

**FILED**

JUN 10 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 290344

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

MICHELE MERLYNN MARTINEZ,

Appellant.

---

BRIEF OF RESPONDENT

---

David B. Trefry WSBA #16050  
Special Deputy Prosecuting Attorney  
Attorney for Respondent

JAMES P. HAGARTY  
Yakima County Prosecuting Attorney  
128 N. 2<sup>nd</sup> Street, Room 329  
Yakima, WA 98901-2621

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	ii-iii
I. <u>ASSIGNMENTS OF ERROR</u> .....	1
A. ASSIGNMENTS OF ERROR .....	1
B. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
II. <u>STATEMENT OF THE CASE</u> .....	1
III. <u>ARGUMENT</u> .....	2
RESPONSE TO ASSIGNMENTS OF ERROR ‘A-C’- CANTRELL WAS APPROPRIATELY APPLIED IN THIS CASE.....	2
RESPONSE TO ASSIGNMENT OF ERROR ‘D’ – CCO MARTIN HAS VALID LEGAL AUTHORITY TO SEARCH THE VEHICLE .....	10
RESPONSE TO ASSIGNMENT OF ERROR ‘E’ – APPELLANT GAVE CONSENT TO THE INITIAL SEARCH OF THE FORD ...	14
RESPONSE TO ASSIGNMENT OF ERROR ‘F’ – THE SEARCH WAS VALID; THEREFORE THE EVIDENCE SEIZED WAS NOT FRUIT OF THE POISONOUS TREE.....	16
IV. <u>CONCLUSION</u> .....	18

TABLE OF AUTHORITIES

PAGE

**Washington Cases**

Merritt v. Newkirk, 155 Wash. 517, 285 P.442 (1930) ..... 14

State v. Bucknell, 144 Wn.App. 524, 183 P.3d 1078, 1080 (2008)..... 8

State v. Cantrell, 124 Wn.2d 183, 875 P.2d 1208 (1994)..... 5, 6, 9, 11

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)..... 2

State v. Cole, 73 Wn.App. 844, 871 P.2d 656 (1994) ..... 17

State v. Fisher, 145 Wash.2d 209, 35 P.3d 366 (2001) ..... 11

State v. Henrickson, 129 Wash.2d 61, 917 P.2d 563 (1996) ..... 11

State v. Hill, 123 Wash.2d 641, 870 P.2d 313 (1994) ..... 16

State v. Johnson, 128 Wash.2d 431, 909 P.2d 293 (1996) ..... 16

State v. Longuskie, 59 Wn.App. 838, 801 P.2d 1004 (1990)..... 9

State v. Lucas, 56 Wash.App. 236, 783 P.2d 121 (1989),  
*review denied*, 114 Wash.2d 1009, 790 P.2d 167 (1990) ..... 10

State v. Myers, 133 Wn.2d 26, 941 P.2d 1102 (1997)..... 8

State v. Parramore, 53 Wash.App. 527, 768 P.2d 530 (1989)..... 10

State v. Patterson, 51 Wash.App. 202, 752 P.2d 945,  
*review denied*, 111 Wash.2d 1006 (1988) ..... 10

State v. Ross, 141 Wash.2d 304, 4 P.3d 130 (2000)..... 11

State v. Walker, 136 Wn.2d 678, 965 P.2d 1079 (1998) ..... 14, 15, 16

TABLE OF AUTHORITIES (continued)

	PAGE
<b>Federal Case</b>	
<u>Wong Sun v. U.S.</u> , 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963) .....	17
<b>Rules and Statues</b>	
RAP 10.3(b) .....	1
RCW 9.94A.631 .....	10, 12, 15

## I. ASSIGNMENTS OF ERROR

Appellant makes numerous assignments of error. These can be summarized as follows;

### A. **ASSIGNMENTS OF ERROR**

- A. Cantrell is only applicable to occupied vehicles on a highway.
- B. Cantrell is not applicable if a party is “constrained” or the object of the search is an “effect.”
- C. Campos had no ability to consent to the search.
- D. The search by CCO Martin was invalid.
- E. Appellant did not consent to the search of the Escort.
- F. Evidence seized from the alleged illegal search should be suppressed.

### B. **RESPONSE TO ASSIGNMENTS OF ERROR.**

- A. Cantrell is applicable in this factual setting.
- B. There was no objection to the search by any party.
- C. Campos had full authority to consent to search.
- D. The search by DOC is mandated by statute and by agreement of the probationer.
- E. Appellants consent was not needed.
- F. The trial court was correct when it denied the motion to suppress.

## II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

### III. ARGUMENT.

The issues raised by Martinez are controlled by clearly settled case law, are of a factual nature or were well within the discretion of the trial court. The Court of Appeals should only overturn the actions of the trial court if that court has failed to comply with the standard set forth in State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971): Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. ....Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” (Citations omitted.)

#### **RESPONSE TO ASSIGNMENT OF ERROR ‘A-C’– CANTRELL WAS APPROPRIATELY APPLIED IN THIS CASE.**

The State elicited a wealth of information from the appellant while she was on the stand. She was the owner of or had registered numerous vehicles, vans, a BMW and other cars which all miraculously were not capable of being used according to her statements. However they were all titled and licensed in her name. The only car that was not titled and

licensed in her name was the one Ford Escort, the vehicle that is the subject of this appeal.

Q: Okay. What about the BMW? Fidel, could he take that if he wanted or did he need permission for that, as well? I

mean, what was the situation with the BMW?

A: Well, that car was under my name so just... If he had his

license -- After November he got his license, so he'd

just drive. He would drive the car. He didn't necessarily

have to have my permission. I mean, that would be our responsibility.

Q: Well, and let me ask --

A: My responsibility.

Q: Okay. But why didn't he need your permission for the BMW

as opposed to the Ford Escort?

A: Because it wasn't under my mom's name. I would've been

responsible if something would have happened instead of my

mom, which would be the other case.

Q: Okay. And, and did you -- Was the situation --

Did you

divide up that that Ford Escort was yours to use and the

BMW was his to use?

A: Sure. Yes.

Q: Is that how it worked?

A: Yeah.

Q: Okay.

A: Yes.

Q: Well, and how often did Fidel use the BMW?

A: Really he wouldn't hardly drive. Like I said, he didn't

have his license until barely... He's never had his

license, so he wouldn't hardly drive, you know. He wouldn't drive. I usually would drive if we would go into town or wherever.

Q: Okay.  
(RP 147-48)

There is no dispute that the "legal" owner of this vehicle was Ms. Campos, appellant's mother. Ms. Campos was at the scene because appellant called her. The court did not find credible the testimony by Martinez that she had refused to allow the officers to search the car. The court found the testimony of the officer credible. The officer stated that after the weapon was found he asked the Martinez for consent and went through the form with her. Appellant's response was she was uncertain about what to do. Martinez had been arrested on numerous occasions and was familiar with the system.

The officer merely ran the plate on the car and realized that the mother, Ms Campos, was the true owner of the car, there was nothing sinister as appellant states in her brief. When the officer realized that he was actually speaking with the wrong party he approached Martinez's mother, clearly not in an attempt to circumvent the law but to comply with the law. There is no doubt the question before the court today would be why the officer had not requested consent of the true owner of the car, Martinez's mother, to enter the car, since the officer knew the name of the

true owner; she was at the scene and who by her own words and the testimony of the appellant, would be responsible if anything happened to or with this car.

Appellant states that State v. Cantrell, 124 Wn.2d 183, 186-87, 875 P.2d 1208 (1994) is not applicable. The State and the court disagreed. As was stated in Cantrell:

“The voluntary consent to search a motor vehicle, given by a person with common authority over it, supports a search of the vehicle and evidence so discovered can be used against a nonconsenting occupant of the vehicle. We decline to extend the holding in *Leach* to motor vehicle search cases.”  
...Initially it is important to note two facets of this case. First, the Defendant did not object to the search and, therefore, the issue of whether consent by a co-occupant remains valid in the face of another occupant's *objection* is not before the court. Second, the Defendant was a permissive driver, and not a mere passenger, so whether passengers have a reasonable privacy expectation in a vehicle or its contents with the exception of their own belongings is also not before the court.

At the scene Ms. Campos at the scene was read the consent form was allowed to read the form and then she signed the form. Her only question was whether she could or would be held responsible for what was found in the car.

Martinez would have this court turn the bright line rule as forth in cases such as Cantrell into some sort of math problem. The officers

would be responsible for the determination of if the car met the new equation. They would now be responsible to determine if the car was off the road and if it was truly a vehicle or now it was an “effect.” This apparently would have to be done on a case by case basis. The law does not make some distinction as to whether a vehicle is a vehicle based on its location. This very court recently decided a case where the vehicle which was the basis of a felony conviction had no motor or transmission and was found hidden under a tarp.

Appellant would in effect have this court consider any and all vehicles which were not being driven at the time of contact or off the road to be considered “effects” and given the status that the Washington State Supreme Court refused to give them in Cantrell. The ruling in Cantrell gave effect to the fact that a car is something that is different than a home or a business. The court indicated there that the privacy interest is great in an automobile BUT cars are a highly regulated item. The sole purpose is to take the occupants and their effects out and about in public on public highways so that they can conduct their affairs and return home. At one point in time in Cantrell both occupants of the vehicle were out of the car, would that turn car in that case into an “effect?”

Martinez granted consent for the officers to “look” into the car. It is clear in this instance that she did not withdraw that consent. She claims

in her testimony that as she sat locked away in the car she revoked. She fails to mention how this revocation did not get imparted to her mother whom she was allowed to speak to at the scene.

A: Yeah, he'd have to tell me first.

Q: And, and why was that?

A: Just because it was under my mom's name still and I didn't want to bring her any trouble or, you know, whatnot. (RP 120)

...

Q: And how many other cars did you own during that time period?

A: I had probably about three, but they were not working. I guess I had them in my name, but they didn't work.

(RP 129)

Ms. Campos was the legal owner. Appellant states she and only she was capable of consenting to a search of the Ford Escort. And yet she also states her husband and her mother were allowed to drive the car and she makes it clear her mother, not Martinez, is the party who would be responsible if something were to happen to or with the car. This is no different than the typical teenager stating that "his" car is "his" car but other than the self-serving statements and a few receipts there is nothing to back up Martinez's claim.

It is interesting to note that nowhere in this transcript did appellant bring into the courtroom a receipt or a card that would demonstrate that she had proof of insurance for this car. Appellant states on the stand that the reason her husband had to ask to drive this car was because it was her mothers. Ms. Campos said that she was concerned about this car because

she would be responsible if anything happened with the car, that she cosigned to purchase the car;

A: We co-signed for Michele.(RP 152)

...

Q: Okay.

So they asked you if you were the registered owner of the car and you told them yes?

A: Uh-huh (affirmative).

Q: At that time you didn't tell them that it really wasn't yours, it was your daughter's?

A: No.

...

Q: Okay.

So if something happened, an accident or something like that, who would be responsible for that involving that car?

A: Myself because it was under my name.  
(RP 158-59)

This is the self-same person who said she never was read or had occasion to read the consent document even though the offices both indicate it was read to her and she was allowed to review the document and then signed that document with her only concern being would SHE be held liable or accountable for what was in it. The trial court did not find her testimony credible, State v. Bucknell, 144 Wn. App. 524, 528, 183 P.3d 1078, 1080 (2008) "'Credibility determinations are within the sole province of the jury and are not subject to review.'" State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province

of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990)."

In this instance the trial court made a determination with regard the testimony of the appellant, her mother and the officers. The court unequivocally found that the testimony of appellant and her mother was not credible. This is a discretionary ruling by a trial court and shall not be overturned by this court without demonstration by the appellant that the court abused that discretion; appellant has not met that burden here.

Appellant would have this ignore the edicts of Cantrell where the court specifically states that Leach is not applicable overruling the Court of Appeals;

While there is a privacy interest in an automobile, /16 the interest does not rise to the level of a person's expectation of privacy in a residence. /17 There is less expectation of privacy in an automobile than in either a home or an office. /18 Since a person enjoys a lesser expectation of privacy in a vehicle than in an office or a home, we decline to extend the rule enunciated in State v. Leach, 113 Wn.2d 735, 782 P.2d 1035 (1989) to vehicle searches. (Id at 190)

The trial court citing Cantrell:

"The basic issue before the Court here is whether the Leach (phonetic) rule should be extended to searches of vehicles. The third-party consent cases turn on the suspect's reasonable expectation of privacy. If the suspect has willingly allowed another person common authority over the place or thing, then he or she runs the

risk that the other will expose it to another person,”  
which I, again, was fairly compelling language to me.”  
(183-84)

**RESPONSE TO ASSIGNMENT OF ERROR ‘D’ – CCO MARTIN  
HAS VALID LEGAL AUTHORITY TO SEARCH THE VEHICLE.**

Under the federal and state constitutions, an exception to the warrant requirement exists for searches of probationers. State v. Patterson, 51 Wash.App. 202, 204-07, 752 P.2d 945, *review denied*, 111 Wash.2d 1006 (1988). Parolees and probationers have a diminished right of privacy because of the State's continuing interest in the defendant and supervision of the defendant as a probationer. State v. Lucas, 56 Wash.App. 236, 240, 783 P.2d 121 (1989) *review denied*, 114 Wash.2d 1009, 790 P.2d 167 (1990). Community supervision is the functional equivalent of probation. State v. Parramore, 53 Wash.App. 527, 529, 768 P.2d 530 (1989).

This warrant exception is codified in RCW 9.94A.631, which states in part,

If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

"Reasonable cause" need be only a well-founded suspicion of a violation, not probable cause. State v. Fisher, 145 Wash.2d 209, 224-28, 35 P.3d 366 (2001).

Warrantless searches are per se unreasonable under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, unless they fall within a few specifically established and well-delineated exceptions. State v. Ross, 141 Wash.2d 304, 312, 4 P.3d 130 (2000); State v. Hendrickson, 129 Wash.2d 61, 70, 917 P.2d 563 (1996). A warrantless search is constitutional when valid consent is granted. State v. Cantrell, 124 Wash.2d 183, 187, 875 P.2d 1208 (1994). Here, appellant's husband had granted valid consent in advance and appellant granted it at the scene when the officer asked if he could "look in" the car, immediately preceding the search.

As a condition of Mr. Medina's community supervision, he agreed "I'm aware I'm subject to search/seizure of my person, residence, automobile or other personal property if there's reasonable cause on the part of the Department of Corrections to believe I have violated conditions." (PR 40-41) "it joint control, ownership" (RP 42) Search was also authorized in the judgment and sentence (RP 46) In addition, at the time of the search at issue here, Community Corrections Officer (CCO) Martin had reasonable suspicion to believe there were other

violations including the operation of the vehicle without insurance, drinking, failing to remain in treatment, association with known gang members which supported the reasonableness of this previously authorized search.

CCO Martin knew that appellant was married to Medina. CCO Martin had been to the residence before. He had only seen this vehicle operated by Medina. Medina had indicated that he was going to get insurance on this car. CCO Martin knew and it is undisputed that appellant and Medina are husband and wife. The initial search of the car was legal under the RCW 9.94A.631, therefore the CCO was legally in the car at the time he found the weapon.

Further, appellant stated that the CCO could “look” into the car. It should be noted that appellant was not ignorant of the procedures and process that the CCO operated under. The CCO states that the interior of the home was the same as other times making it apparent that he had been there before as well as the fact that during the search on the date in question Martinez was present. “The living room really didn’t have a -- from every time I’ve been to that residence, didn’t have a lot in it.” (RP 13)

**“Defense Counsel Cross:** Okay. And, so, at the point where now you’re at the red Ford Escort and you had said to Mr. Keller that you were going to search that

vehicle and you were just asking as common courtesy to Ms. Martinez, is that correct?

**Officer Martin:** It's correct. Because based on the totality, based on taking everything into, into circumstances that I had contacted Mr. Medina the week prior, based on them being in a relationship together, seeing him drive the vehicle, knowing that he has conditions which state that the vehicle, the house, you know, him, all the property is subject to search, so when I was speaking with Ms. Medina or Ms. Martinez at that point in time, I was kind of informing her what was going on and what was happening, you know, based on the violations, because she was not where we were when I located the substance and then Mr. Medina was detained and arrested, she wasn't there, so she was kind of asking, 'Hey, what's going on,' so I kind of informed her what was going on, and just in that conversation, you know, I was confirming, 'Hey, this is your guys' vehicle,' or at least, 'I've seen you guys driving it,' or, 'I've seen Mr. Medina driving it,' and she confirmed that, that they both drive it. So at that point I've come into certain things, times where, you know, you have to get the keys, so I just kind of ask, 'Hey, do you have the keys? Do you mind if we just look in it, search it?' 'No, no problem. That's fine.'" RP 29-30.

Martinez allowed the CCO and the officers to "look around" in her home. For her to now say that she did not allow or mean the CCO could search the car when she said he could look is ludicrous. Appellant had full knowledge of what was going to happen when she authorize the CCO to "look" in the car.

This is a community property state. Once again a careful reading of the transcript makes it apparent that Mr. Medina, according to the

testimony of the appellant, had full use of all of the cars except this Ford Escort. It is of note that appellant claims that she needed to borrow her mothers car when she needed a more “roomier” car and yet that is the very description she used when testifying about her BMW, conveniently the BMW like so many, if not all, of her cars was not usable, only the one owned by her mother was reliable and roomy enough.

Declarations of spouses have slight bearing on status of property.

Merritt v. Newkirk, 155 Wash. 517, 285 P. 442 (1930).

**RESPONSE TO ASSIGNMENT OF ERROR ‘E’ – APPELLANT GAVE CONSENT TO THE INITIAL SEARCH OF THE FORD.**

The testimony was unrefuted; appellant stated to the CCO officer that he could “look” into the cab of the Ford. There was no coercion, there were no strong arm tactics, threats or arrest or any other action.

CCO Martin had a legal basis as set forth above to search the car. He did not need the appellant to allow the search for that search to proceed. “The state is obligated to meet three requirements in order to show that a warrantless, but consensual search was valid: 1) The consent must be voluntary; 2) the person granting consent must have authority to consent; 3) the search must not exceed the scope of the consent.” State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). The officers who were at the scene spoke with the alleged owner of this car, Mrs. Martinez.

They did not need to ask her permission as this search was already authorized pursuant to RCW 9.94A.631. This analysis is superfluous because of the authorization in this statute.

However for analytical purposes the actions of the officers met the test set forth in Walker. The CCO says specifically that he was only looking for the additional violation of not having valid insurance. He merely was explaining his actions to Martinez when he asked her do you mind if I look into the car, she said YES. She went so far as to remove some of her personal property, a drink, before the search went forth. This alone indicates there was no coercion on the part of the officer. He allowed her into the vehicle prior to his looking in, allowed her to remove an item. If this was some sort of involuntary action the officers certainly would not let her take items from the car. They also would not have allowed a person to enter and remove items from the car whom they did not perceive, at the time, to be an individual capable of possession of the vehicle. Martinez herself had stated that she was the owner of the vehicle. She had indicated that her husband had driven the car. Therefore two of the factors in Walker have been met. Finally, this portion of the search was very minimal, well within the scope stated by CCO Martin. He immediately saw this weapon under the seat when he initially entered the car. The search did not proceed any farther. Therefore the scope

requirement of Walker was met. Using the very case cited by appellant it is clear that she gave valid consent for this initial search.

The testimony of the CCO makes it clear that this gun would have inevitably been found. He was going to search with or without the “consent” of appellant; he had the signed consent of the husband from his supervision conditions in the DOC document as well as the judgment and sentence.

This court will review findings of fact on a motion to suppress for substantial supporting evidence. State v. Hill, 123 Wash.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair minded, rational person of the truth of the findings. Hill, 123 Wash.2d at 644, 870 P.2d 313. The court will review de novo conclusions of law pertaining to suppression of evidence. State v. Johnson, 128 Wash.2d 431, 443, 909 P.2d 293 (1996).

The findings and conclusions in this case for both the suppression and the stipulated facts trial are supported by the evidence and testimony presented and were in this instance such that the “fair minded, rational” trial court judge adopted them over those proposed by appellant

**RESPONSE TO ASSIGNMENT OF ERROR ‘F’ – THE  
SEARCH WAS VALID; THEREFORE THE EVIDENCE  
SEIZED WAS NOT FRUIT OF THE POISONOUS TREE.**

Appellant states cites Wong Sun v. U.S., 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963), “As a rule, evidence obtained through exploitation of an unconstitutional search must be suppressed. And further states “Evidence obtained as a result of an unconstitutional investigatory seizure must also be suppressed. State v. Cole, 73 Wn. App. 844, 871 P.2d 656 (1994).” Each and every one of the searches was valid. Martinez strings the searches together and paints the entire period of contact between the parties as some sort of sinister plot, a conspiracy amongst the officers to find something in the trunk. Apparently when the officers were not busy “stowing away” Martinez in the back of a police car “with the doors and windows shut” they were able to divine the fact that there was something illegal in the trunk. The fact is there was a valid consent from the owner of the car therefore there was no tainted fruit in this case.

The State does not need to argue inevitable discover because that theory is based on the fact that the State officer was doing something they should not have and therefore another basis for this seizure is needed. It is and has always been the position of the State that the totality of the actions by all officers present, from the CCO to the line officers, were based not on some sordid tale, some conspiratorial act but on the fact that there was a person on supervision who had agreed to conditions, a party, Martinez, who knew full well the ramifications of those conditions and a set of facts

wherein the officers were required to get the consent of the person all agree was the legal owner to search a vehicle.

The search of the home, the person of Mr. Medina, the Ford Escort all were based on statute or case law which, when tied to the facts of this case, make it clear that the actions of all of the officers was justified and the conclusions and findings of the trial court were based on those facts and findings. The actions of the trial court were correct.

#### IV. CONCLUSION

The assignments of error raised were factual in nature, well within the trial courts discretion, or clearly controlled by settled law and the decision of the court were not an abuse of discretion.

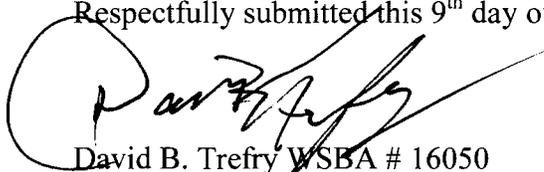
There is really no better method to sum up this case than that stated by the deputy prosecutor in the case:

The State would submit that the search was valid as a condition of probation search because that is an automobile that Mr. Medina owns and uses. It's also valid because they had consent initially from Michele Martinez to take a look in the car. There was no discussion there about the extent of what that search would be or what that look would be, and there were no limitations placed upon it, but it ended as soon as the door was open and the Officer Martin (sic) observed the pistol under the front seat. And, finally, we had the consent, complete written consent executed by the legal owner of the car. She had no questions

about it. The form was read to her. She was given opportunity to read it herself. She states today that she doesn't -- couldn't read it without glasses, but she didn't express any of those concerns to the officer, other than asking if she would get in trouble if something were found in the car. The State would submit that the search that was conducted is proper and that these motions should be denied. (RP 198-99)

The actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this 9<sup>th</sup> day of June 2011

A handwritten signature in black ink, appearing to read "David B. Trefry". The signature is written in a cursive style with a large, circular flourish on the left side.

David B. Trefry WSBA # 16050  
Special Deputy Prosecuting Attorney  
Yakima County, Washington

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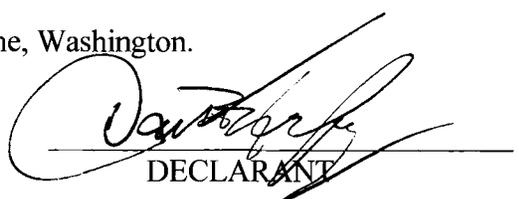
STATE OF WASHINGTON  
Respondent,  
vs.  
MICHELE MERLYNN MARTINEZ,  
Appellant

NO. 29034-4-III  
DECLARATION OF SERVICE

I, David B. Trefry state that on June 9, 2011, I emailed, by agreement of the parties, a copy of the State's Motion on the Merits to: Mr. Jeff Goldstein, Attorney At Law at [jeffgoldsteinattorney@yahoo.com](mailto:jeffgoldsteinattorney@yahoo.com) and via the United States Postal service to Michele Merlynn Martinez, 2241 Olmstead Rd., Grandview, WA 98930.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9<sup>th</sup> day of June, 2011 at Spokane, Washington.

  
DECLARANT

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