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

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STATE OF WASHINGTON,

Respondent,

v.

FRANKIE STRICKLEN,

Appellant.

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Appeal from the Superior Court of Pierce County  
The Honorable Jerry Costello, Judge

No. 17-1-02891-8

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

A confidential informant (CI) told police Defendant was dealing crack cocaine. Defendant later sold drugs to CI during two controlled buys. On both occasions Defendant left from and returned immediately to his residence. Probable cause to search his home and vehicles was based on these facts, combined with reasonable inferences drawn from the lead officer's training and knowledge of how drug dealers conduct business.

That Defendant was engaged in ongoing drug dealing established a reasonable probability evidence would be found in his home and vehicles when the warrant issued. When these locations were searched, police found an illegally possessed firearm and evidence of drug dealing.

Defendant was located away from his residence when the search began. Officers brought him to the scene, read him the warrant, and provided him a copy at the jail in compliance with Criminal Rule 2.3(d).

Defendant was convicted at trial of unlawful possession of a firearm, firearm enhanced unlawful possession of cocaine with intent to deliver, and unlawful possession of methamphetamine. The court properly delegated authority to Department of Corrections to set conditions of community custody.

## **II. RESTATEMENT OF THE ISSUES**

- A. Does Defendant's challenge to the presumptively valid search warrant fail where the warrant is supported by probable cause, establishes a nexus between criminal activity and Defendant's residence, and recent observations at the time the warrant issued showed Defendant was involved in ongoing drug sales?
- B. Did officers comply with the requirements of Criminal Rule 2.3(d) where officers read the warrant to Defendant at the scene, provided him a written copy at the jail, and left a copy at his residence? Even if there was a violation, should the evidence be admissible where the officers acted in good faith and Defendant was not prejudiced?
- C. Does Defendant's challenge to the trial court's findings of fact fail when those findings were based on substantial evidence contained in the warrant affidavit and testimony at the suppression hearing?
- D. Did the trial court properly delegate authority to the Department of Corrections to set conditions as authorized by statute and based on an assessment of Defendant's risk to the community?

## **III. STATEMENT OF THE CASE**

### **A. Probable Cause**

In June 2017, Tacoma Police Department (TPD) Officer Hannah Heilman learned from a confidential informant (CI) that an individual known as "Frankie" was dealing crack cocaine in Pierce County. Ex.3 pg.2. "Frankie" was identified as Frankie Stricklen, hereinafter "Defendant." Ex.3 pg.3. CI was shown a photograph of Defendant and confirmed he was "Frankie." Ex.3 pg.3.

Heilman drove with CI to the area where Defendant lived. Ex.3 pg.3. CI identified 220 Tacoma Avenue North as Defendant's residence and

pointed out the maroon Monte Carlo parked outside as the vehicle Defendant used to deliver drugs. Ex.3 pg.3. Two police reports and a utility record confirmed Defendant lived at that building in unit #5. Ex. 3 pg.3-4.

CI purchased crack cocaine from Defendant at the direction of Heilman on two occasions in June and July of 2017. Ex.3 pg.3-4. Both purchases were arranged by phone in the presence of Heilman. Ex.3 pg.3-4. Officers maintained constant surveillance of Defendant, his residence, and CI throughout each controlled buy. Ex.3 pg.3-4.

The first buy took place on June 29, 2017. Ex.3 pg.3. After the CI's phone call, Defendant was seen leaving 220 Tacoma Avenue North with a black backpack. Ex.3 pg.3. He got into the maroon Monte Carlo, drove to the pre-determined meeting location, and sold crack cocaine to CI. Ex.3 pg.3-4. Defendant immediately returned to 220 Tacoma Avenue North and used a key to enter the residence by the front door. Ex.3 pg.4.

The second buy took place within 5 days of July 25, 2017.<sup>1</sup> Ex.3 pg. 4. Prior to the purchase, CI told police s/he had recently seen Defendant in a yellow Monte Carlo. Ex.3 pg.4. Officers conducting surveillance at Defendant's residence observed both a maroon and yellow Monte Carlo in the alley, each registered to the same individual. Ex.3 pg.4.

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<sup>1</sup> The warrant was issued on July 25, 2017. Ex.1.

Following CI's phone call, Defendant left 220 Tacoma Avenue North, drove to the pre-determined meeting location in the maroon Monte Carlo, and sold crack cocaine to CI. Ex.3 pg.4-5. Defendant immediately returned to his residence. Ex.3 pg.5. After parking, he transferred an item from the trunk of the yellow Monte Carlo to the maroon Monte Carlo. Ex. 3 pg.5. He then entered 220 Tacoma Avenue North using a key.<sup>2</sup> Ex.3 pg.5.

By the time of this investigation, Heilman had been a police officer for approximately 13 years and was assigned to investigate the sale and distribution of illegal narcotics Ex.3 pg.6. She had received specialized training on drug trafficking, had previously contacted numerous narcotics users and dealers, and had been involved in approximately 200 narcotics-related arrests. Ex.3 pg.5-6. Her training and experience established that drug traffickers commonly hide narcotics and profits in residences and vehicles. Ex.3 pg.5.

**B. Warrant**

On July 25, 2017, a Pierce County Superior Court judge authorized a search of 220 Tacoma Avenue North #5, the two Monte Carlo automobiles associated with Defendant, and Defendant's person for evidence Defendant committed the crime of unlawful delivery of a controlled substance. Ex.1

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<sup>2</sup> These facts in this and the preceding paragraphs establish substantial evidence for challenged Finding of Fact No.5. (Br. Of Appellant at 2).

pg.2. The warrant allowed police to search these locations for controlled substances, books and records showing narcotics transactions and co-conspirators, profits of illegal drug sales, evidence of dominion and control, and weapons used to protect and further drug trafficking. Ex.1 pg.1-2.

**C. Search**

The search warrant was executed on July 31, 2017. RP(3/14/18) 17, 1RP 84. While Heilman and her team prepared for the search, other officers located Defendant in the yellow Monte Carlo and conducted surveillance. 1RP 164. These officers observed foot traffic to and from Defendant's vehicle. 1RP 165. Defendant was detained following a traffic stop and provided officers a key to enter his residence. 1RP 88.

The front door to Defendant's apartment opened to the living room. 1RP 120. In this room, officers found an operable semi-automatic handgun. 1RP 113-114. 120, 2RP 68-69. 133. A loaded extended magazine was attached to the firearm. 2RP 25. 70-71. An empty standard-size magazine was located elsewhere in the room. 2RP 25, 69, 71-73. Officers also found a box of .45 caliber ammunition, a firearm holster, and three cell phones. 1RP 93-94, 118-19, 2RP 21-22. 74-75. Documents found in the living-room closet indicated Defendant resided at the apartment. 1RP 99-100.

Evidence was also found in the kitchen. 1RP 116, 2RP 18, 43, 91, 93. There was a Crown Royal bag containing .22 rifle cartridges on top of

the refrigerator. 1RP 116. 2RP 91, 93. An Altoids container on the countertop contained methamphetamine. 2RP 18, 43. There was a photograph of Defendant on the refrigerator. 1RP 116. 2RP 91. Two counterfeit bills were also found in the kitchen. 1RP 93.

There was a quantity of crack cocaine consistent with distribution on the kitchen table. 1RP 116-17, 2RP 17-18, 43, 120, 125. Next to the cocaine, a razor and packaging material indicated Defendant was processing smaller quantities of cocaine for sale. 2RP 123-24, 127-28. A CenuryLink bill with Defendant's name on it was beside these materials. 2RP 121-22.

Men's clothing and shoes consistent with Defendant's size were found throughout the one-bedroom apartment. 1RP 119, 2RP 76-77, 121-23, 126-27. Officers did not observe clothing consistent with the presence of women or children. 1RP 120-21, 2RP 125-26.

Officers found three cell phones on the front passenger seat of the yellow Monte Carlo. 1RP 144, 2RP 20-21, 75-76. There was a baggie of crack cocaine in the back pocket of that seat. 1RP 146, 2RP 43. Officers located \$840 cash in the Monte Carlo's trunk. 1RP 149-50.

**D. Proceedings**

**1. Charges**

Defendant was charged with unlawful possession of a firearm in the first degree (Count I), firearm enhanced unlawful possession of cocaine

with intent to deliver (Count II), unlawful possession of cocaine (Count III), and unlawful possession of methamphetamine (Count IV).<sup>3</sup> CP 1-5.

## **2. Motion to Suppress**

Defendant filed a motion to suppress prior to trial. CP 6-22, 23-24, 25-27. Defendant raised compliance with Criminal Rule (CrR) 2.3(d), lack of probable cause to search, and staleness of the warrant. *Id.* The search warrant affidavit, search warrant, and return of service were admitted at the CrR 3.6 hearing on March 14, 2018. RP(3/14/18) 1-77, CP 220, Ex.1, Ex.2, Ex.3. The court also heard testimony from TPD Detective Daniel Grant and TPD Officer Michael Young regarding compliance with CrR 2.3(d). RP(3/14/18) 15-36. The court found both credible. CP 100 (FoF 22).<sup>4</sup>

Grant assisted in the search of Defendant's residence. RP(3/14/18) 17-18. Defendant was brought to the scene in a patrol vehicle after officers began searching his apartment. RP(3/14/18) 18-20, 22-24, CP 99-100 (Fof 12, 14). Grant read the warrant to Defendant approximately 15 minutes after the search began. RP(3/14/18) 24-25. Defendant was handcuffed and seated in the back of the patrol vehicle when this took place. RP(3/14/18) 24-25. Defendant did not ask any questions or express any confusion. RP(3/14/18)

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<sup>3</sup> Count III was changed from unlawful possession of oxycodone to unlawful possession of cocaine in the amended information. CP 1-5.

<sup>4</sup> Finding of Fact is abbreviated Fof. Conclusion of Law is abbreviated CoL.

20-21. Grant later provided a copy of the warrant to the officer transporting Defendant to jail.<sup>5</sup> RP(3/14/18) 21, 24, CP 100 (Fof 19).

Young served as the evidence custodian of the search team during the search of Defendant's residence. RP(3/14/18) 29. He did not see Defendant before entering Defendant's residence. RP(3/14/18) 33, CP 99-100 (Fof 12, 14). Once the search was completed, approximately an hour and fifteen minutes after it began, Young left a copy of the warrant and the return of service in the residence on the kitchen table.<sup>6</sup> RP(3/14/18) 30-32, 35-36, Ex.1, Ex.2. Both Grant and Young testified Defendant had been stopped and detained at a location away from his residence prior to the search commencing. RP(3/14/18) 19, 34-35.

The court denied Defendant's motion to suppress and entered findings of fact and conclusions of law. RP(3/14/18) 37-77, CP 98-101. Specifically, the court affirmed the issuing judge's determination of probable cause and found a nexus between the observed criminal activity and Defendant's residence. RP(3/14/18) 70-71, CP 98 (Fof 2), CP 101 (CoL 3). The court also found that probable cause was not stale at the time the warrant was issued based on Defendant's ongoing drug activity.

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<sup>5</sup> The facts in this paragraph along with the court's credibility determination (Fof 22) establish substantial evidence for challenged Finding of Fact Nos.19 and 20. (Br. of Appellant at 2).

<sup>6</sup> The facts in this and the preceding paragraph establish substantial evidence for challenged Findings of Fact Nos.12 and 14. (Br. of Appellant at 2).

RP(3/14/18) 70, CP 99 (Fof 5, 6). Finally, the court found that officers complied with CrR 2.3(d) as Defendant was initially detained away from the scene when the search began, was read a copy of the warrant, and was provided a written copy when he was transported to jail. RP(3/14/18) 47-49, CP 100 (Fof 14, 19, 20), CP 101 (CoL 4).

### **3. Trial, Sentencing, and Appeal**

Trial was held between March 26 and April 2, 2018. 1RP 6, 3RP 94. Defendant was convicted as charged of Counts I, II, and IV, to include the firearm enhancement charged with Count II.<sup>7</sup> CP 169-70, 172-73.

The court imposed a 152 month prison sentence with 12 months of community custody. CP 202. The court gave Department of Corrections (DOC) discretion to set geographical boundaries, require Defendant to participate in crime-related treatment in addition to the specifically-ordered substance abuse treatment, and set additional conditions of community custody. CP 203.

Defendant did not timely appeal. CP 210. The Court of Appeals granted Defendant's motion to file an untimely notice of appeal. CP 227.

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<sup>7</sup> Count III was dismissed by the State during trial. 3RP 25-27, CP 174-75.

#### IV. ARGUMENT

- A. **The presumptively valid warrant was based on probable cause, established a nexus between criminal activity and Defendant's residence, and was based on recent observations of Defendant's ongoing drug sales at the time the warrant was issued.**

Probable cause for a search warrant is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability that defendant is involved in criminal activity and the evidence of the criminal activity can be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Probable cause to search requires (1) a nexus between the criminal activity and the item to be seized, and (2) a nexus between the item to be seized and the place to be searched. *State v. McGovern*, 111 Wn. App. 495, 499, 45 P.3d 624 (2002). A judge makes a practical, commonsense determination, based upon all the circumstances set forth in the affidavit and by drawing commonsense inferences. *State v. Maddox*, 152 Wn.2d at 509 (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317 (1983)).

A search warrant is entitled to a presumption of validity. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). Great deference is given to the issuing judges's determination of probable cause. *State v. Leupp*, 96 Wn.App. 324, 329, 980 P.2d 765 (1999). The warrant and affidavit are both tested in a commonsense, non-hyper technical manner with all doubts resolved in favor of the warrant's validity. *State v. Keodara*,

191 Wn.App. 305, 313, 364 P.3d 777 (2015) (citing *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992)).

The review of a judge's decision to issue a search warrant is limited to the four corners of the affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The defendant bears the burden at the trial court level of establishing the unreasonableness of a search pursuant to a warrant. *State v. Hopkins*, 113 Wn.App. 954, 958, 55 P.3d 691 (2002). However, when a suppression hearing is held, an appellate court reviews conclusions of law de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007); *Neth*, 165 Wn.2d at 182.

Both the issuing judge and trial court properly found that the search warrant affidavit established probable cause to search based on Defendant's recent and ongoing drug activities.<sup>8</sup> The determination was specifically based on the following: 1) that in June 2017, CI informed law enforcement Defendant was dealing crack cocaine in Pierce County; 2) that on June 29, 2017, the Defendant delivered crack cocaine to CI during a controlled buy; 3) that within five days of July 25, 2017, Defendant again delivered crack cocaine to CI during a controlled buy; 4) that during the first controlled buy Defendant left his residence with a backpack; 5) that on both controlled

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<sup>8</sup> Challenged Conclusion of Law No.3. (Br. of Appellant at 2).

buys, Defendant left his residence, delivered the drugs, and immediately returned to his residence where he entered with a key; 6) that Defendant used both the maroon and yellow Monte Carlo vehicles to deliver and/or store drugs or items related to narcotics; and 7) that individuals involved in drug trafficking commonly conceal evidence and profits in vehicles and residences.<sup>9</sup> Ex.3 pg. 2-5.

Furthermore, the issuing judge and trial court properly found a nexus between the facts supporting probable cause, Defendant's residence, and the two Monte Carlo vehicles he used for drug sales. At the time Heilman applied for the warrant, observations of Defendant's criminal activity provided a reasonable likelihood evidence would be found in these locations.

1. **Recent and ongoing drug sales established a reasonable probability evidence of criminal activity would be present in Defendant's residence and vehicles at the time the warrant was issued.**

Police observations of Defendant's recent and ongoing criminal activity were not stale at the time Heilman applied for a warrant. CP 99 (Fof 5, 6). The trial court's conclusion of law on this issue is reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

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<sup>9</sup> These facts establish substantial evidence for challenged Finding of Fact No.2. (Br. of Appellant at 2).

A search warrant affidavit must contain facts and circumstances establishing a reasonable probability that evidence of criminal activity will be at the search location when the warrant is executed. *State v. Perez*, 92 Wn.App. 1, 8-9, 963 P.2d 881 (1999) (citing *State v. Young*, 62 Wn.App. 895, 903, 802 P.2d 829 (1991)). The information is only stale if the facts and circumstances in the affidavit no longer support this inference. *Perez*, 92 Wn.App. at 8.

An issuing judge must examine the totality of the circumstances in a particular case to determine whether information in an affidavit is stale. *State v. Ague-Masters*, 138 Wn.App. 86, 101, 156 P.3d 265 (2007) (citing *State v. Maddox*, 152 Wn.2d at 506). An important but nondispositive factor is the passage of time between the observations of criminal activity and when the affidavit is presented to the issuing judge. *State v. Lyons*, 174 Wn.2d 354, 360-61, 275 P.3d 314 (2012); *Perez*, 92 Wn.App. at 9 (citing *State v. Higby*, 26 Wn.App. 457, 460, 613 P.2d 1192 (1980)). Another factor is the nature and scope of the suspected criminal activity. *Lyons*, 174 Wn.2d at 361 (citing *Andresen v. Maryland*, 427 U.S. 463, 478 n.9, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)).

Cases involving ongoing drug activity allow for a greater passage of time between observations of criminal activity and issuance of a search warrant because the evidence in these cases is not fleeting. *United States v.*

*Ortiz*, 143 F.3d 728, 732-33 (2d Cir. 1998). When the facts in a search warrant affidavit “present a picture of continuing conduct or an ongoing activity. ... the passage of time between the last described act and the presentation of the application becomes less significant.” *United States v. Ortiz*, 143 F.3d at 732 (2d Cir. 1998) (quoting *United States v. Martino*, 664 F.2d 860, 867 (2d Cir. 1981)).

“In investigations of ongoing narcotics operations, intervals of weeks or months between the last described act and the application for a warrant [does] not necessarily make the information stale.” *United States v. Ortiz*, 143 F.3d at 732-33 (2d Cir. 1998) (quoting *Rivera v. United States*, 928 F.2d 592, 602 (2d Cir. 1991))(internal quotations omitted). In *United States v. Jeanetta*, a two-week interval between the controlled buy and issuance of the warrant did not render the informant’s information stale. *United States v. Jeanetta*. 533 F.3d 651, 655 (8<sup>th</sup> Cir.), *cert. denied*, 129 S.Ct. 747 (2008). Similarly, in *United States v. Formaro*, two and a half weeks between the last controlled buy and issuance of the warrant did not render probable cause stale. *United States v. Formaro*, 152 F.3d 768, 771 (8<sup>th</sup> Cir. 1998).

“Common sense is the test for staleness of information in a search warrant affidavit.” *Maddox*. 152 Wn.2d at 505. Washington courts have similarly held that a delay between a controlled buy and issuance of the

warrant does not render the information stale where the evidence shows the defendant is engaged in ongoing drug sales. In *Maddox*, the information underlying the affidavit was not stale where an informant told police he had bought methamphetamine from defendant 35 times in the past four years and one controlled buy took place three days before issuance of the warrant. *State v. Maddox*, 116 Wn.App. 796, 804, 67 P.3d 1135 (2003), affirmed by *State v. Maddox*, 152 Wn.2d 499, 98 P.3d 1199 (2004). In *Perez*, the court found that a controlled buy taking place four days before the warrant issued was not stale where the information from the informant and police observations showed the defendant was engaging in ongoing drug activity. *Perez*, 92 Wn.App. at 9.

Like in *Maddox* and *Perez*, the passage of a few days between the last observed drug sale and the presentation of the warrant affidavit did not render the information stale where the evidence indicated Defendant was engaged in ongoing drug sales at least a month in duration. *Perez*, 92 Wn.App. at 9; *Maddox*, 116 Wn.App. at 804. The CI's initial tip to police that Defendant was dealing narcotics, and the two subsequent controlled drug purchases, took place throughout June and July 2017, signifying Defendant's drug activity was ongoing. Ex.3 pg.2-4.

On each occasion officers conducted a controlled buy, Defendant was immediately available to sell drugs, and did so after leaving his

residence without first making any stops. Ex.3 pg.3-4. These facts demonstrate he had an unbroken supply of crack cocaine, requiring contact with others involved in the drug trade, and he was regularly earning money from drug sales. Ex.3 pg.3-4. The officers saw two different vehicles involved in Defendant's drug sales, suggesting sophistication and planning in Defendant's enterprise. Ex.3 pg.3-5.

The totality of these facts indicated more than fleeting possession of a controlled substance. Rather, the facts and the nature of the crime under investigation demonstrate that evidence of drug activity was likely to be found at Defendant's residence and in his vehicles when the warrant was issued on July 25, 2017.<sup>10</sup> *See Perez*, 92 Wn.App. at 8-9. The issuing judge and trial court properly found that the observations of criminal activity supporting probable cause were not stale. Ex.1, CP 99 (Fof 5, 6). Defendant's challenge to the timeliness of the warrant should fail.

**2. There was probable cause to support the issuance of a search warrant for Defendant's residence as the affidavit established a nexus between the criminal activity, the place to be searched, and the items to be seized.**

There was probable cause to believe evidence of Defendant's drug dealing was in his residence where he left his residence before each controlled buy, returned directly to his residence afterwards, carried a

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<sup>10</sup> This analysis supports challenged Finding of Fact No.6. (Br. of Appellant at 2).

backpack from his residence before the first buy, and used a key to enter his building. CP 101 (CoL 3, 6). The trial court's conclusion of law on this issue is reviewed de novo. *Gatewood*, 163 Wn.2d at 539.

Judges draw inferences based on "where evidence is likely to be kept." *State v. Dunn*, 186 Wn.App. 889, 897, 348 P.3d 791 (2015). A judge can draw a reasonable inference that evidence of drug deals, drugs, and drug paraphernalia is likely to be found where the drug dealer lives. *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986).

Common experience suggests that drug dealers must mix and measure the merchandise, protect it from competitors, and conceal evidence of their trade—such as drugs, drug paraphernalia, weapons, written records, and cash—in secure locations. For the vast majority of drug dealers, the most convenient location to secure items is the home. After all, drug dealers don't tend to work out of office buildings. And no training is required to reach this commonsense conclusion.

*United States v. Spencer*, 530 F.3d 1003, 1007 (D.C. Cir. 2008). Probable cause can be met by showing not only that a drug dealer lives at a particular residence and drug dealers commonly keep drugs where they live, *but also* additional facts from which to reasonably infer that this drug dealer keeps drugs at *his or her* residence. *McGovern*, 111 Wn.App. at 499-500 (emphasis in original).

There are multiple factors a court can consider when determining whether probable cause to search a residence has been established. The

experience and expertise of an officer can be taken into account. *Maddox*, 152 Wn.2d at 511. Generalizations regarding the common habits of drug dealers can be used with other evidence where a factual nexus supported by specific facts is provided and is based on the affiant's experience. *State v. Thein*, 138 Wn.2d 133, 148, 977 P.2d 582 (1999). Facts that individually would not support probable cause can do so when viewed together with other facts. *State v. Constantine*, 182 Wn.App. 635, 645-46, 330 P.3d 226 (2014).

State and federal courts have found probable cause exists when law enforcement is able to see an individual go to or from a home either before or after a drug delivery. *See State v. G.M.V.*, 135 Wn.App. 366, 372, 144 P.3d 358 (2006); *see also United States v. Hollis*, 490 F.3d 1149 (9th Cir. 2007) abrogated on other grounds by *DePierre v. United States*, 564 U.S. 70, 131 S.Ct. 2225, 180 L.Ed.2d 114 (2011). It is reasonable to suspect a drug dealer stores drugs in a home for which s/he owns a key. *United States v. Grossman*, 400 F.3d 212, 218 (4th Cir. 2005). The fact that a drug dealer goes to his or her home prior to or after a sale supports the inference the drug supply is probably located there. 2 Wayne R. LaFave, *Search And Seizure: A Treatise on the Fourth Amendment* § 3.7(d), at 528-530 (5th ed. 2012).

All of the factors a judge can consider when deciding whether there is probable cause to believe evidence of a drug crime is in a residence are present in this case. The search warrant contains the requisite combination of an officer's training and experience related to drug crime, generalizations about the habits of drug dealers, and specific evidence showing Defendant probably used his residence to store drugs. Ex.3 pg.2-6.

Heilman made clear in the warrant affidavit she has extensive experience with drug cases and the techniques of drug dealers. Ex.3 pg.5-6. Heilman has the requisite experience and expertise a judge can consider in a probable cause determination. Heilman knew based on her training and experience that drug dealers store and hide drugs in residences and vehicles. Ex.3 pg.5.

The generalizations in the affidavit regarding the habits of drug dealers hiding drugs and profits in residences are combined with Heilman's experience and the specific facts from the investigation. Defendant was observed during each controlled buy leaving and then returning to his home. Ex.3 pg.2-5. That Defendant left his home and arrived at each buy location without making any stops first shows he was taking drugs from his home. Ex.3 pg.2-5. This was demonstrated on the first drug buy when Defendant left his residence carrying a backpack. Ex.3 pg.3-4. That Defendant returned home after each buy shows he was not storing his profits elsewhere. Ex.3

pg.2-5. These facts created a reasonable inference that Defendant was using his home to store his drug supply, prepare drugs for sale, and conceal his profits. See *McGovern*, 111 Wn.App. at 499-500; 2 Wayne R. LaFave, *Search And Seizure: A Treatise on the Fourth Amendment* § 3.7(d), at 528-530 (5th ed. 2012).

The affidavit in *Hollis* is very similar to the affidavit here. In *Hollis*, the police conducted a controlled buy with a cooperating witness. *Hollis*, 490 F.3d at 1152. After the controlled buy, police followed the defendant to an apartment. *Id.* The court found that because the affidavit rested primarily on the officers' observations of the controlled drug buy and the defendant's subsequent movements to his apartment, the affidavit showed there was a fair probability drugs would be found there. *Hollis*, 490 F.3d at 1153.

The factual scenario in *G.M.V.* is also very similar to the facts of the present case. In *G.M.V.*, the police saw the defendant's boyfriend, Longoria, go from the defendant's residence to a controlled drug buy. *G.M.V.*, 135 Wn.App. at 369. On one occasion the police saw Longoria go to the buy location from the house and back to the house. *Id.* On a second occasion they only saw him return to the house. *Id.* The police subsequently obtained a search warrant for the house. *Id.* The court found that because the warrant had been to search the place where Longoria left from and returned to before

and after selling drugs, there was a nexus to establish probable cause there were drugs in the house. *G.M.V.*, 135 Wn.App. at 372.

This Court addressed another similar factual scenario in the unpublished case *State v. Wood*.<sup>11</sup> *State v. Wood*, 1 Wn.App. 2d 1052 (2017). In *Wood*, the defendant returned home after suspected drug transactions and on another occasion left his home prior to a suspected drug transaction. *Id.* This Court found these facts sufficient to support a search of the defendant's home for evidence of drug dealing. *Id.*

Here, like in *Hollis*, the affidavit was based primarily on the officers' observations of two controlled drug buys and Defendant's subsequent movements. As occurred almost identically in *G.M.V.*, officers in this case saw Defendant leave his home, complete a drug sale, and return to his home (in this case on two occasions). Using the same logic as *G.M.V.*, this is sufficient probable cause that there was evidence in Defendant's home.

Defendant wrongfully compares this case to *Thein*, where there was a complete absence of facts establishing a nexus between Defendant's criminal activity and his home. *See Thein*, 138 Wn.2d at 148. In contrast, the issuing judge and trial court in this case properly found the warrant established probable cause to search Defendant's residence based on

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<sup>11</sup> Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013, may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. CR 14.1(a).

specific facts combined with the officers's experiences and generalizations about the habits of drug dealers.<sup>12</sup> These decisions should be affirmed.

**3. Defendant cannot show his counsel was ineffective for refraining from arguing portions of the warrant were overbroad when even if those sections were insufficiently particular they did not result in the seizure of any evidence and were severable from the warrant.**

Defendant argues for the first time on appeal that the warrant was overbroad because it authorized a search of "any vehicles on/or associated with the residence" as well as a search for books, papers and photographs. Brf.App. 19-20.<sup>13</sup> This ground was not raised below and is not preserved as an error on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)(error must be on specific ground made at trial).

Defendant now claims that failure to preserve this argument is ineffective assistance of counsel. Br. of Appellant at 22, 29. To prevail on this claim, a defendant must prove that (1) counsel's representation was deficient, and (2) defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Prejudice only exists if the result of the proceeding would have been

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<sup>12</sup> Challenged Conclusion of Law No. 6. (Br. of Appellant at 2).

<sup>13</sup> Defendant also alleges in briefing the warrant authorized a search of thumb drives and hard drives, however, this language does not appear in the warrant. (Br. of Appellant at 19), Ex.1.

different absent the error. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Privacy interests are protected against unreasonable search and seizure by requiring that a search warrant describe with particularity the place to be searched and the things to be seized. *State v. McKee*, 3 Wn.App.2d 11, 14, 413 P.3d 1049 (2018), reversed on other grounds by *State v. McKee*, 193 Wn.2d 271, 438 P.3d 528 (2019). A warrant is overbroad “either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist.” *State v. Higgs*, 177 Wn.App. 414, 425-26, 311 P.3d 1266 (2013) (quoting *Maddox*, 116 Wn.App. at 805).

The degree of particularity required depends on the type of evidence sought and the circumstances of each case, subject to the “rules of practicality, necessity, and common sense.” *Perrone*, 119 Wn.2d at 546-47 (quoting *State v. Withers*, 8 Wn.App. 123, 126, 504 P.2d 1151 (1972)). A description is sufficiently particular “if it is as specific as the circumstances and the nature of the activity under investigation permits.” *Perrone*, 119 Wn.2d at 547.

Even when a warrant is overbroad, suppression of evidence is not required for evidence seized under the valid portions of a warrant. *Perrone*,

119 Wn.2d at 556. Under the severability doctrine, infirmity of part of a search warrant requires suppression of evidence only from the invalid part of a warrant. *Id.* Five requirements must be met for the doctrine to apply: (1) the warrant must lawfully have authorized entry into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole; (4) the searching officers must have found and seized the disputed items while executing the valid part of the warrant; and (5) the officers must not have conducted a general search, i.e., a search in which they flagrantly disregarded the warrant's scope. *Maddox*, 116 Wn. App. At 807-09.

Officers in this case had probable cause to enter Defendant's residence and the yellow Monte Carlo where they searched for and seized evidence of crime. "Officers executing a warrant for [drugs] are authorized to inspect virtually every aspect of the premises." *Higgs*, 177 Wn.App. at 433 (quoting *State v. Chambers*, 88 Wn.App. 640, 645, 945 P.2d 1172 (1997)). Contraband discovered during this process is subject to seizure under the plain view doctrine. *Id.* In this case, officers lawfully collected a handgun and its accoutrements, controlled substances, drug paraphernalia,

cell phones, counterfeit bills, indicia of occupancy, and U.S. currency when they lawfully searched Defendant's home and vehicle. Ex.2., 1RP 149-50.

The five requirements of the severability doctrine are met here: (1) the warrant lawfully authorized entry into Defendant's residence and the yellow Monte Carlo; (2) the warrant listed ten particularly described items to be seized; (3) the particularly described items include the majority of the warrant; (4) officers found the items while conducting a lawful search of the residence and yellow Monte Carlo; and (5) officers were acting within the scope of the warrant at the time the items were seized. Ex3.. RP(3/14/18, 1RP, 2RP, 3RP (CoL 6).

As all five requirements are met, Defendant cannot demonstrate ineffective assistance of counsel. No evidence was collected pursuant to the now-disputed portions of the warrant. Any arguably overbroad segment of the warrant was severable from the portions authorizing the search for evidence that proved Defendant's guilt. Defendant's counsel was not deficient for refraining from making an argument that would not result in the suppression of evidence. Defendant suffered no prejudice from the absence of such an argument. Defense counsel made a sound decision to refrain from raising a meritless argument in the trial court. Defendant's ineffective assistance claim should fail.

**B. Police complied with CrR 2.3(d) by reading Defendant the warrant, providing him a written copy at the jail, and leaving the warrant and return in a conspicuous place in his residence.**

Officers complied with CrR2.3(d) by reading Defendant a copy of the warrant after he was brought to the scene, providing a written copy to Defendant at the jail, and leaving a copy of the warrant and return in a conspicuous place in Defendant's residence.<sup>14</sup> (Fof 12-21) (CoL 4). The trial court's conclusion of law on this issue is reviewed de novo. *Gatewood*, 163 Wn.2d at 539.

CrR 2.3(d), Execution and Return with Inventory, provides:

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 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.

Criminal Rule 2.3(d). The plain language of the rule requires a physical copy of the warrant to be provided to the person or persons present. *State v. Ettenhofer*, 119 Wn.App. 300, 305, 79 P.3d 478 (2003). There is no requirement the warrant must be served prior to the commencement of the search. *State v. Ollivier*, 178 Wn.2d 813, 851-52, 312 P.3d 1 (2013); see also *State v. Aase*, 121 Wn.App. 558, 567, 89 P.3d 721 (2004).

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<sup>14</sup> Challenged Conclusion of Law No. 4. (Bf. of Appellant at 2).

CrR 2.3(d) is ministerial in nature. *State v. Temple*, 170 Wn.App. 156, 162, 285 P.3d 149 (2012). Procedural noncompliance does not invalidate an otherwise lawful search absent a showing of prejudice. *Id.* “[P]rejudice in this context means the search would otherwise not have occurred or would have been less intrusive absent the error.” *Aase*, 121 Wn.App. at 566 (citing *United States v. Johnson*, 660 F.2d 749, 753 (9<sup>th</sup> Cir. 1981), *cert. denied*, 455 U.S. 912, 102 S.Ct. 1263 (1982)). Suppression of evidence only occurs if the rule violation has irretrievably tainted the collection of evidence. *State v. Linder*, 190 Wn.App. 638, 651, 360 P.3d 906 (2015).

Washington Courts have consistently declined to suppress evidence of a search where there is a violation of CrR 2.3(d) that does not prejudice the defendant. *See City of Tacoma v. Mundell*, 6 Wn.App. 673, 677-78, 495 P.2d 682 (1972) (not reversible error for defendant to receive copy of warrant the day after search); *State v. Bowman*, 8 Wn.App. 148, 150, 504 P.2d 1148 (1972)(suppression not required where warrant read aloud and served on another person present but not served on defendant); *Aase*, 121 Wn.App. at 567 (suppression not required where defendant received copy of warrant after search commenced); *see also State v. Parker*, 28 Wn.App. 425, 426-27, 626 P.2d 508 (1981)(search not invalidated by officers providing defendant unsigned and undated copy of warrant).

Defendant was stopped and detained in one of his vehicles away from his residence. RP(3/14/18) 19, 34-35, 1RP 88, CP 100 (Fof 13). Although Defendant was not present at the outset of the search, officers brought him to the scene and read him the warrant while he was handcuffed in a patrol vehicle, notifying him of the search and its scope. RP(3/14/18) 24-25, CP 100 (Fof 14, 17). A physical copy of the warrant was both provided to Defendant at the jail and left at his residence. RP(3/14/18) 21, 24, 30-32, 35-36, CP 100 (Fof 19).

Officers were not required to provide Defendant a copy of the warrant prior to the search commencing. *Ollivier*, 178 Wn.2d 813, 851-52. Even though Defendant was detained away from his residence, officers brought him to the scene and read him the warrant shortly after the search began. RP(3/14/18) 24-25. Not only did officers act in good faith to apprise Defendant of the warrant's contents as soon as possible, but they then complied with CrR 2.3(d) by providing Defendant a written copy of the warrant at the jail and at his residence. 3RP(3/14/18) 21, 24, 30-32, 35-36, Ex.1, Ex.2, CP 100-01 (Fof 20) (CoL 4).<sup>15</sup>

Although Defendant argues officers violated CrR 2.3(d), Defendant does not challenge the trial court's finding he failed to allege any prejudice

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<sup>15</sup> This paragraph and the preceding paragraph provide support for challenged Findings of Fact Nos. 19 and 20 and challenged Conclusion of Law No. 4. (Br. of Appellant at 2).

in the service of the search warrant. CP 100 (Fof 21). Even if a CrR 2.3(d) violation were found, suppression of evidence is not a remedy of this ministerial rule absent prejudice. *Temple*, 170 Wn.App. at 162.

Defendant's reliance on *Ettenhofer* is misplaced. In *Ettenhofer*, officers received telephonic approval for a warrant but failed to execute a written warrant with the court's signature. *Ettenhofer*, 119 Wn.App. at 302. Suppression of the evidence was not predicated on the violation of CrR 2.3(d), but rather on law enforcement's unlawful entry into the defendant's home absent a written warrant in violation of article I, section 7. *Id.* at 308-09. This Court should affirm that officers in this case complied with CrR 2.3(d). If any violation occurred, suppression is not the remedy because Defendant was not prejudiced.

**C. Substantial evidence supported the trial court's findings of fact and the conclusions of law based on those findings**

When evaluating a trial court's rulings on a motion to suppress, the reviewing court determines whether substantial evidence supports the challenged findings of fact. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). Unchallenged findings are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

"Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (citations and internal quotation

marks omitted). Credibility determinations are for the factfinder and are not reviewable on appeal. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Conclusions of law are reviewed de novo. *Gatewood*, 163 Wn.2d at 539. Unchallenged conclusions of law become the law of the case. *Nguyen v. City of Seattle*, 179 Wn.App. 155, 163, 317 P.3d 518 (2014).

Defendant challenges eight of the trial court's findings of fact and three of its conclusions of law. (Br. of Appellant at 2). As detailed below and throughout the State's briefing, substantial evidence supports those findings of fact and the conclusions of law based thereon.

Defendant first challenges Finding of Fact No. 1. This finding contains one minor error but is otherwise based on substantial evidence. In Finding of Fact No. 1, the court found, "On July 25<sup>th</sup> 2017, Tacoma Police Department (TPD) Officers obtained and served a search warrant, signed by Pierce County Superior Court Judge Schwartz, for the defendant's person, two of his vehicles, and his residence (220 Tacoma Avenue #5, Tacoma, Washington)." CP 98 (Fof 1). The warrant and affidavit are signed by Heilman and Judge Schwartz and dated July 25, 2017. Ex.1, Ex.3. The search took place six days later on July 31, 2017. Ex.2, RP(3/14/18) 17. Apart from this error, substantial evidence supports Finding of Fact No. 1.

In challenged Finding of Fact No. 2, the court found. "The search warrant was accompanied by a Complaint for Search Warrant which provided the probable cause for the issuance of the search warrant." CP 98 (Fof 2). The search warrant complaint was written by Officer Heilman and contains the facts the judge used to determine probable cause. Ex.3. The trial court's finding was supported by substantial evidence. To the extent this finding involves a legal conclusion, the basis for this conclusion is addressed in Section IV.A. and IV.A.(2) of this briefing. This Court should affirm this finding.

In challenged Finding of Fact No.5, the court found. "The length of time between the two cocaine purchases is indicative of the defendant's involvement in an ongoing drug trade and not mere possession of narcotics." CP 99 (Fof 5). The two cocaine purchases during Heilman's investigation took place on June 29, 2017, and within 5 days of July 25, 2017, at least 27 days apart. Ex.3 pg.3-5. They were preceded by the CI telling Heilman Defendant was dealing drugs in Pierce County. Ex.3 pg.3. That following this information Defendant had possession of and was selling drugs on two occasions weeks apart, was dealing drugs prior to these occasions according to CI, was immediately able to respond to calls from CI to deliver drugs, and did not stop anywhere before or after the controlled buys, provides substantial circumstantial evidence that Defendant was

regularly and continuously involved in the drug trade. Ex.3 pg.3-5; *Delmarter*, 94 Wn.2d at 638. This Court should affirm this finding.

In challenged Finding of Fact No.6, the court found, “The length of time between the last drug deal and securing the search warrant coupled with evidence of an ongoing drug trade did not cause the information in the complaint to become stale.” CP 99 (Fof 6). This finding appears to be a conclusion of law and is addressed in Section IV.A.(1) of this briefing.

In challenged Findings of Fact Nos. 12, 14, 19, and 20, the court found that: 12) The defendant was not present at the outset of the search; 14) The defendant was brought to the premises of the search at some point in time after the search of his residence already commenced; 19) A physical copy of the warrant was provided to the defendant when he reached the Pierce County Jail; and 20) The fact that the officers did not give a cuffed suspect a copy of the search warrant until he reached the jail was not unreasonable. CP 99-100 (Fof 12, 14, 19, 20).

These challenged findings are based on the testimony of Grant and Young. RP(3/14/18) 15-36. The court found the testimony of both credible, a finding not reviewable on appeal. *Brockob*, 159 Wn.2d at 336. Both Grant and Young credibly testified Defendant was detained away from his residence, was not present when the search began, but arrived during the

search, substantial evidence for Findings of Fact Nos. 12 and 14. RP(3/14/18) 18-20, 22-25, 33-35.

Grant's credible testimony he provided a written copy of the warrant to the officer taking Defendant to jail is substantial circumstantial evidence for Finding of Fact No. 19, that the warrant was provided to Defendant at the jail. RP(3/14/18) 21, 24; *Delmarter*, 94 Wn.2d at 638. Grant's credible testimony Defendant was handcuffed at the scene in a patrol vehicle is substantial circumstantial evidence supporting Finding of Fact No. 20, that the officers' actions concerning the warrant were reasonable. RP(3/14/18) 24-25. To the extent this finding includes a legal conclusion, it is addressed in Section IV.B. of this briefing. Challenged Findings of Fact Nos 12, 14, 19, and 20 should be affirmed.

Defendant also challenges Conclusions of Law Nos. 3, 4, and 5. CP 101. These conclusions are addressed throughout the State's briefing in Sections IV.A. and IV.B. The trial court's findings should be affirmed.

**D. The trial court appropriately delegated authority to DOC to set community custody conditions as authorized by statute and based on its assessment of Defendant's risk to community safety.**

The trial court properly delegated authority to DOC to set conditions of Defendant's community custody pursuant to RCW 9.94A.704 and its assessment of Defendant's risk to the community. Conditions of community custody imposed by the trial court are reviewed for abuse of discretion and

will be reversed only if “manifestly unreasonable.” *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). A defendant may bring a pre-enforcement challenge to such a condition “if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *State v. Sanchez Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (citing *State v. Bahl*, 164 Wn.2d 793, 751, 193 P.3d 678 (2008)).

The trial court imposes conditions of community custody pursuant to RCW 9.94A.703. DOC imposes additional conditions of community custody pursuant to RCW 9.94A.704. Some of these additional conditions are mandatory. RCW 9.94A.704(3). DOC also has the discretion to impose conditions following its assessment of an offenders risk of reoffense and danger to the community. RCW 9.94A.704(2)(a). These conditions may include participation in rehabilitative programs and other affirmative conduct. RCW 9.94A.704(4). That both the sentencing court and DOC can set conditions serves both the purposes of punishment and rehabilitation:

While it is the function of the judiciary to determine guilt and impose sentences, the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the Legislature.

*State v. Sansone*, 127 Wn.App. 630, 642, 111 P.3d 1251 (2005).

Defendant contends the trial court violated the separation of powers by allowing DOC to set “other conditions” of community custody. Br. of Appellant at 24, CP 203. This court addressed an almost identical challenge in *State v. McWilliams*, 177 Wn.App. 139, 152, 311 P.3d 584 (2013). That defendant argued that his community condition written as “Conditions per DOC; CCO” was an impermissible delegation of the court’s sentencing authority. *McWilliams*, 177 Wn.App. at 152. This Court found that “the sentencing court properly delegated the specifics of (the defendant’s) community custody conditions to the DOC” within the parameters articulated by *Sansone. McWilliams*, 177 Wn.App. at 154.

Like in *McWilliams*, the trial court’s delegation to DOC to set “other conditions” in this case is a permissible delegation of authority to an entity statutorily responsible for the reformation of the offender and the protection of the community. *McWilliams*, 177 Wn.App. at 154. Defendant’s sentencing condition allowing DOC to set conditions of Defendant’s community custody should be affirmed.

## V. CONCLUSION

In June and July 2017. Defendant was engaged in ongoing drug dealing in Pierce County. The investigation showed that he was not only delivering drugs, but likely kept evidence of his crimes in his home. Upon timely issuance of the warrant, police found an illegal firearm and evidence

Defendant was preparing crack cocaine for distribution. This Court should find that the evidence underlying Defendant's convictions was obtained pursuant to a valid warrant and police followed proper protocols in the warrant's service. Furthermore, Defendant's sentence rightly allows DOC to set conditions of his community custody. This court should affirm Defendant's convictions and sentence.

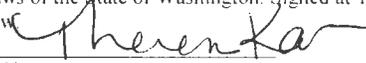
RESPECTFULLY SUBMITTED this 7th day of August, 2019.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

  
ERICA EGGERTSEN  
WSB# 40447  
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered ~~by E-file or 21st mail~~ to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her 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.

8.7.19   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**August 07, 2019 - 2:15 PM**

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**Appellate Court Case Title:** State of Washington, Respondent v. Frankie L. Stricklen, Appellant  
**Superior Court Case Number:** 17-1-02891-8

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