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No. 52068-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Frankie Stricklen,**

Appellant.

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Pierce County Superior Court Cause No. 17-1-02891-8

The Honorable Judge Jerry T. Costello

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Stricklen’s convictions were based on evidence obtained in violation of the Fourth Amendment and Wash. Const. art. I, §7.
2. The trial court erred by failing to grant Mr. Stricklen’s suppression motion.
3. The search was conducted “without authority of law” under Wash. Const. art. I, §7 because the officers failed to comply with CrR 2.3(d).

**ISSUE 1:** CrR 2.3(d) requires officers to give written copies of any search warrant to the person whose home is searched or whose property is taken, unless “no such person is present.” Did the failure to provide Mr. Stricklen a written copy of the warrant and receipt render the search unconstitutional?

4. The search warrant affidavit did not establish probable cause.

**ISSUE 2:** A search warrant must be based on probable cause. Was the search warrant for an apartment here unsupported by probable cause because it was based on stale information regarding drug sales allegedly made from Mr. Stricklen’s car?

5. The search warrant was unconstitutionally overbroad.
6. The warrant improperly authorized police to search for and seize items for which they lacked probable cause, including books and other items protected by the First Amendment.

**ISSUE 3:** A search warrant is unconstitutionally overbroad if it authorizes police to search for items for which there is no probable cause. Was the warrant here unconstitutionally overbroad?

7. If Mr. Stricklen’s suppression arguments are not available on appeal, he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

**ISSUE 4:** An accused person is deprived of the effective assistance of counsel when his attorney’s deficient performance causes prejudice. If defense counsel’s arguments are insufficient to preserve the errors raised on review, was Mr. Stricklen denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

8. The trial court erred by adopting Finding of Fact No. 1.
9. The trial court erred by adopting Finding of Fact No. 2.
10. The trial court erred by adopting Finding of Fact No. 5.
11. The trial court erred by adopting Finding of Fact No. 6.
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**ISSUE 5:** A trial court's findings must be reversed unless supported by substantial evidence. Must the court's findings regarding the search be reversed because they are not supported by substantial evidence?

19. The sentencing court violated the separation of powers doctrine.
20. The sentencing court improperly delegated to DOC the authority to impose core conditions of Mr. Stricklen's community custody.
21. The trial court erred when it entered Order 4.6 in the Judgment and Sentence, granting the community corrections officer unfettered power to require Mr. Stricklen to participate in treatment and to impose "[o]ther conditions."

**ISSUE 6:** The separation of powers doctrine is violated when one branch of government impermissibly delegates its constitutionally-conferred powers to another branch. Did the sentencing court violate the separation of powers doctrine by allowing DOC to set core conditions of Mr. Stricklen's community custody?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Police obtained a search warrant to search an apartment and a car and to arrest Frankie Stricklen. RP (3/27/18) 84-86. Officers stopped and arrested Mr. Stricklen about three miles from the apartment. RP (3/14/18) 34; RP (3/27/18) 165-166; RP (3/28/18) 96-99.

To get into the apartment, officers asked Mr. Stricklen for a key. RP (3/27/18) 168-169. Searching officers used the key to enter and then searched the apartment. RP (3/14/18) 29; RP (3/27/18) 87, 171.

Police brought Mr. Stricklen to the apartment as the search was being conducted. RP (3/14/18) 18, 35; RP (3/27/18) 136-137; CP 100. No one testified they gave Mr. Stricklen a copy of the warrant or saw anyone else do so.<sup>1</sup> RP (3/14/18) 15-76; RP (3/27/18) 134-135. While he sat cuffed in the back of a patrol car, a detective read him the contents of the search warrant. RP (3/14/18) 19-20. A copy was left on the table in the apartment, and another was given to the officers who booked Mr. Stricklen into the jail. RP (3/14/18) 21, 24, 30.

An officer drove Mr. Stricklen's car to the apartment, and then to the police station. RP (3/27/18) 151, 167, 171. During the search, suspected controlled substances, cell phones and cash were found in the

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<sup>1</sup> Despite this lack of evidence, the court later found that a copy had been provided to Mr. Stricklen at booking. CP 100.

car. RP (3/27/18) 143-150. Officers found rock cocaine as well as a gun and ammunition and more cell phones in the apartment. RP (3/27/18) 93; RP (3/28/18) 18-19, 75-76, 125.

The State charged Mr. Stricklen with unlawful possession of a firearm, possession of a controlled substance with intent to deliver with a firearm enhancement, and possession of a controlled substance.<sup>2</sup> CP 1-4.

Mr. Stricklen filed a motion to suppress the evidence.<sup>3</sup> CP 6-27; RP (3/2/18) 3-13; RP (3/14/18) 4-76. He argued that since CrR 2.3(d) was violated, the fruits of the search must be suppressed.<sup>4</sup> CP 6-27. The defense also argued lack of probable cause including stale information and invalid arrest. RP (3/14/18) 37-74.

The search took place on July 31, 2018. RP (3/14/18) 17. The affidavit supporting the issuance of the warrant indicated that delivery of a

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<sup>2</sup> There was originally a second charge of drug possession, but the State dismissed that count after resting its case. RP (4/2/18) 25.

<sup>3</sup> Briefing the issue in the trial court became an issue in this case: the court told the State to respond to the suppression motion by February 15, 2018. RP (3/14/18) 5. The State failed to respond. RP (3/14/18) 5. The court set another deadline, this too was missed. RP (3/14/18) 5. Mr. Stricklen filed a motion to dismiss, which was denied. RP (3/14/18) 4-11; CP 28-32.

<sup>4</sup> CrR 2.3 reads, in pertinent part, as follows:

(d) Execution and Return With Inventory. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request provide a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

controlled substance was committed “on or about the 7<sup>th</sup> day of June 2017 and continuing to the present.” Ex. 3, p. 1. The officer claimed that Mr. Stricklen sold drugs from his car on June 29<sup>th</sup>, 2017 and “[w]ithin the past five days.” Ex. 3, pp. 3-5.

The issuing magistrate was also told that just after the second controlled buy, police watched Mr. Stricklen open the hood of his maroon Monte Carlo. Ex. 3, p. 5. He then opened the trunk of his yellow Monte Carlo, retrieved something from it, and placed it in the maroon car. Ex. 3, p. 5. The affidavit also claimed that “drug trafficking organizations go to great lengths to hide their drugs and profits to include using residences...” Ex. 3, p. 5. The warrant itself authorized a search for books, papers, photographs, thumb drives, and hard drives. CP 94-95.

The court held a hearing pursuant to CrR 3.6. RP (3/14/18) 15-76. The trial judge denied the suppression motion and entered a written order. RP (3/14/18) 48-49, 69-71; CP 98-101. The court found that law enforcement had presented probable cause justifying the warrant, including that the informant bought drugs from Mr. Stricklen “on two different dates, June 29, 2018, and another date within five days of June 25, 2017.” CP 99.

At trial, Mr. Stricklen argued that the State had not proven dominion and control.<sup>5</sup> RP (3/26/18) 19-23; RP (3/27/18) 134-138; RP (4/2/18) 79-83. The jury convicted on all three counts, including the firearm enhancement. RP (4/2/18) 100-103.

At sentencing, the court issued a standard range sentence of 152 months. CP 201-202. Without argument or comment, the court indicated that conditions of any community custody could be set by the corrections officer assigned. CP 203.

Mr. Stricklen timely appealed. CP 210.

### **ARGUMENT**

#### **I. THE SEARCH WAS CONDUCTED “WITHOUT AUTHORITY OF LAW” BECAUSE OFFICERS FAILED TO COMPLY WITH CrR 2.3.**

The police obtained a search warrant for Mr. Stricklen, his two cars, his house, and “any vehicles on/ or associated with the residence.” CP 95. Although Mr. Stricklen was present when police seized one of his cars and was brought to the apartment before police finished searching it, the officers did not provide him written copies of the search warrant and receipt. The officers’ failure to provide written copies violated CrR 2.3(d) and Wash. Const. art. I, §7.

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<sup>5</sup> This issue was contested at the suppression hearing as well. RP (3/14/18) 49-50, 65-68.

A. The officers violated CrR 2.3(d) by reading the warrant to Mr. Stricklen instead of providing him a written copy.

The state constitution prohibits searches and seizures conducted “without authority of law.” Wash. Const. art. I, §7. A search undertaken pursuant to a search warrant is governed by CrR 2.3.

The rule provides the “authority of law” required under the constitution. It requires “[t]he peace officer taking property under the warrant [to] give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken.” CrR 2.3(d). The police failed to comply with this requirement. This failure violated CrR 2.3 and Mr. Stricklen’s rights under Wash. Const. art. I, §7.

Here, the court apparently believed that police were excused from providing Mr. Stricklen written copies of the warrant and receipt. CP 100. The court found that an officer “read the defendant a copy of the search warrant while the defendant was at the premises, handcuffed, and inside a patrol vehicle.” CP 100.

Orally reading a warrant to the defendant does not satisfy CrR 3.2(d). The rule contemplates service of “a copy of the warrant” along with “a receipt for the property.” CrR 2.3(d).

The Court of Appeals has “conclude[d] that the *written* warrant requirement so clearly evident in CrR 2.3 is also an aspect of the constitutional warrant requirement.” *State v. Ettenhofer*, 119 Wn. App. 300, 308, 79 P.3d 478 (2003) (emphasis in original). Under *Ettenhofer*, the officers’ actions here were constitutionally deficient.

In *Ettenhofer*, an officer made a telephonic request for a search warrant. *Id.*, at 303. The magistrate found probable cause and authorized the search. *Id.* However, no written warrant was produced or provided to the defendant.<sup>6</sup> *Id.*

The *Ettenhofer* court determined that the failure to produce a written warrant was not merely ministerial. *Id.*, at 307-308. The court reasoned that “the warrant requirements evident in CrR 2.3... and article I, section 7 are interrelated.”<sup>7</sup> *Id.*, at 308. The violation of the rule’s requirement for a written warrant amounted to a constitutional violation and required exclusion of the evidence.<sup>8</sup> *Id.*, at 308-309.

Here, the executing officers did not provide Mr. Stricklen with a copy of the written warrant. CP 100. Instead, an officer read the warrant to

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<sup>6</sup> Presumably, the authorization was recorded along with the affiant’s sworn testimony.

<sup>7</sup> The third interrelated authority examined by the court was RCW 10.79.040, which criminalizes warrantless home searches. *Id.*, at 308.

<sup>8</sup> Even absent a constitutional violation, failure to comply with the rule requires suppression “where no other remedy is available to enforce a rule’s requirements.” *State v. Linder*, 190 Wn. App. 638, 651, 360 P.3d 906 (2015). Such is the case here.

him.<sup>9</sup> RP (3/14/18) 19. Under the reasoning set forth in *Ettenhofer*, reading the warrant aloud is insufficient to comply with CrR 2.3.

Furthermore, the failure to provide a written copy is not merely ministerial; rather, it amounts to a constitutional violation. *Id.* Absent compliance with CrR 2.3, the search was conducted “without authority of law,” and violated Wash. Const. art. I, §7. Mr. Stricklen’s convictions must be reversed.

B. The record does not show that Mr. Stricklen was ever provided a written copy of either the warrant or the receipt for property taken.

Nothing in the record of the suppression hearing shows that Mr. Stricklen ever received a written copy of the warrant. RP (3/14/18) 15-36. Although the trial court found that “[a] physical copy of the warrant was provided to the defendant when he reached the Pierce County jail,” this finding is not supported by the evidence. CP 100.

A trial court’s findings are reviewed for substantial evidence. *State v. Weyand*, 188 Wn.2d 804, 811, 399 P.3d 530 (2017). Evidence is not “substantial” unless it is “enough to persuade a fair-minded person of the truth of the finding.” *State v. Lee*, ---Wn.App.2d ---, \_\_\_, 435 P.3d 847 (2019).

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<sup>9</sup> Describing this process, the officer testified “If there’s words on it, I try to read them. I try to read them.” RP (3/14/18) 19.

Here, the only testimony relating to the court's finding came from Officer Grant.<sup>10</sup> When asked if he'd provided Mr. Stricklen a copy of the warrant, he testified that he "provided it to the booking officers." RP

(3/14/18) 21. He was asked about this on cross-examination:

I provided it to the booking officer, so when they gave it to him, I don't know...I believe I provided it to the booking officer. So when exactly that happened, I can't say for sure.  
RP (3/14/18) 24.

The State did not introduce any evidence from the booking officer, or anyone else who may have given Mr. Stricklen a copy of the warrant.

RP (3/14/18) 15-36.

Furthermore, the trial court did not find that Mr. Stricklen was ever provided a copy of the receipt. CP 98-101. Because the State bore the burden of proving compliance with CrR 2.3, the absence of such a finding must be held against the prosecution. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

In fact, the testimony shows that officers never provided Mr. Stricklen a copy of the receipt:

Q. And the return-of-service was not provided to him either, was it?

A. No, I did not.

Q. So until later, is it correct he would not have had knowledge of what was taken or what could have been taken or what was

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<sup>10</sup> Later, during trial, the lead officer on the case acknowledged that actually providing a copy of a search warrant to a person was a very rare occurrence. RP (3/27/18) 134-135.

authorized to be taken? He didn't know any of that at that point, right?

A. As far as I know, no. I didn't go down and explain to him what we found in the residence and actually took. That's why it's documented and left in a conspicuous place on the kitchen table. RP (3/14/18) 36.

The officers were obligated to give Mr. Stricklen “a copy of the search warrant and receipt.” CrR 2.3(d). Nothing shows that he was ever provided a copy of either.

Because the officers failed to comply with CrR 2.3, the search was conducted “without authority of law.” Wash. Const. art. I, §7. The evidence must be suppressed.<sup>11</sup>

C. Mr. Stricklen was entitled to written copies of the warrant and the receipt regardless of when he arrived at the house.

The trial court apparently believed that officers were excused from providing Mr. Stricklen a written copy of the warrant because he was not present when officers entered his house. CP 100. According to the court, officers were not required to provide the written copy because Mr. Stricklen “was brought to the premises of the search at some point in time after the search of his residence had already commenced.” CP 100.

This is incorrect for two reasons.

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<sup>11</sup> Suppression is required even if the failure to comply with CrR 2.3(d) does not give rise to a constitutional violation. *Linder*, 190 Wn. App. at 651.

First, the requirements of CrR 2.3(d) were triggered as soon as police arrested Mr. Stricklen and took his car from him. The rule directs that the executing officer “shall give to the person *from whom...the property is taken* a copy of the search warrant and receipt.” CrR 2.3(d) (emphasis added).

The officers did not give Mr. Stricklen a written copy of the warrant when they took his car from him. *See* RP (3/14/18) 15-36. This violated CrR 2.3(d), regardless of his presence or absence when the warrant was executed at his house.

Second, CrR 2.3(d) required the officers to give Mr. Stricklen a written copy of the warrant when he was brought to the residence during the search. The rule does not distinguish between those present at the outset and those who arrive home after a search has commenced. The rule directs that the executing officer “shall give to the person... *from whose premises the property is taken* a copy of the search warrant and receipt.” CrR 2.3(d) (emphasis added).

Mr. Stricklen was a person “from whose premises the property [was] taken.” CrR 2.3(d). The officers were required to “give [him] a copy of the search warrant and receipt.” CrR 2.3(d).

The only exception to the rule arises where “no such person is present.”<sup>12</sup> CrR 2.3(d). But Mr. Stricklen was present before officers left the scene: the court found that Mr. Stricklen was “at the premises.” CP 100. Because of this, he was entitled to written copies of the warrant and the receipt. CrR 2.3(d).

The officers’ failure to provide written copies violated CrR 2.3(d) and Wash. Const. art. I, §7. *Ettenhofer*, 119 Wn. App. at 308; *Linder*, 190 Wn. App. at 651. Mr. Stricklen’s convictions must be reversed and the case remanded for dismissal.

D. CrR 2.3(d) applies even where a suspect has been handcuffed.

The trial court found that it was “not unreasonable” for the officers to withhold a copy of the warrant from Mr. Stricklen because he was handcuffed. CP 100. But CrR 2.3(d) does not provide an exception for persons who have been handcuffed.

In appropriate circumstances, police are permitted to handcuff occupants of a residence during execution of a search warrant. *See, e.g., Muehler v. Mena*, 544 U.S. 93, 98, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005). This is so even in the absence of any suspicion focused on the person detained. *Id.*

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<sup>12</sup> In such cases, the officers may post a copy of the warrant and the receipt. CrR 2.3(d).

The trial court's reasoning would allow police to ignore CrR 2.3(d) whenever they handcuff a suspect. There is no authority permitting officers to dispense with the requirements of CrR 2.3(d) when they handcuff the person entitled to receive a copy of the warrant and the receipt.

The officers failed to comply with CrR 2.3(d) and searched "without authority of law." Wash. Const. art. I, §7. Mr. Stricklen's convictions must be reversed, the evidence suppressed, and the charges dismissed with prejudice. *Ettenhofer*, 119 Wn. App. at 308; *Linder*, 190 Wn. App. at 651.

**II. MR. STRICKLEN'S CONVICTIONS WERE BASED ON EVIDENCE UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ART. I, §7.**

The warrant authorized police to search Mr. Stricklen's house for books and other items protected by the First Amendment. The warrant was based on allegations that Mr. Stricklen twice sold drugs from his car. Ex. 3 (3/14/18). One sale took place a month prior to the warrant application; the timing of the other sale is unclear. Ex. 3, pp. 2-5.

The warrant was overbroad and unsupported by probable cause. The evidence should have been suppressed.

A. The search warrant affidavit did not establish probable cause.

Under both the state and federal constitutions, search warrants must be based on probable cause.<sup>13</sup> *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). To establish probable cause, the warrant application “must set forth sufficient facts to convince a reasonable person of the probability... that evidence of criminal activity can be found at the place to be searched.” *Id.*

An affidavit in support of a search warrant “must state the underlying facts and circumstances.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). By itself, an inference drawn from the facts “does not provide a substantial basis for determining probable cause.” *Lyons*, 174 Wn.2d at 363-64.

Similarly, generalizations about the habits of drug dealers or other criminals cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Thein*, 138 Wn.2d at 147-148. The constitution requires more. *Id.*; see also *State v. Keodara*, 191 Wn. App. 305, 315-316, 364 P.3d 777 (2015), *review denied*, 185 Wn.2d 1028, 377

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<sup>13</sup> The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. Amend. IV. The state constitution protects against disturbance of a person’s private affairs without authority of law. Wash. Const. art I, §7. It provides stronger protection to individual privacy rights than does the Fourth Amendment. *State v. Meneese*, 174 Wn.2d 937, 946, 282 P.3d 83 (2012). Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to art. I, §7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

P.3d 718 (2016).

In this case, the warrant affidavit did not establish probable cause. By the time police sought the warrant, the information was stale. Furthermore, at best, the affidavit provided probable cause to search Mr. Stricklen's cars, but not his house. Because of this, Mr. Stricklen's convictions must be reversed, the evidence suppressed, and the charges dismissed with prejudice.

The affidavit recites that delivery of a controlled substance was committed "on or about the 7<sup>th</sup> day of June 2017 and continuing to the present."<sup>14</sup> Ex. 3, p. 1. The officer alleges that Mr. Stricklen sold drugs from his car on June 29<sup>th</sup>, 2017 and "[w]ithin the past five days." Ex. 3, pp. 3, 4. The trial court found that the informant bought drugs from Mr. Stricklen "on two different dates, June 29, 2018, and another date within five days of June 25, 2017." CP 99.

Under these circumstances, police did not have probable cause to search Mr. Stricklen's house when they sought a warrant on July 25, 2017. The information was stale and did not establish that evidence of a crime would be found in Mr. Stricklen's home.

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<sup>14</sup> This is reiterated on the first page of the search warrant itself. CP 94.

Before issuing a warrant, a magistrate must determine if the information provided in support of the warrant application is stale. *Lyons*, 174 Wn.2d at 361. This determination is “based on the circumstances of each case.” *Id.* In addition to the passage of time, courts consider “the nature of the crime, the nature of the criminal, the character of the evidence to be seized, and the nature of the place to be searched.” *State v. Garbaccio*, 151 Wn. App. 716, 728, 214 P.3d 168 (2009) (quoting *State v. Smith*, 60 Wn.App. 592, 602, 805 P.2d 256 (1991)).

Evidence that a person sold drugs from his car does not provide probable cause to search the person’s home at a later date. In controlled substance cases, the “character of the evidence to be seized”<sup>15</sup> is fleeting. *See, e.g., State v. Rieker*, 190 Wn. App. 1016 (2015) (unpublished) (noting the “transitory nature of drugs”). Furthermore, “it does not require expert knowledge to conclude that a car is a temporary receptacle for moving drugs.” *State v. Sackett*, 130 Wn. App. 1004 (2005) (unpublished).

Even if the information were not stale, the affidavit does not provide probable cause to search Mr. Stricklen’s house. The affidavit suggests that Mr. Stricklen was in his car during both alleged drug sales.

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<sup>15</sup> *Garbaccio*, 151 Wn. App. at 728.

Ex. 3, pp. 3-5. Although he drove to and from his house, this does not prove that he kept drugs inside the residence.

Other information in the affidavit also suggests that any evidence would be found in the cars rather than the house. After the second transaction, police watched Mr. Stricklen open the hood of his maroon Monte Carlo. Ex. 3, p. 5. He then opened the trunk of his yellow Monte Carlo, retrieved something from it, and placed it in the maroon car. Ex. 3, p. 5. This detail suggests that Mr. Stricklen operated out of his cars, rather than keeping contraband in his house.

The only information in the affidavit suggesting that the house might contain evidence came in the form of generalizations of the type prohibited under *Thein*. The final paragraph of the affidavit recites that the officer knew, through training and experience, that “drug trafficking organizations go to great lengths to hide their drugs and profits to include using residences...” Ex. 3, p. 5. Such generalizations cannot provide a basis to search a person’s residence. *Thein*, 138 Wn.2d at 147-148.

The affidavit did not supply probable cause: the information was stale and (at best) justified only a search of the cars. The search violated Mr. Stricklen’s rights under the Fourth Amendment and Wash. Const. art. I, §7. *Id.*; *Lyons*, 174 Wn.2d at 361. His convictions must be reversed, the

evidence suppressed, and the case dismissed with prejudice. *Lyons*, 174 Wn.2d at 361.

B. The warrant improperly allowed police to seize items for which they lacked probable cause.

A search warrant is overbroad if it allows police to search for and seize items for which there is no probable cause. *Perrone*, 119 Wn.2d at 551-552; *see also Keodara*, 191 Wn. App. at 316-317. Furthermore, a warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Perrone*, 119 Wn.2d at 545.

Here, the affidavit suggested that Mr. Stricklen twice sold drugs from his car. Ex. 3. The informant made no mention of books, papers, photographs, electronic media, or any other materials protected by the First Amendment. Ex. 3. Despite this, the warrant authorized a search for many different categories of such materials, including (among other things) books, papers, photographs, thumb drives, and hard drives. CP 94-95.

The warrant was overbroad. No particularized information

suggested that police would find any of the listed items. Nor was there any particularized suspicion that such items could be linked to the commission of any crime.

The warrant suffered from another overbreadth problem as well. In addition to allowing police to search the two Chevrolet Monte Carlos, the warrant permitted a search of “*any* vehicles on/ or associated with the residence on/ or associated with the residence [sic].” CP 95 (emphasis added).

The building contained multiple units, as evidenced by Mr. Stricklen’s occupancy of unit #5. *See* Ex. 3, pp. 2-3. The warrant allowed police to search vehicles “on/ or associated with” the residence even if they were unconnected to Mr. Stricklen and his alleged drug activities.

Nothing suggested that other vehicles “on/ or associated with the residence” would contain anything of evidentiary value. *See* Ex. 3. Despite this, the authorization improperly allowed police to search vehicles belonging to the other tenants of the building where Mr. Stricklen lived.

The search warrant was overbroad. It allowed police to search for items for which they lacked probable cause; it also allowed police to intrude into vehicles unrelated to Mr. Stricklen or his alleged criminal activity. The search violated the Fourth Amendment and Wash. Const. art. I, §7. Mr. Stricklen’s convictions must be reversed, the evidence

suppressed, and the case dismissed with prejudice. *Perrone*, 119 Wn.2d 538, 551-552.

**III. IF MR. STRICKLEN’S SUPPRESSION ARGUMENTS ARE NOT AVAILABLE ON REVIEW, HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Defense counsel asked the trial court to suppress the evidence. CP 6-27. This should adequately preserve any suppression arguments raised on review.

However, even if counsel’s arguments prove insufficient to preserve the errors asserted here, Mr. Stricklen’s claims are available on review. The issues may be raised either as manifest error (under RAP 2.5(a)(3)) or because counsel deprived Mr. Stricklen of the effective assistance of counsel.

The introduction into evidence of material unconstitutionally seized creates a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Swetz*, 160 Wn. App. 122, 128, 247 P.3d 802 (2011) *review denied*, 174 Wn.2d 1009, 281 P.3d 686 (2012). To raise a manifest constitutional error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *Lamar*, 180 Wn.2d at 583. An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217

P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

In this case, the erroneous admission of illegally seized evidence had practical and identifiable consequences. *Id.* Without the evidence, the State would have been unable to proceed to trial. In addition, given what the trial court knew, the court “could have corrected the error” by suppressing the evidence. *Id.* Accordingly, the erroneous admission of the evidence may be reviewed for the first time on appeal even absent defense counsel’s motion to suppress. *Id.*; RAP 2.5 (a)(3).

Alternatively, Mr. Stricklen’s arguments may be addressed through an ineffective assistance claim under the Sixth and Fourteenth Amendments. In his suppression motion, defense counsel argued, *inter alia*, that the warrant was not supported by probable cause, and that officers violated CrR 2.3(d) when executing the warrant. This should be sufficient to preserve all the arguments raised here. However, if counsel’s arguments in the court below prove insufficient to preserve the issues, Mr. Stricklen was denied the effective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, the defendant must show deficient performance and prejudice. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). Here, defense counsel should have raised all available arguments when seeking suppression of the evidence illegally seized.

Counsel's strategy involved seeking suppression of the evidence. Given this (entirely appropriate) strategy, counsel had no tactical basis to forego meritorious arguments in support of suppression. The entire prosecution rested on the admission of evidence seized pursuant to the warrant. A successful motion to suppress would have resulted in dismissal.

The Court of Appeals should consider any unpreserved suppression claims under RAP 2.5(a)(3). If Mr. Stricklen's arguments are unavailable on review, he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* His convictions must be reversed. *Id.*

**IV. THE SENTENCING COURT VIOLATED THE SEPARATION OF POWERS BY DELEGATING TO THE DEPARTMENT OF CORRECTIONS THE AUTHORITY TO SET CORE CONDITIONS OF MR. STRICKLEN'S COMMUNITY CUSTODY.**

The separation of powers doctrine is derived from the constitution's distribution of governmental authority into three branches. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). The doctrine serves to ensure that the "fundamental functions" of each branch remain inviolate. *Carrick v. Locke*, 125 Wn.2d 129, 134-135, 882 P.2d 173 (1994).

The state constitution vests the judicial power in the judiciary. Wash. Const. art. IV, §1. Sentencing is a judicial function. *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).

Sentencing courts “may not delegate excessively.” *Id.*; *see also United States v. Morin*, 832 F.3d 513, 516 (5th Cir. 2016); *United States v. Melendez-Santana*, 353 F.3d 93, 101 (1st Cir. 2003), *overruled on other grounds by United States v. Padilla*, 415 F.3d 211 (1st Cir. 2005). In this case, the court did “delegate excessively”<sup>16</sup> when it gave Mr. Stricklen’s CCO unfettered discretion to require treatment or set “[o]ther conditions.” CP 203.

Under the Sentencing Reform Act, courts are required to set conditions for any offender sentenced to community custody. RCW 9.94A.703. In setting conditions, a judge may require the offender to “[p]articipate in crime-related treatment or counseling services” or to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3).

The court must also “[r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704.” RCW 9.94A.703(1)(b). However, the department’s authority, as outlined in that

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<sup>16</sup> *Sansone*, 127 Wn. App. at 642.

provision, does not include unfettered power to require treatment or to impose additional conditions. RCW 9.94A.704.

Here, the court erroneously delegated to the Department of Corrections the power to direct Mr. Stricklen to engage in “crime-related treatment or counseling services.” CP 203. It also improperly delegated to DOC the power to impose “[o]ther conditions,” without any limitation. CP 203.

These are core conditions of community custody that must be imposed by the sentencing court. RCW 9.94A.703(3). They are not “administrative detail[s] that could be properly delegated.” *Sansone*, 127 Wn. App. at 642.

By allowing DOC to set these conditions of community custody, the court abdicated its responsibility. *Id.* As a result, Mr. Stricklen was not “put on notice as to what would result in [him] being sent back to prison.” *Id.*, at 643. The improper delegations violated the separation of powers. *Id.* They must be stricken. *Id.*

### **CONCLUSION**

For the foregoing reasons, Mr. Stricklen’s convictions must be reversed, the evidence suppressed, and the charges dismissed with

prejudice. Alternatively, the improper conditions of community custody must be stricken.

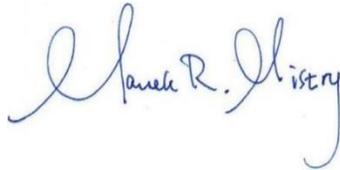
Respectfully submitted on April 10, 2019,

**BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 10, 2019.



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