

FILED
Court of Appeals
Division III
State of Washington
2/19/2019 3:48 PM

NO. 35848-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

LANNY GRIFFITH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CHELAN COUNTY

The Honorable T.W. Small, Judge
The Honorable Robert McSeveney, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURTHOUSE SEARCH OF GRIFFITH'S JACKET POCKET WAS UNCONSTITUTIONAL UNDER BOTH OUR STATE AND FEDERAL CONSTITUTION.

There are a couple points of law on which Griffith and the State agree. First, Griffith agrees that, under the Fourth Amendment, a limited, minimally intrusive courthouse search for weapons and explosives is permissible. Am. Br. of Appellant, 26. Second, the State agrees implied consent cannot justify an area-entry search. Br. of Resp't, 9 n.2 ("The State does not argue in support of implied consent."); see also Br. of Resp't, 15 n.3 (noting the theory of implied consent is no longer good law). Griffith therefore rests of his opening brief with regard to implied consent. Am. Br. of Appellant, 30-36.

There are few other points on which the parties agree. Griffith will address these in turn, beginning with article I, section 7 of our state constitution.¹ State v. Hinton, 179 Wn.2d 862, 868, 319 P.3d 9 (2014) ("When presented with arguments under both the state and federal constitutions, we start with the state constitution.").

¹ The Washington Supreme Court recently reiterated that a State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), analysis "is not required to justify an independent analysis of article I, section 7 in new contexts." State v. Mayfield, __ Wn.2d __, __ P.3d __, 2019 WL 470973, at *5 (Feb. 7, 2019).

- a. Unlike the Fourth Amendment, reasonableness is not the touchstone of article I, section 7.

In his opening brief, Griffith discussed cases where Washington courts have denounced broad, suspicionless searches under article I, section 7. Am. Br. of Appellant, 40-42. The State criticizes Griffith's reliance on these cases, pointing out "Mr. Griffith cannot cite to a single area-entry search case where our courts have diverged under Art. I, § 7 from Fourth Amendment precedent." Br. of Resp't, 44. However, as the State itself acknowledges, no "Washington appellate court" has "weighed in on this issue." Br. of Resp't, 2. It would be challenging, indeed, to develop any article I, section 7 jurisprudence if Washington courts were limited solely to prior cases that considered the very same issue (of which there are none).

The Washington Supreme Court reached a fractured decision in York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 178 P.3d 995 (2008), regarding the federal special needs exception, of which the courthouse search is a subset. The four-justice plurality noted "we have not created a general special needs exception or adopted a strict scrutiny type analysis that would allow the State to depart from the warrant requirement whenever it could articulate a special need beyond the normal need for law enforcement." Id. at 314 (plurality opinion). A four-justice concurrence believed "a narrowly drawn special needs exception" is "consistent with Washington law." Id. at

316 (Madsen, J., concurring) (emphasis added). The final concurring justice wrote, “where the state demonstrates a ‘special need,’ the ‘authority of law’ requirement [of article I, section 7] may be satisfied in select cases.” Id. at 335 (J.M. Johnson, J., concurring) (emphasis added). Thus, the five justices who believed in some type of special needs exception noted it must be limited and narrowly applied under our state constitution.

Furthermore, simply because Washington courts have applied Fourth Amendment jurisprudence does not mean they have wholesale adopted it under article I, section 7. Br. of Resp’t, 39-40 (arguing that, because the five concurring justices in York cited federal administrative search cases, “it appears that Washington does not provide much—if any—great protection to citizens during administrative searches”). For instance, in State v. Armenta, 134 Wn.2d 1, 16-17, 948 P.2d 1280 (1997), the Washington Supreme Court applied the federal attenuation doctrine—a creature of the Fourth Amendment—to hold the search of Armenta’s vehicle was unconstitutional.

But, very recently in Mayfield, the court considered whether the federal attenuation doctrine was compatible with article I, section 7, where the issue was properly raised and briefed by the parties. 2019 WL 470973, at *1. The court ultimately rejected federal attenuation, instead adopting an “extremely narrow” state attenuation exception, “entirely independent of the

modern attenuation doctrine used by federal courts.” Id. at *14, *15. In reaching this conclusion, the court emphasized “[a]rticle I, section 7 and its corresponding exclusionary rule provide uniquely heightened privacy protections.” Id. at *5.

The State also points out no article I, section 7 or Fourth Amendment challenge was made to a courthouse search in State v. Wadsworth, 139 Wn.2d 724, 991 P.2d 80 (2000). Yet, by the State’s own acknowledgment, Wadsworth is not controlling. Br. of Resp’t, 38-39; In re Elec. Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (“We do not rely on cases that fail to specifically raise or decide an issue.”). Wadsworth also involved a courthouse search for weapons, not drugs. 139 Wn.2d at 728-29.

Instead, the value in Griffith’s cited cases is by analogy. Am. Br. of Appellant, 40-42. Though the State criticizes Griffith’s reliance on City of Seattle v. Mesiani, 110 Wn.2d 454, 755 P.2d 775 (1988), that case is actually particularly apropos here. Br. of Resp’t, 42 (arguing “Mesiani has no bearing on the constitutionality of area-entry administrative searches”).

Mesiani considered the constitutionality of sobriety checkpoints. Sobriety checkpoints involve brief, suspicionless stops of motorists so that police officers can detect signs of intoxication and remove drunk drivers from the road. City of Indianapolis v. Edmond, 531 U.S. 32, 39, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000). Such checkpoints indisputably promote

public safety by catching drunk drivers who might otherwise go undetected, thereby reducing injurious and fatal car accidents. See Michigan Department of State Police v. Sitz, 496 U.S. 444, 451, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (tolling the dangers of drunk driving). The Sitz Court upheld sobriety checkpoints as reasonable under the Fourth Amendment.² Id. at 455. The Court believed the State’s interest in preventing drunk driving outweighed the minimal intrusion into privacy. Id.

The Mesiani court declared random sobriety checkpoints unconstitutional under article I, section 7. 110 Wn.2d at 458. The court “acknowledge[d] the state’s strong interest in assuring all drivers comply with applicable laws.” Id. at 456. Yet, “the privacy interest of individuals and objects in automobiles” outweighed the State’s interest under article I, section 7. Id. at 456-57.

Mesiani demonstrates that, under article I, section 7, there comes a point when public safety concerns must yield to individual privacy. This is precisely the issue in Griffith’s case. The State spends a significant amount of its briefing warning of the dangers of fentanyl and weaponized drugs. But the State does not cite to a single example where such drugs caused injury or harm at a courthouse or any other government building. See Br. of Resp’t,

² The State claims Sitz “has no precedential value beyond its facts.” Br. of Resp’t, 43. However, the rule of Sitz has been adopted and repeatedly applied in subsequent U.S. Supreme Court decisions. See, e.g., Illinois v. Lidster, 540 U.S. 419, 427, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004); Edmond, 531 U.S. at 39.

31-37 (citing only one instance where a police officer accidentally overdosed following a vehicle search).

Certainly drunk driving presents a more “substantial and real” threat to public safety than fentanyl.³ United States v. McCarty, 648 F.3d 820, 831 (9th Cir. 2011). Practically any object or substance can be used as or transformed into a weapon. But, under article I, section 7, the individual privacy of Washington State citizens is paramount and cannot succumb to every farfetched or hypothetical danger.

The State attempts to distinguish Mesiani by contending, without citation, that “[p]eople visiting courthouses do not share the same privacy interests” as the privacy interest in one’s automobile.⁴ Br. of Resp’t, 42. However, “readily recognizable personal effects are protected from search to the same extent as the person to whom they belong.” State v. Pippin, 200 Wn. App. 826, 840, 403 P.3d 907 (2017) (quoting State v. Parker, 139 Wn.2d 486, 498-99, 987 P.2d 73 (1999)). The State does not, and cannot,

³ In 2016 alone, there were 10,497 fatalities resulting from drunk driving in the United States. USDOT Releases 2016 Fatal Traffic Crash Data, NHTSA (Oct. 6, 2017), <https://www.nhtsa.gov/press-releases/usdot-releases-2016-fatal-traffic-crash-data>.

⁴ The State later cites the open courts doctrine, which is a check on the judicial system, not on personal privacy rights. Br. of Resp’t, 43; State v. Wise, 176 Wn.2d 1, 5-6, 288 P.3d 1113 (2012) (recognizing the public trial right serves to assure fair trials, deter perjury and other misconduct, temper biases and undue partiality, and provide for accountability and transparency).

cite authority that Griffith surrendered all of his personal privacy rights at the courthouse door.

Perhaps most significantly, the State does not address how the Fourth Amendment's administrative search focus on reasonableness is compatible with article I, section 7. The State relies heavily on United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973), yet the Davis court held, "[t]o pass constitutional muster, an administrative search must meet the Fourth Amendment standard of reasonableness." Br. of Resp't, 13-15. As Griffith discussed in his opening brief, article I, section 7 is not concerned with reasonableness, but whether an individual's private affairs are disturbed without authority of law. Am. Br. of Appellant, 38 (discussing State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008) ("By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not.")).

For the same reason, the New Hampshire, Oregon, and Pennsylvania cases cited by the State are irrelevant here. Br. of Resp't, 41. As the State acknowledges, "none of these states' constitutions are verbatim the same as Washington's." Br. of Resp't, 41. In State v. Plante, 594 A.2d 165, 167 (N.H. 1991), the New Hampshire court applied a reasonableness standard under its state constitution. The Oregon constitution, like the Fourth Amendment, prohibits only "unreasonable" searches. Smith v. Wash.

County, 43 P.3d 1171, 1177-78 (Or. Ct. App. 2002). Moreover, the issue in Smith was who possessed the proper rulemaking authority to establish courthouse search procedures. Id. at 1178-79. The Pennsylvania constitution, too, restricts only unreasonable searches. Minich v. County of Jefferson, 919 A.2d 356, 359-60 (Pa. Commw. Ct. 2007) (noting article I, section 8 of the Pennsylvania constitution “requires a greater degree of scrutiny for all searches,” but still ultimately reviewing the courthouse search for reasonableness).

These out-of-state cases are of no persuasive value in interpreting our own unique constitutional provision. The Mayfield court recognized Washington courts have repeatedly rejected calls to narrow or abandon our stringent exclusionary rule. 2019 WL 470973, at *6-*7. The court emphasized, “as our state law has developed independently over time, we have been extremely cautious about recognizing exceptions to the exclusionary rule, ensuring ‘that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy.’” Id. at *8 (quoting State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009)). This Court should be extremely cautious here, too, where the State asks for permission to broadly search all courthouse entrants for drugs.

- b. The courthouse search also fails the reasonableness standard under the Fourth Amendment.

The State responds to Griffith's Fourth Amendment argument by first contending Mattix's subjective motives are irrelevant. Br. of Resp't, 18-19. In so arguing, the State fails to discuss or address United States v. McCarty, 648 F.3d 820 (9th Cir. 2011). Am. Br. of Appellant, 20 (emphasizing McCarty). The Ninth Circuit in McCarty held an individual screener's actions must be "cabined to the scope of the permissible administrative search." 648 F.3d at 834-35. Individual security officers therefore cannot "snoop to their hearts' content without regard to the scope of their actions." Id. at 834.

Thus, both the programmatic goals of the courthouse search, as well as the individual screener's actions, must be reasonable. Mattix operated outside the programmatic goals of the Chelan County courthouse search when he went looking for drugs in Griffith's jacket pocket. Deputy Shaw testified their programmatic goal is to search for weapons, not drugs. 1RP 66-72. Yet Mattix repeatedly testified he also searches for drugs. 1RP 37-38 (looking at soft items out of "[c]uriosity"), 38 (secondary purpose of searching for contraband), 38-39 ("dual-purpose search" for both weapons and drugs). In this way, his actions as an individual screener are relevant, and fatal to the State.

In his opening brief, Griffith emphasized the trial court refused to make a critical finding as to whether he removed his cell phone before the search of his jacket. Am. Br. of Appellant, 24; CP 38 (Findings of Fact 13-14). Mattix testified the cell phone was still in Griffith's pocket, but Officer Duke testified Mattix told her Griffith removed his cell phone and placed it in the basket. 1RP 10-11, 19-20. The State contends the remedy for this missing finding "is to remand for the trial court to make that finding," citing State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998). Br. of Resp't, 22.

The State makes two critical errors in so arguing. First, the trial court did not simply overlook this key finding. Rather, the court expressly declined to resolve the disputed issue of fact, concluding it was unnecessary and "[t]he evidence really wasn't overwhelming either way." 1RP 87. This is why Griffith has discussed Mattix's credibility and the contradictions in his testimony—this Court cannot resolve the unresolved finding where the trial court refused to do so. Moreover, the trial court's refusal to make the finding suggests, contrary to the State's claim, that it did not find Mattix entirely credible. Br. of Resp't, 21 (contending the trial court implicitly found Mattix credible).

Second, Head involves the line of cases where the trial court fails to enter *any* written findings of fact or conclusions of law, as required by CrR 3.5(c) (confession), CrR 3.6(b) (suppression hearing), and CrR 6.1(d) (bench

trial). Head, 136 Wn.2d at 622. Here, however, the trial court did enter written findings and conclusions, as required by CrR 3.6(b). As such, the court's refusal to resolve the disputed issue of fact is held against the State because it bears the burden of justifying the warrantless search.⁵ State v. Webb, 147 Wn. App. 264, 270, 274, 195 P.3d 550 (2008); State v. Watson, 56 Wn. App. 665, 666, 784 P.2d 1294 (1990).

The State further contends the lack of finding is actually resolved by Finding of Fact 5, which states, "Security officers are also trained to recognize drugs, but the Court finds that the discovery of drugs is incidental to the search for weapons and not a purpose for which the security officers are trained to conduct searches." CP 38; Br. of Resp't, 20-21. This finding, however, is of general rather than specific applicability. It merely discusses the courthouse search scheme as a whole, not Mattix's search specifically. Indeed, if read to apply to Mattix's search, then it contradicts Findings of Fact 13 and 14, where the court refused to resolve the disputed issue of fact regarding the location of Griffith's cell phone.

Moreover, Griffith has challenged Finding of Fact 5 by arguing Mattix's discovery of drugs was not incidental to a search for weapons. Am. Br. of Appellant, 28-29. The court did not make the critical finding that

⁵ The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P. 2d 767 (1996). The State was the prevailing party below, yet failed to secure the necessary findings for affirmance on appeal.

Griffith's cell phone was still in his pocket. The record does not establish Mattix pulled out the baggy of methamphetamine believing it to be a weapon. Nor did Mattix testify he inadvertently pulled the baggy out of Griffith's pocket along with his cell phone. The record fails to establish any reason why Mattix removed the baggy from Griffith's pocket, regardless of whether the cell phone was still inside. Thus, Finding of Fact 5, even if applied specifically to Mattix's actions, is not supported by substantial evidence in the record.

The State also emphasizes GR 36, which serves only to bolster Griffith's argument. Br. of Resp't, 40-41. GR 36(g)(2) expressly contemplates "[w]eapons screening" at courthouse entrances, not broad searches for drugs. Nowhere does GR 36 mention controlled substances. It contemplates situations like bomb threats, weapons in the court facility, active shooters, and so on—in other words, weapons and explosives, consistent with the Ninth Circuit case law. GR 36(e).

The State further suggests the "physical examination" encouraged by GR 36(g)(2) is not limited to "Terry⁶-style pat-down of the outside of personal belongings." Br. of Resp't, 41. The State takes much issue with Griffith's reliance on Terry cases, contending "allusions to Terry and its progeny are inapposite." Br. of Resp't, 23. The State again misses the point.

⁶ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The relevance of the Terry cases is they establish the intrusiveness of various searches. For instance, reaching into an individual's pocket is more intrusive than a patdown search, which is itself highly intrusive. United States v. Casado, 303 F.3d 440, 449 (2d Cir. 2002); Jacobsen v. City of Seattle, 98 Wn.2d 668, 673, 658 P.2d 653 (1983). Searching a pocket is therefore unjustified where an officer can dispel his or her suspicions with a physical patdown. See State v. A.A., 187 Wn. App. 475, 488, 349 P.3d 909 (2015).

The State claims, again without any citation, that Mattix “is unquestionably permitted to pull all the contents out of Mr. Griffith’s jacket pockets.” Br. of Resp’t, 23. The State glosses over the rules that cabin administrative searches. Administrative searches must be “no more intrusive than necessary to protect against the danger to be avoided.” McMorris v. Alioto, 567 F.2d 897, 899 (9th Cir. 1978). The State has yet to demonstrate how reaching into pockets, without first conducting a less intrusive magnetometer scan or physical patdown, is necessary to discover weapons. See Casado, 303 F.3d at 448 (“The less intrusive alternative of a frisk was obvious, commonly employed, and would have been effective to achieve the sole legitimate purpose for conducting such a search—physical safety.”).

The State further relies on federal circuit court cases upholding “the implementation of advanced imaging technology (AIT),” particularly

Electronic Privacy Information Center v. U.S. Dep't of Homeland Security, 653 F.3d 1 (D.C. Cir. 2011) [hereinafter EPIC]. Br. of Resp't, 24. However, in upholding AIT scanning, the EPIC court emphasized “any passenger may opt-out of AIT screening in favor of a patdown, which allows him to decide which of the two options for detecting a concealed, nonmetallic weapon or explosive is least invasive.” 653 F.3d at 10. Griffith, on the other hand, was given no choice before Mattix reached into his jacket pocket, revealing its private contents.

The State also relies heavily on the New Hampshire decision in Plante, claiming it involved “an indistinguishable courthouse search.” Br. of Resp't, 25. Yet again, however, Plante actually supports Griffith's argument. There, the court emphasized the search at issue was “narrowly tailored to discovery of dangerous weapons and explosives.” Plante, 594 A.2d at 167. The bailiff conducting the search legitimately believed a hard-sided throat lozenge box in the defendant's handbag could contain a deadly weapon. Id. at 588-89. By contrast, the State has failed to demonstrate Mattix's search was narrowly tailored to the discovery of weapons, and further failed to demonstrate Mattix legitimately believed the small, soft baggy in Griffith's pocket could be a dangerous weapon.

Finally, the State quibbles with the holding of United States v. Bulacan, 156 F.3d 963 (9th Cir. 1998), claiming “the Ninth Circuit explicitly

did not rule on whether a search for drugs could ever be a valid secondary purpose.” Br. of Resp’t, 27. On this point, the State is again incorrect.

The Bulacan court cautioned “against the potential dangers of administrative searches,” warning, “the intrusion on the public is great.” 156 F.3d at 973. As such, the court held, “[i]n contrast with weapons and explosives, the presence of narcotics on federal property does not present an immediate threat to the occupants.” Id. at 973-74. Just as Griffith’s urges this Court, the Ninth Circuit concluded the government failed to show its interest in searching for drugs “outweighs the public’s interest in privacy.” Id. at 973.

The State claims the world has changed since Bulacan, touting the dangers of fentanyl and other drugs. Br. of Resp’t, 27, 31-37. Again, however, the State fails to cite a single example of fentanyl posing a real, substantiated danger to courthouse goers. See Br. of Resp’t, 31-37. This stands in stark contrast to the “outburst of acts of violence, bombings of federal buildings and hundreds of bomb threats,” which justify limited searches for weapons and explosives at courthouses. Downing v. Kunzig, 454 F.2d 1230, 1231 (6th Cir. 1972).

The lack of evidence supporting a search for drugs is bolstered by the record. The State itself emphasizes very few drugs or drug paraphernalia were discovered in Chelan County courthouse searches over the past several

years. Br. of Resp't, 6-7 (noting only 45 instances in 2016, only 72 instances in 2015, and only 38 instances in 2014); 1RP 54-58. The State does not cite a single instance of fentanyl or corrosive acid or anything of the like being discovered at the Chelan County Courthouse. The Mesiani court cautioned that fair balancing “weigh[s] the actual expected alleviation of the social ill against the cumulated interests invaded.” 110 Wn.2d at 459. The State nevertheless asks this Court to broadly allow for intrusive searches into pockets and elsewhere to ferret out a drug that, by the State’s own reckoning, has not posed any danger to courthouses, including Chelan County.

Most concerning about the State’s position is its unworkability. Searches for weapons and explosives can be limited to minimally intrusive x-ray or magnetometer scans, or perhaps a patdown where necessary. Drugs will be difficult if not impossible to detect using these methods. So, how far will the intrusion extend to discover drugs? By the State’s account, security officers can “unquestionably” search and pull out the contents of courthouse entrants’ pockets. Br. of Resp't, 23. What and where else can the government search? How much individual privacy are we willing to sacrifice in the name of public safety?

The State has failed to carry its burden of showing drugs pose a “real danger of violence” that warrants the expansive intrusion into personal

privacy, under both article I, section 7 and the Fourth Amendment. McMorris, 567 F.2d at 899. This Court should so hold.

2. REVERSAL IS REQUIRED WHERE THE RECORD FAILS TO DEMONSTRATE THE DEFENDANT'S PERSONAL EXPRESSION OF WAIVER OF THE JURY TRIAL RIGHT.

In response to Griffith's invalid jury trial waiver argument, the State contends the issue is waived under RAP 2.5(a)(3) because Griffith did not object below. Br. of Resp't, 44-45. The State's argument should be rejected for several reasons.

None of the jury trial waiver cases cited and discussed by the parties refused to address the issue under RAP 2.5(a)(3). A knowing, intelligent, and voluntary waiver of the jury trial right cannot be inferred from a silent record. State v. Stegall, 124 Wn.2d 719, 730-31, 881 P.2d 979 (1994). Both the United States and Washington Supreme Court therefore hold, where there is no evidence a defendant validly waived his jury trial right, "the conviction must be reversed." United States v. Dominguez Benitez, 542 U.S. 74, 84 n.10, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004); State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979).

As such, reviewing courts considering whether the record establishes a valid waiver of the jury trial right do not look to whether the constitutional error was manifest or prejudiced the defendant. Rather, they consider

whether there is some “personal expression of waiver from the defendant” on the record. Stegall, 124 Wn.2d at 725. If not, “the conviction must be reversed.” Dominguez Benitez, 542 U.S. at 84 n.10.

Moreover, “[t]he burden of proving the waiver of a constitutional right rests with the State, not the defendant.” Stegall, 124 Wn.2d at 730. It makes little sense to apply RAP 2.5(a)(3) in such circumstances. How can a defendant object when he does not have a knowing and intelligent understanding of the constitutional right he is waiving?

Regardless, an invalid jury trial waiver is a manifest constitutional error reviewable for the first time on appeal. There does not seem to be any dispute from the State that an invalid jury trial waiver is constitutional error. Rather, the State contends the error is not manifest, asserting “[p]rejudice is a high burden.” Br. of Resp’t, 45. But “prejudice” in the context of manifest constitutional error is a term of art, distinct from whether an error “prejudiced” the outcome of the defendant’s trial.

Manifestness under RAP 2.5(a)(3) “requires a showing of actual prejudice.” State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015) (quoting State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). To demonstrate actual prejudice, the appellant must make a plausible showing that the error had practical and identifiable consequences at trial. Id. To determine whether an error is practical and identifiable, “the appellate court

must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” Id. (quoting O’Hara, 167 Wn.2d at 584).

In Kalebaugh, it was manifest constitutional error for the trial court to give a preliminary jury instruction that reasonable doubt is a doubt for which a reason can be given. Id. The law does not require that a reason be given for a juror’s doubt. Id. at 585. The instruction was therefore a misstatement of the law (constitutional error) that the trial court should have known and corrected (manifest error). Id. at 584.

Like Kalebaugh, the invalid jury trial waiver resulted in actual prejudice, i.e., it had practical and identifiable consequences at Griffith’s trial. Had the trial court realized no valid waiver was obtained, it would have either obtained such a waiver, or the parties would have proceeded to a jury trial. Given clear case law on the subject, the court should have known that a personal expression of waiver from Griffith was required. The error was manifest and therefore reviewable for the first time on appeal.

The State also emphasizes “[t]he amended notice of appeal ‘seek[s] review . . . [of the] stipulated facts,’ but does not specifically state that Mr. Griffith seeks review of his waiver/non-waiver of jury trial.” Br. of Resp’t, 46 (citing CP 46). The State therefore contends “the amended notice of

appeal only seeks review of the physical document entitled ‘Stipulated Facts’ found at CP 47-48.” Br. of Resp’t, 46.

The State ignores the rest of Griffith’s notice of appeal, which includes review of the felony judgment and sentence. CP 62. The notice therefore encompasses all issues that occurred at trial, including the jury trial waiver error. See RAP 2.4(a) (“The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal.”). Moreover, the notice of appeal is signed only by defense counsel, who cannot waive his client’s jury trial right. State v. Hos, 154 Wn. App. 238, 250, 225 P.3d 389 (2010).

Finally, the State contends that, at most, a reference hearing rather than reversal is an adequate remedy, citing Wicke. Br. of Resp’t, 46-47. As the State notes, the Wicke court held that because it was an “uncomplicated DWI case,” the “practical disposition” was to remand for a new trial, “rather than remanding for a reference hearing to determine if a sufficient standard of proof might be forthcoming to establish a valid jury waiver.” 91 Wn.2d at 645. Following this brief discussion in Wicke, the Washington Supreme Court does not appear to have clarified the circumstances in which a reference hearing rather than reversal is appropriate.

Griffith’s case, too, is an uncomplicated drug possession case with stipulated facts. Pursuant to Wicke, the “practical disposition” is to reverse

Griffith's conviction and remand for a new trial. See also Stegall, 124 Wn.2d at 731 (reversing two possession of cocaine convictions where record did not demonstrate valid waiver of right to a 12-person jury); Hos, 154 Wn. App. at 252 (reversing possession of methamphetamine conviction and remanding for a new trial where the record failed to establish valid jury trial waiver). The reference hearing the State suggests is also problematic because it could probe into confidential attorney-client communications. See Br. of Resp't, 27 (recalling a "hushed attorney-client discussion" and noting, at a reference hearing, "the trial court could take evidence on the conversations [defense counsel] had with Mr. Griffith").

This Court should reach the merits of Griffith's challenge, reverse his conviction, and remand for a new trial, where the record fails to reveal any personal expression from Griffith waiving his jury trial right.

3. HOUSE BILL 1783 AND RAMIREZ PROHIBIT THE IMPOSITION OF DISCRETIONARY COSTS ON INDIGENT DEFENDANTS.

In response to Griffith's legal financial obligation (LFO) argument, the State asks this Court to exercise its purported discretion under State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015), to decline review of the issue. Blazina previously granted appellate courts discretion to accept or decline review of challenges to discretionary LFOs made for the first time on appeal. Id. at 835 ("Each appellate court must make its own decision to

accept discretionary review.”). In the wake of Blazina, this Court often declined to review such challenges.

Now, after House Bill (HB) 1783 and State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), the discretionary rule of Blazina no longer applies to indigent defendants whose direct appeals are still pending. The Ramirez court held, “House Bill 1783, which prohibits the imposition of discretionary LFOs on an indigent defendant, applies on appeal to invalidate Ramirez’s discretionary LFOs (and the \$200 criminal filing fee).” 191 Wn.2d at 750. Where a defendant is indigent at the time of sentencing and his direct appeal is still pending, discretionary costs are invalid and must be stricken. Id. at 749-50.

The State does not appear to dispute that Griffith was indigent at the time of sentencing. Br. of Resp’t, 48-50. As Griffith’s direct appeal is still pending, his discretionary LFOs are invalid.⁷ Ramirez mandates that this Court remand for those costs to be stricken from the judgment and sentence.⁸ See, e.g., State v. Lundstrom, __ Wn. App. 2d __, 429 P.3d 1116, 1121

⁷ The State does not specifically respond to Griffith’s challenge to the \$800 in discretionary LFOs imposed—only the \$200 criminal filing fee and \$100 DNA fee. Br. of Resp’t, 48-50.

⁸ On January 29, 2019, undersigned counsel reviewed every decision (nearly 20) by Division Three of this Court addressing discretionary LFOs post-Ramirez, most of which are unpublished. In no case did this Court exercise any purported discretion under Blazina to decline review of the issue. Rather, this Court remanded in every case for the discretionary LFOs to be stricken.

(2018) (holding, based on Ramirez, that “trial courts are prohibited from imposing the \$200 criminal filing fee on defendants who are indigent at the time of sentencing”).

The State also argues Griffith has not met his burden of proof on the \$100 DNA fee because “the record does not contain any evidence that [Griffith’s] DNA was ever taken and typed.” Br. of Resp’t, 49-50. The State relies on Division One’s decision in State v. Thibodeaux, __ Wn. App. 2d __, 430 P.3d 700 (2018) , for this proposition. Br. of Resp’t, 49-50. There, the court held the existing record did not establish the State had already collected Thibodeaux’s DNA, because “defendants do not always submit to DNA collection despite being ordered to do so.” Thibodeaux, 430 P.3d at 703.

This Court has not expressly decided whether to depart from Division One’s decision in Thibodeaux, but has impliedly done so. In State v. Maling, __ Wn. App. 2d __, 431 P.3d 499, 501 (2018), decided after Thibodeaux, Maling challenged the trial court’s imposition of the \$100 DNA fee. This Court held the record “indicates Mr. Maling’s request for relief is controlled by Ramirez,” because he “was indigent at the time of sentencing and Mr. Maling’s lengthy felony record indicates a DNA fee has previously been collected.” Maling, 431 P.3d at 501 (footnote omitted). This Court

accordingly directed the trial court to strike the DNA fee from the judgment and sentence. Id. The State does not cite or address Maling.

In other unpublished cases, also decided after Thibodeaux, this Court has likewise inferred appellants' DNA had previously been collected by virtue of their felony criminal history.⁹ Functionally, then, this Court has not followed Thibodeaux. Nor should it do so here, where Griffith has three felony convictions after 2002, when mandatory biological sampling took effect. CP 49; Laws of 2002, ch. 289, §§ 2, 4.

Even if this Court is inclined to agree with the State that the current record is insufficient to establish Griffith's DNA has previously been collected, this Court must already remand for the other discretionary costs to be stricken. The trial court can take additional evidence on remand as to whether Griffith's DNA is already on file with the Washington State Patrol Crime Lab, and then determine whether the fee is appropriate.

⁹ See, e.g., State v. Cate, No. 35230-7-III, 2019 WL 276020, at *7 (Jan. 22, 2019) (striking DNA fee where appellant "has previous felony convictions"); State v. Dunbar, No. 35351-6-III, 2019 WL 123716, at *5 (Jan. 8, 2019) (holding appellant's "lengthy felony record is an indication that a DNA fee has been previously collected"); State v. Lewis, No. 35411-3-III, 2018 WL 6333776, at *2 (Dec. 4, 2018) (inferring appellant "has previously provided a DNA sample pursuant to his prior felony convictions" and directing trial court to strike \$100 DNA fee). Under GR 14.1, these unpublished decisions have no precedential value, are not binding on any court, and are cited here only for such persuasive value as this Court deems appropriate.

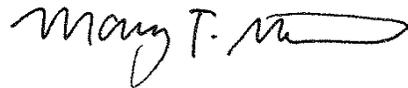
B. CONCLUSION

For the reasons discussed here and in the opening brief, this Court should reverse Griffith's conviction and remand for dismissal of the charge with prejudice. Alternative, this Court should remand for a new trial or for the trial court to strike the discretionary LFOs imposed.

DATED this 19th day of February, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift", with a stylized flourish at the end.

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February 19, 2019 - 3:48 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Lanny Lee Griffith
Superior Court Case Number: 17-1-00092-3

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