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OCT 21, 2013

Court of Appeals
Division III
State of Washington

No. 31407-3-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

PAUL CAREY HARTZELL, Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

- A. WAS THE TRIAL COURT'S DENIAL OF THE APPELLANT'S SUPPRESSION MOTION WAS PROPER WHERE OFFICERS HAD PROBABLE CAUSE TO ARREST THE APPELLANT?
- B. IS RCW 9A.76.175 AN UNCONSTITUTIONAL LIMITATION ON FREE SPEECH UNDER THE FIRST AMENDMENT OF THE UNITED STATE'S CONSTITUTION?
- C. IS RCW 9A.76.175 FACIALLY VAGUE, OR VAGUE AS APPLIED TO THE APPELLANT?
- D. DO ANY OF THE APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS WARRANT REVERSAL OF HIS CONVICTIONS?

II. STATEMENT OF THE CASE

On July 10, 2012, officers were summoned to Wasem's Drug in Clarkston, Washington, regarding a subject who purchased a single syringe and went into the bathroom. Report of Proceedings (hereinafter RP)(12/19/12) pp. 17, The subject, later identified as the Appellant, Paul C. Hartzell, had purchased a syringe and was in the bathroom for approximately twenty-five minutes, which caused the staff at Wasem's to become concerned for the subject. RP (11/30/12) p. 23, RP (12/19/12) p. 19.

Officers Scot Wohl and Monte Renzelman of the Clarkston Police Department responded and, after approximately a minute of knocking, were able to get the Appellant to respond. RP (11/30/12) p. 23, RP (12/19/12) pp. 19, 42. The Appellant then opened the door and exited the bathroom.¹ RP (11/30/12) p. 24, RP (12/19/12) pp. 19, 42 - 43. Officers recognized the Appellant from previous encounters and knew him to be hostile toward law enforcement. RP (11/30/12) p. 24. Due to the officers' knowledge of the Appellant's prior hostility and the fact that he had recently purchased a hypodermic needle, officers inquired of him as to the needle's location. RP (11/30/12) p. 24. The Appellant denied

¹In his brief the Appellant claims that the police opened the door. Brief of Appellant, p. 3. The testimony at hearing and trial was consistent that the Appellant opened the door.

having a needle on his person. RP (11/30/12) p. 24, RP (12/19/12) p. 43. While speaking with the officers, they observed the Defendant to be sweating profusely, have constricted pupils, erratic thought/speech patterns, and mood swings. RP (12/19/12) pp. 44 - 45. Officers recognized the Defendant's demeanor and appearance as being consistent with stimulant intoxication. RP (11/30/12) pp. 25 - 26. Officers observed something protruding from the Appellant's right pocket. RP (11/30/12) p. 25, RP (12/19/12) p. 23. For their safety, officers took control of the Appellant's arms, placed him in hand cuffs and secured the object in his pocket which was determined to be a syringe and hypodermic needle. RP (12/19/12) pp. 23, 44, 46.

Officers questioned him regarding his activities in the bathroom and the Appellant claimed to be injecting testosterone, which he claimed to have a valid prescription. RP (11/30/12) p. 27. The Appellant was unable to produce the prescription bottle or vial and claimed that he had flushed the vial down the toilet.² RP (11/30/12) pp. 31 - 32. He told officers that Dr. Jefferson was the prescribing physician and that he works at Tri-State ER in Clarkston, Washington. RP (11/30/12) p. 27. Officer Renzelman

²In his brief, the Appellant appears to claims to have produced the prescription for the police. Brief of Appellant, p. 22. However, in his testimony at the suppression hearing, the the Appellant acknowledged that he did not have the prescription box or any documentation when contacted by officers and claimed he had flushed the vial down the toilet prior to officer contact. RP (11/30/12) p. 15.

was aware that Dr. Jefferson did not work at Tri-State and became suspicious. RP (11/30/12) p. 27. Officers contacted Dr. Jefferson's office at Valley Medical Center in Lewiston, Idaho. RP (11/30/12) p. 27. From the scene, Officer Wohl called Valley Medical Center and spoke to staff there and was advised that the Appellant was a patient of Dr. Jefferson's and that the Appellant had been taken off of all prescription medications in June, a month prior to this incident. RP (11/30/12) p. 27 - 28. The Appellant was arrested at that time for Making a False or Misleading Statement to a Public Servant and searched incident to arrest. RP (12/19/12) pp. 24 - 25, 46 - 47. Officers located a baggie with a white powder which was later found to contain methamphetamine. RP (12/19/12) p. 25.

The Appellant was subsequently charged by way of Information with Possession of a Controlled Substance (Methamphetamine) and Making a False or Misleading Statement to a Public Servant. Information, Clerk's Papers (hereinafter CP), 5 - 6. The Appellant filed a motion to suppress pursuant to CrR 3.6, which was heard on November 30, 2012 and testimony was taken from the Appellant and Officer Wohl. RP (11/30/12), *generally*. At the conclusion of the hearing, the trial Court denied the Appellant's motion. RP (11/30/12) p. 40. The Court subsequently entered Findings of Fact, Conclusions of Law and

Order denying the Appellant's motion. CP 45-48.

The matter was tried to jury on December 19, 2012 and the jury found the Appellant guilty of both charges. CPs 72, 146 - 153. The Appellant has now filed a timely appeal, challenging primarily the Trial Court's decision to deny his suppression motion and challenging the constitutionality of RCW 9A.76.175. CP 154 -163, Brief of Appellant.

III. DISCUSSION

Here, the Appellant claims that the Trial Court's finding of probable cause to arrest was erroneous and further, that the statute under which the Appellant was arrested is unconstitutional as over broad. Because the Appellant fails to carry the burden of establishing the unconstitutionality of RCW 9A.76.175, and further, that the officers possessed substantial and sufficient information to support probable cause to arrest, this Court should deny this appeal and affirm his conviction.

A. BECAUSE OFFICERS HAD PROBABLE CAUSE TO BELIEVE TO ARREST, THE TRIAL COURT'S DENIAL OF THE APPELLANT'S SUPPRESSION MOTION WAS PROPER.

The Appellant claims that the search of his person was unlawful. "A warrantless search is presumed unreasonable except in a few established and well-delineated exceptions. See Katz v.

United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A search incident to a lawful arrest is such an exception. See United States v. Robinson, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).” See State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). “The Fourth Amendment limits the permissible scope of a warrantless search incident to arrest to the area within the arrestee's immediate control, i.e., places from which the individual might obtain a weapon or destroy incriminating evidence.” See State v. Mitzlaff, 80 Wn.App. 184, 186, 907 P.2d 328 (1995) (*citing Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)), *review denied*, 129 Wn.2d 1015, 917 P.2d 575 (1996). Here, the Appellant challenges only that the officers lacked probable cause to arrest him.³

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. See State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Probable cause is not a technical inquiry. See id.

³The Appellant does not assert that the officers exceed the scope of the Search Incident to Arrest rule since the methamphetamine was found in his pocket, nor does the Appellant challenge the initial contact by law enforcement which was clearly within the proper scope of law enforcement's community caretaking function. See State v. Villarreal, 97 Wn.App. 636, 643-44, 984 P.2d 1064 (1999).

Officers need not have evidence sufficient to prove the crime beyond a reasonable doubt prior to arrest. See State v. Scott, 93 Wn.2d 7, 604 P.2d 943, *cert. denied*, 446 U.S. 920, 100 S.Ct. 1857, 64 L.Ed.2d 275 (1980). As stated in State v. Conner, 58 Wn.App. 90, 791 P.2d 261 (Div. I, 1990):

[I]n order for an officer to make an arrest, he or she need not have facts sufficient to establish guilt beyond a reasonable doubt, but only reasonable grounds for suspicion, along with evidence of circumstances sufficiently strong in themselves to allow a cautious and disinterested person to believe the suspect is guilty.

Conner, at 98. Here, the Appellant makes no challenge to the Trial Court's findings of fact concerning the officers' observations or any of the articulable facts supporting the decision arrest the Appellant. Unchallenged findings of fact entered after suppression hearing are verities on appeal. See State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

RCW 9A.76.175 states:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

Here, upon contacting the Appellant, the officers asked him where the needle was and the Appellant stated he didn't have it. Officers then saw the packaging of the needle protruding from his pants

pocket. The location of an item which could be used as a weapon or might otherwise endanger the officer's safety is clearly material to the discharge of the officer's duties. See State v. Ellison, 172 Wn.App. 710, 291 P.3d 921 (Div. II, 2013)(*Recognizing that officer safety is of sufficient concern to justify a limited warrantless search for items which would endanger the officer*). The Appellant then claimed that he had been injecting testosterone and further claimed to have a prescription for testosterone. In speaking with the officers, the Appellant gave incorrect information regarding the doctor's place of employment. Further, the Appellant's explanation that he flushed the vial down the toilet added to the officer's suspicion. Having already lied to police about the hypodermic, officers investigated further, contacting the doctor's office from which the Appellant claimed to have received the prescription. The officers were advised that he Appellant did not have a valid prescription for testosterone or any other prescription drug. This information, from a reliable source, directly contradicted the Appellant's suspect claims, and clearly provided the officer with probable cause to believe that the Appellant had now given additional false information. The arrest and search of the Appellant incident thereto was clearly lawful under these circumstances.

The Appellant's claim that the officers didn't rely on his

statement is likewise not of consequence. The State does not have to prove that the officer actually relied on the statements. See State v. Godsey, 131 Wn.App. 278, 291, 127 P.3d 11 (2006).

The Appellant attempts to muddy the waters further by claiming that he provided the offices with the prescription box. See Footnote 1, *supra*. However, neither the prescription box nor the vial from which he claimed to be injecting was provided to officers at the time of contact and arrest.⁴ The court must consider the totality of the facts and circumstances within the officers knowledge **at the time of the arrest.** See State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996)(*emphasis added*). Here, the Appellant did not provide any documentation of any prescription at the time the officers contacted him and instead claimed he had flushed the vial. At that time, there was clearly probable cause to arrest the Appellant for Making a False or Misleading Statement to a Public Servant when he lied about the location of the hypodermic needle and further, when he made misleading statements about having a prescription for testosterone. The Trial Court specifically found

⁴ In order to avoid a semantical argument between whether the Appellant told officers he “had” a prescription or that he “once had” a valid prescription, since the evidence produced at the suppression hearing showed that he had previously been prescribed testosterone, the State elected at trial to pursue the charge of Making a False Statement to a Public Servant based upon the Appellant’s denial that he had the syringe and hypodermic needle on his person. RP (12/19/12) pp. 68 - 69.

that either statement would support the officers' decision to arrest under RCW 9A.76.175, and therefore, the Appellant was properly searched incident thereto.

To avoid this obvious conclusion, the Appellant assails the constitutional validity of RCW 9A.76.175. As discussed below, the Appellant's conclusions are erroneous, but, assuming *arguendo*, that this Court could find that the statute is unconstitutional, either facially or as applied, the arrest and subsequent search is still valid. While rejecting application of the Federal "Good Faith" exception to the exclusionary rule to a Article I, Section 7 challenge under the Washington State constitution, the Washington Supreme Court has recognized that an arrest resulting from an officer's good faith reliance on a statute that is subsequently declared unconstitutional does not invalidate the arrest. See State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010) In Afana, the Washington Supreme Court specifically stated:

Thus, even if the statute that contributed to the determination of probable cause by proscribing the defendant's conduct is later declared unconstitutional, a reasonable person at the time of the arrest, with knowledge of the fact of the defendant's conduct and the circumstance of the statute, would have reasonably believed that there was probable cause to make an arrest.

See id. at 183. In State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), which was cited by the Afana Court approvingly, the

Washington Supreme Court noted that this narrow “Good Faith” exception is appropriate to foreclose speculation by enforcement officers concerning the constitutionality of a criminal law. Potter, at 842. (Citing and adopting the rule announced in Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979)).⁵ Here, the officers were entitled to rely upon a criminal law that was, and still is, valid. As such, the Trial Court’s determination that the officers had probable cause to arrest for violation of RCW 9A.76.175 was proper and the Court’s denial of the Appellant’s motion to suppress should be affirmed.

B. RCW 9A.76.175 IS NOT AN UNCONSTITUTIONAL LIMITATION ON FREE SPEECH UNDER THE FIRST AMENDMENT OF THE UNITED STATE’S CONSTITUTION.

In an effort to avoid the obvious result outlined above, the Appellant claims that RCW 9A.76.175 is unconstitutional in violation of the First Amendment of the United States Constitution.⁶ The Appellant’s argument relies entirely on a misreading of the

⁵It is anticipated that the Appellant will claim that Washington has not followed the DeFillippo rule and will cite to State v. White, 97 Wn.2d 92, 640 P.2d 1061(1982), for that proposition. See Appellant’s Opposition to Motion on the Merits. However, White was overruled on that point by Brockop and Potter, *supra*. See Alfana, at 183, fn. 8.

⁶ The Appellant makes no claim as to the constitutionality under Article I, Section 5 of the Washington State Constitution and as such will not be addressed herein.

Unites States Supreme Court ruling in U.S. v. Alvarez, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012). Because of this, and the obviously absurd result of the his claim, the Court should likewise decline to adopt the rule espoused by the Appellant and affirm the conviction in this matter.

As a starting point, a statute is presumed to be constitutional and the party challenging the statute has the burden of establishing it is unconstitutional beyond a reasonable doubt. See State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000).

A law criminalizing speech is unconstitutionally overbroad under the First Amendment “ ‘if it sweeps within its prohibitions constitutionally protected free speech activities.’ ” City of Bellevue v. Lorang, 140 Wn.2d 19, 26, 992 P.2d 496 (2000) (quoting City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989)). The overbreadth doctrine will invalidate a statute only if the “ ‘enactment reaches a substantial amount of constitutionally protected conduct,’ ” City of Houston v. Hill, 482 U.S. 451, 458, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)), “judged in relation to the statute’s plainly legitimate sweep,” Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). See State v. Pauling, 149 Wn.2d 381, 386, 69 P.3d 331 (2003); Lorang, 140 Wn.2d at 26–27, 992 P.2d 496. Further, “[a] statute will be invalidated only if the court is unable to limit sufficiently its standardless sweep by a limiting construction.” Pauling, 149 Wn.2d at 386, 69 P.3d 331.

See State v. Johnston, 156 Wn.2d 355, 363, 127 P.3d 707 (2006).

RCW 9A.76.175 prohibits knowingly making a false or

misleading material statement to a public servant. The Appellant claims that this statute infringes upon his First Amendment rights under the United State's Constitution. To support this claim, the Appellant cites to U.S. v. Alvarez, *supra*, wherein the Unites States Supreme Court struck down the "Stolen Valor" Act, 18 U.S.C. §704(b). The Appellant's claim is without merit as Alvarez is clearly distinguishable from the case at bar. A discussion of the Alvarez case and the plurality of opinions is necessary as a preface to discussion of the statute in question.

As then enacted,⁷ 18 U.S.C. §704(b) provided:

FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.-Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States ... shall be fined under this title, imprisoned not more than six months, or both.

The Stolen Valor Act required only that the speaker make a false representation of bestowment of military honor and required no other showing. In striking down that provision of the Stolen Valor

⁷After the Court's decision in Alvarez, 18 USCA §704(b) was subsequently amended to read as follows:

FRAUDULENT REPRESENTATIONS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.-Whoever, *with intent to obtain money, property, or other tangible benefit*, fraudulently holds oneself out to be a recipient of a decoration or medal described in subsection (c)(2) or (d) shall be fined under this title, imprisoned not more than one year, or both.

(Emphasis added)

Act, the Supreme Court rejected the Government's argument that false speech is an unprotected category of speech. See Alvarez at 2545 -2546. The Government argued that certain types of false speech are clearly unprotected, specifically as pertinent, false statements to a federal official. See id. The Court specifically accepted the Government's premise that these categories of speech are unprotected. See id. In so recognizing, the Court stated:

Content-based restrictions on speech have been permitted only for a few historic categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.

Alvarez at 2539. The Court further considered one particular historic category:

The Government then gives three examples of regulations on false speech that courts generally have found permissible: first, the criminal prohibition of a false statement made to a Government official, 18 U.S.C. § 1001; second, laws punishing perjury; and third, prohibitions on the false representation that one is speaking as a Government official or on behalf of the Government, see, e.g., § 912; § 709.

The Court went on to specifically discuss the Federal statute prohibiting the making of a false statement to a government official, which is virtually indistinguishable in purpose and structure from the Washington Statute in question here:

The federal statute prohibiting false statements to Government officials punishes “whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government ... makes any materially false, fictitious, or fraudulent statement or representation.” § 1001. Section 1001's prohibition on false statements made to Government officials, in communications concerning official matters, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context.

Therein the Court distinguished the Stolen Valor Act's prohibition against merely false representation against the prohibitions found in 18 U.S.C. § 1001. The Court clearly recognized that certain prohibitions on false speech were entirely acceptable, appropriate, and not subject to the higher level of scrutiny. As stated by Justice Alito in his dissenting opinion:

[I]t has long been assumed that the First Amendment is not offended by prominent criminal statutes with no close common-law analog. The most well known of these is probably 18 U.S.C. § 1001, which makes it a crime to “knowingly and willfully” make any “materially false, fictitious, or fraudulent statement or representation” in “any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” Unlike perjury, § 1001 is not limited to statements made under oath or before an official government tribunal. Nor does it require any showing of “pecuniary or property loss to the government. Instead, the statute is based on the need to protect agencies from the perversion which might result from the deceptive practices described.

Alvarez at 2561 -2562 (U.S.,2012)(*Alito dissenting*)(*internal citations omitted*). Even the concurring Justices agreed that the

Stolen Valor Act could survive if certain conditions were placed upon its application.

And a more finely tailored statute might, as other kinds of statutes prohibiting false factual statements have done, insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.

Alvarez at 2556, (*Breyer concurring*). RCW 9A.76.175 is precisely the statute that Justice Breyer speaks. RCW 9A.76.175 requires that the statement made to a public servant not only be false, but be made knowingly and that the statement be material. That statute further defines materiality to mean “a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.” In addition to a **knowingly** false statement, the statute in question requires that the statement the public servant would be reasonably likely to rely upon in discharging his or her duties as a public servant. These limitations eliminate the possibility that the Statute would infringe upon Constitutionally protected free speech. It cannot be argued that a person has a constitutional right to lie to the government in an official proceeding. See United States v. Dunnigan, 507 U.S. 87, 97, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) (“*To uphold the integrity of our trial system ... the constitutionality of perjury statutes*”).

is unquestioned”).

This position is supported by Federal authorities. See U.S. v. Citrowske, 951 F.2d 899, (C.A.8, 1991)(*Finding that prosecution of the defendant for violation of 18 U.S.C. § 1001 was proper despite claim that his actions were protected protest speech under the first amendment*). Even after the Alvarez decision, the Federal Courts have made clear that laws such as RCW 9A.76.175 are not infirm. See U.S. v. Hamilton, 699 F.3d 356, 363 (C.A.4 (N.C.),2012). In Hamilton, the Court noted:

We observe that the Supreme Court discussed 18 U.S.C. § 1001 in its opinion in United States v. Alvarez as an example of a statute regulating false speech that “courts generally have found permissible.” Alvarez, — U.S. —, 132 S.Ct. 2537, 2545–46 (2012) (plurality opinion). Although a plurality of the Court rejected the government’s argument that statutes like § 1001 establish that false speech is categorically unprotected by the First Amendment, the plurality made clear that its rejection of the government’s argument “does not imply” that § 1001 is “vulnerable.” Alvarez, 132 S.Ct. at 2546 (plurality opinion); See also id. at 2561–62 (Alito, J., *dissenting*) (*discussing § 1001*).

Id. at 363, fn. 3. As such, Alvarez does not mark change in First Amendment jurisprudence nor alter in any significant manner this well settled area of law.

The Appellant’s concern that the statute “threatens to chill constitutionally protected speech” is misplaced. See Appellant’s Brief, p. 13.

Similarly, false and misleading statements made to police in the criminal investigative context are not protected under federal and state constitutional free speech provisions. This is because there is even greater public interest in deterring false statements in the criminal investigative context than there is in the commercial context. As the Court of Appeals aptly noted, "[W]hile Mr. Budik may not have had any obligation to speak, ... if he chose to speak, he was not privileged to mislead police."

State v. Budik, 173 Wn.2d 727, 746, 272 P.3d 816 (2012)

(Johnson *dissenting*). Where the First Amendment protections are not extended to such false speech, no "chilling" of constitutionally protected speech may occur. RCW 9A.76.175, by its very terms, limits application only to unprotected areas of speech and therefore, does not infringe on anyone's First Amendment rights. As such, the Appellant's arguments fail and he cannot sustain his heavy burden of demonstrating unconstitutionality beyond a reasonable doubt as required. See Wadsworth, *supra* at 734.

C. RCW 9A.76.175 IS NOT FACIALLY VAGUE, OR VAGUE AS APPLIED TO THE APPELLANT.

The Appellant finally argues that RCW 9A.76.175 is unconstitutional as vague, both facially and as applied. "A statute is presumed constitutional and the party challenging the constitutionality of a legislative enactment has the burden of proving it is unconstitutionally vague." See State v. Maciolek, 101

Wn.2d 259, 263, 676 P.2d 996 (1984). "A statute or ordinance should not be declared unconstitutional unless it appears unconstitutional beyond a reasonable doubt." See id. "The test for evaluating the vagueness of legislative enactments contains two components: adequate notice to citizens and adequate standards to prevent arbitrary enforcement." See id. "'Common intelligence' is the test of what is fair warning. Thus, if men of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement, it is not wanting in certainty." See id. at 265.

The limits on the applicability of RCW 9A.76.175 are apparent. A person may not bear false witness to a public official where the information is material to the discharge of his or her duties. Mere false speech to an officer, in and of itself, is insufficient to trigger criminal culpability under the statute. The statute is plain to a person of common understanding that they are forbidden from giving false information to an officer during an investigation.

The Appellant's hypotheticals are no more helpful. In the situation of the officer investigating a wayward sex offender, the officer's determination that the girlfriend is being dishonest is not dispositive, and a jury or judge would still have to determine whether the girlfriend's statements are objectively false and

material, or more specifically, that her statement that the sex offender does not “live here” was objectively false.⁸ So too here where a jury determined that the Appellant’s statement that he didn’t have the syringe on his person was false and material to the discharge of the officers’ duties.

In the spirit of hypotheticals, imagine that the police officer is dressed in uniform and leaving his home to go to work. He asks his teenage son if he is finished with his schoolwork. Imagine further, that the son lies to his father, the officer, and tells him that the homework is finished when in fact, he hasn’t even started. The Appellant’s argument presupposes that the officer’s son could be arrested, charged and convicted of a violation of RCW 9A.76.175. However, because the statute also requires that the false statement be material to the discharge of the officer’s duties as an officer, his son’s statement is merely a lie to a parent, subjecting him to possible parental discipline, but placing in absolutely no criminal jeopardy.

The Appellant argues that the statute provides the officer unfettered discretion to determine whether a statement is false or material. See Appellant’s Brief at p. 21. The mere fact that a police

⁸ No argument could possibly be made that the girlfriend’s statement as to the residential address of a registered sex offender was not material in light of the nature of the hypothetical investigation.

officer is vested with the authority to determine from the facts known to him or her at the time whether there is probable cause to believe that a suspect has committed a violation of RCW 9A.76.175 is of no consequence. As stated in Maciolek:

The mere fact that a person's conduct must be subjectively evaluated by a police officer to determine if that person has violated a statute does not make that statute unconstitutionally vague. If this were so, most criminal statutes would be void for vagueness. What is forbidden by the due process clause are criminal statutes that contain no standards and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.

101 Wn.2d at 267. Here, the truth or falsity of a statement must be objectively determined by the jury as must the materiality of the statement. If the statement does not relate to proper and official discharge of an officer's duties it would not support charging or arrest. Similarly, if the statement is not objectively false or misleading, a charge may not be lodged or sustained.

As applied to the Appellant's particular facts, his conduct goes to the core of the harm sought to be avoided by the statute; causing harm to government operation by providing misinformation. The Appellant was contacted by police due to the excessive period of time he was in the restroom of the drug store after purchasing a needle and syringe. His failure to respond to inquiries from staff, and later those of officers caused concern for his safety. When he

finally came out of the bathroom, officers were understandably concerned that the Appellant might still have the hypodermic needle on him and may pose a threat to their safety. His demeanor and statements exacerbated this concern. When asked where the needle was, he lied to police. He was certainly aware that they were police officers, and that they were concerned with his activities in the bathroom, especially relating to the needle. He can hardly be heard to complain that he couldn't know that his conduct of lying to police about the needle's location would fall within the prohibitions of RCW 9A.76.175. His conduct goes to the core of the false statement statute. A statute is not unconstitutionally vague if the defendant's conduct falls squarely within its prohibitions. See State v. Smith, 111 Wn.2d 1, 10, 759 P.2d 372 (1988).

D. THE APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS IS CLEARLY MERITLESS.

In his Statement of Additional Grounds (hereinafter SAG), the Appellant makes six claims of error, none of which have merit. Initially, the Appellant claims that his Sixth Amendment right to speedy trial was violated. The Appellant provides no discussion to support his claim. See In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)(*"naked castings into the constitutional sea are not*

sufficient to command judicial consideration and discussion.") (quoting with approval from United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir.1970), *cert. denied*, 401 U.S. 917, 91 S.Ct. 900, 27 L.Ed. 2d 819 (1971)). There is nothing in the record to suggest that the Appellant's trial was delayed to such extent as to create a colorable issue under the Sixth Amendment. Even under CrR 3.3, the Appellant's right to speedy trial was honored. The Appellant has apparently forgotten that, on October 29, 2012, he executed and the Court accepted a waiver of speedy trial in which the Appellant consented to be tried not later than January 17, 2013. CP p. 9. Since the Appellant's trial occurred December 19, 2013, the trial was timely under CrR 3.3.⁹ See RP (12/19/12) *generally*.

The Appellant's next additional ground is merely a less artfully stated rehash of the grounds set forth in Appellant Counsel's brief and requires no additional discussion beyond the discussion above concerning the lawfulness of his arrest.

The third ground asserted by the Appellant concerns an alleged Miranda¹⁰ violation. Since this issue was never raised

⁹CrR 3.3(b) provides that a defendant detained in jail shall be brought to trial within 60 days of the commencement date. CrR 3.3(c)(2) provides that a waiver of speedy trial is a resetting event.

¹⁰ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

below at the trial level, this Court should not entertain the claim at this time. See RAP 2.5. See also State v. Guzman Nunez, 160 Wn. App. 150, 157, 248 P.3d 103 (2011) (citing State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012). Additionally, the Trial Court's suppression findings make clear that the Appellant was not under arrest at the time he made the false statements to police. CP 45-48. Miranda warnings are not necessary in the on-scene Terry¹¹ detention setting. See State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). This claim is without merit.

The final three claims in his SAG relate to factual disputes. In the first of these, the Appellant takes umbrage with the officers' testimony regarding physiological effect of a stimulant on the pupils. The Appellant offered no testimony regarding this point at trial. RP (12/19/12), *generally*. Next, he claims the officers were not credible when they stated that they were concerned about the Appellant's health and safety, as evidenced by the fact that they failed to summonsed medical aid. Finally, the Appellant claims that he didn't deny having the needle and, in response to officers' questioning about it's location, merely stated, "What needle?". While this statement is still arguably misleading, no trial testimony

¹¹ Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

was offered that the Appellant asked the officers "What needle?". The Appellant didn't take the stand at trial, and didn't discuss his denial of the needle at the suppression hearing. RP (12/19/12), *generally*, RP (11/30/12) pp. 10 -21. Each of these arguments is merely an attack on the credibility of the testimony taken at the suppression hearing and later at trial. Credibility determinations are for the trier of fact and not subject to appellate review. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P 2d 850 (1990). See also Tideland Oil & Gas Corp. v. Hoga, 60 Wn.2d 896, 897, 371 P.2d 1009, 1009 (1962)("[F]actual disputes will not be retried upon appeal."). Here, the trial court heard the testimony at the suppression hearing and the jury heard the testimony at trial. Each weighed the credibility of the witnesses. Their respective decisions regarding the credibility of the witnesses are final. As such, none of the final three claims provides a legal basis for relief.

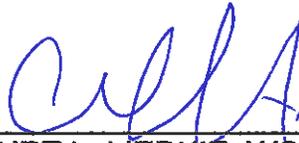
IV. CONCLUSION

In summary, the appeal in this matter, based upon the record, is without merit. The Trial Court's decision to deny the Appellant's motion to suppress was proper. RCW 9A.76.175 is constitutionally sound and the Appellant has failed to demonstrate otherwise. Finally, the grounds set forth in the Appellant's

Statement of Additional Grounds are baseless in law or fact. In the best interests of justice this appeal should be denied and the decision of the trial court and resulting guilty verdicts affirmed.

Dated this 21st day of October, 2013.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

PAUL C. HARTZELL,

Appellant.

Court of Appeals No: 31407-3-III

DECLARATION OF MAILING

DECLARATION

On October 21, 2013 I deposited in the mail of the United States a properly stamped, and addressed envelope directed to all counsel and parties as listed below a copy of the BRIEF OF RESPONDENT in this matter to:

Paul C. Hartzell
#701304
1313 N. 13th Ave.
Walla Walla, WA 99362

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on October 21, 2013.



LISA M. WEBBER
Office Manager

**DECLARATION
OF MAILING**

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DECLARATION OF SERVICE

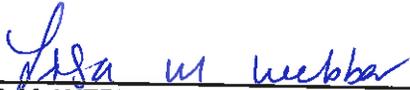
DECLARATION

On October 21, 2013 I electronically mailed, with prior approval from Ms. Andrea Burkhart, a copy of the MOTION ON THE MERITS in this matter to:

ANDREA BURKHART
andrea@burkhartandburkhart.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on October 21, 2013.



LISA M. WEBBER
Office Manager

**DECLARATION
OF SERVICE**