAS UNLAWFUL AND VIOLATED 3RD PARTY PRIVACY INTERESTS

When determining whether a search was legal a trial court should consider the totality of the circumstances. While a warrantless search of a probationer requires not much more than a nexus between the alleged probation violation and the property searched, I believe that the judge in my case overlooked the 3rd party privacy interests at play. Appellate Courts in Washington have made it abundantly clear that warrantless searches acted out under RCW 9.94A.631 are limited to searching properties or premises which clearly belonged to the probationer. This rule is important as it protects the 3rd party privacy interests of non-probationers which are guaranteed under the Washington State Constitution. See e.g. State v. Reichert, 158 Wn.App. 374 (2010); State v. Winterstein, 167 Wn.2d 628 (2009); State v. Parris, 163 Wn.App. 110 (2011); State v. Jardinez, 184 Wn.App. 518 (2014); State v. Lippincott, LEXIS 1810 (2015); State v. Rooney, 190 Wn. App. 653 (2015).

Under the decisions listed above, it does not appear that CCO Grabski had the authority--statutory or otherwise--to conduct a search of personal property within the auto which may have belonged to the 3rd party passenger who enjoys a heightened sense of privacy under our State's Constitution. See WA Const., Art. 1, Section 7. Moreover, the passenger was not under supervision and was not subject to a DOC paperless search. CCO Grabski admitted that there was a female passenger inside the auto. See RP 63,64. He was also aware that she was not a DOC probationer, yet he made no inquiry as to the ownership of the numerous personal properties within the auto prior to commencing his search. By doing so, Grabski violated the 3rd party privacy interests of the

passenger in the auto. In his testimony Grabski admitted that there were numerous properties in the backseat. He went on to describe that contents of the backseat of the car as "kind of messy" and explained that he didn't want to call it "junk" only because it was "somebody's stuff." See RP at 63. Grabski's testimony gives rise to a presumption that the people in the auto may very well have had shared authority over the items in the backseat. Thus, by his own testimony, Grabski could not make a clear determination about which items belonged to whom.

A probationer's diminished expectation of privacy does not apply to his or her cohabitants. *State v. Rooney*, 190 Wn.App. 653 (2015). The consent of only one person with common authority over the place to be searched when multiple cohabitants are present is not sufficient to conduct an otherwise lawful search of shared space. *Id.*

The record here indicates that, upon conclusion of the search, CCO Grabski released the auto over to the 3rd party passenger. See RP 55, 112. This fact alone demonstrates that CCO Grabski knew that the passenger had some interest in the vehicle or the properties therein. That being so, it becomes clear that the paperless search was illegal, the fruit of the poisonous tree doctrine should have been applied, and the trial court should have granted Belanger's Motion To Suppress and excluded the evidence.

ADDITIONAL GROUND 2 - THE TRIAL COURT ERRED WHEN IT DENIED BELANGER'S CrR 3.6 MOTION TO SUPPRESS EVIDENCE BECAUSE THE COURT FAILED TO APPLY A PROPER AGUILAR-SPINELLI TEST WHEN DETERMINING THE INFORMANT'S BASIS OF KNOWLEDGE OR VERACITY

The Aguilar-Spinelli Test is a test which must be satisfied by trial courts when determining whether probable cause existed for a paperless search warrant to be considered lawful. See Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). The test is mandatory, has been adopted by Washington State, and trial courts must apply the test when making determinations regarding the lawfulness of paperless search warrants. See State v. Jackson, 102 Wn.2d 432 (1984).

The two prongs of an Aguilar-Spinelli Test are that: 1) the court must be informed of the reasons which support a conclusion that the informant is both reliable and credible, and 2) the court must also be informed of the underlying circumstances relied upon by the person providing the information to the police. Where a paperless search warrant occurs, based upon information provided by an informant, the police must establish that the information provided which they relied upon in making the arrest meets these two basic elements. Otherwise the search cannot be considered lawful.

To satisfy the Aguilar-Spinelli Test, in a post-arraignment hearing (prior to trial itself), the state must: 1) demonstrate facts which show that the police informant was reliable/credible, and 2) establish some of the underlying circumstances relied upon by the person providing the information. If the State is unable to meet BOTH prongs of the test, a court may dismiss the case for a lack of probable cause to make the arrest in the first place. Further, the State must present evidence to the judge, not merely conclusions, and the information must be sufficient for the judge to determine that probable cause did indeed exist. Moreover, the

judge's conclusions "cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates*, 462 U.S. 213, 238 (1987).

Importantly, in *Johnson v. United States*, 333 U.S. 10 (1948) the United States Supreme Court noted that "the point of the 4th Amendment to the U.S. Constitution, which is not often grasped by over-zealous police, is not that it somehow denies law enforcement support of the usual inferences which reasonable men draw from evidence. Its protections consist in requiring that those inferences be drawn by a neutral and detached judge instead of being judged by the police engaged in the often competitive enterprise of fettering out crime."

Here, the record indicates that, just hours before the search and arrest, Sherriff Huber claimed to have received information from an undisclosed informant. See RP 30, 31, 80, and 81. Huber took the purported information that he received and relayed it to CCO Grabski. Grabski took this information as sufficient to establish probable cause and moved forward with a paperless search warrant. What the record does not indicate is that the trial court applied anything resembling an Aguilar-Spinelli Test when it considered whether or not this warrantless search was lawful. The informant remains undisclosed and no facts were presented which show that this alleged informant was reliable or credible. Furthermore, the State failed to establish any of the underlying circumstances relied upon by the person providing the information. In short, the court failed to apply a proper Aguilar-Spinelli Test or require the State to meet the minimum threshold requirements of that test. The test is not one that may be side-stepped because its purpose is to ensure that constitutional safeguards are not infringed upon by overzealous police. This court should not allow the trial court's lack of compliance to go unrecognized or unaddressed. The information provided to the trial court at Belanger's CrR 3.6 hearing was

insufficient to establish probable cause, therefore the search was unlawful. If the trial court had applied a proper Aguilar-Spinelli Test it would've recognized this and granted Belanger's Motion To Suppress Evidence. This Court should remedy the error and remand for a new trial with instructions to suppress the illegally obtained evidence.

ADDITIONAL GROUND 3 - THE TRIAL COURT ABUSED ITS DISCRETION WHEN ON RECONSIDERATION IT UPHELD THE FIREARM ENHANCEMENTS FOR THE .22 REVOLVER ON COUNTS 1, 2, AND 3.

The trial court abused its discretion by following an unpublished opinion from Division 1 of the appellate court rather than controlling authority. The controlling case that should have been followed is State v. Gurske, 155 Wn.2d 134 (2005), but the trial court felt compelled to follow State v. Elsloo instead.

On the record the court mentioned Van Elsloo nine times when reversing its original decision to dismiss the firearm enhancements for the .22 revolver on counts 1, 2, and 3. See RP at 772, 773, 783, 784, 785. In fact, in closing, the judge specifically stated that "[t]here is alot of things that are very similar between this one and Van Elsloo. I can't see the difference between them, frankly." See RP at 785. While the facts in VAN ELSLOO may have resembled those in Belanger's case, the facts in GURSKE resemble them equally if not more so.

In GURSKE the defendant was in close proximity to a pistol inside of a backpack which was located behind the driver's seat. It was held that the gun was not easily accessible or readily available to be used. In Belanger's case there were two guns. One gun was in a safe on the floor underneath the driver's seat and another gun was found in a backpack behind the driver's seat. Neither one of these guns were easily accessible or readily available for use by Belanger. Officer Grabski even testified to this fact when he stated that "I don't think Mr. Belanger could have reached the backpack from the driver's seat." See RP 673.

As in Gurske, Belanger would've had to have taken multiple steps to access either one of the guns in his car. This concept is at the heart of GURSKE and should have held much more weight in the mind of the trial court judge than an unpublished decision where a different outcome was reached. GURSKE is a Washington

Supreme Court decision and "[d]ecisions by our Supreme Court are binding on all lower courts in the state" and "it would be error for [a court] to fail to follow our Supreme Court's directly controlling authority." 1000 Virginia Ltd. P'ship v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). By failing to adhere to stare decisis, the trial court made a decision that is directly in conflict with GURSKE. This court should recognize and remedy that error by dismissing the firearm enhancements for the .22 revolver on counts 1, 2, and 3.