

FILED
Court of Appeals
Division III
State of Washington
10/12/2018 3:27 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

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1a. The trial court erred in denying Lanny Griffith's motion to suppress evidence, in violation of the Fourth Amendment and article I, section 7 of the Washington Constitution. CP 40.

1b. The trial court erred in finding the discovery of drugs was incidental to the courthouse search for weapons. CP 38 (Finding of Fact 5).

1c. The trial court erred in finding the disputed fact of whether Griffith removed his cellphone from his jacket pocket before the search was unnecessary to resolve the suppression motion. CP 38 (Finding of Fact 14).

1d. The trial court erred in finding illegal drugs pose a public safety threat and newer drugs can kill or injure through touch or inhalation. CP 39 (Finding of Fact 17).

1e. The trial court erred in concluding several out-of-state cases were persuasive. CP 39-40 (Conclusions of Law 4, 5, 8, 9, 11).

1f. The trial court erred in concluding Griffith impliedly consented to the courthouse search. CP 39 (Conclusion of Law 5).

1g. The trial court erred in concluding the search was a valid administrative search for weapons and other dangerous objects, authorized by article I, section 7. CP 39 (Conclusions of Law 6-7).

1h. The trial court erred in entering Conclusion of Law 10, to the extent it concluded the discovery of drugs was incidental to the search for dangerous objects. CP 40.

1i. The trial court erred in concluding drugs pose a sufficient danger to the public such that a courthouse search may encompass drugs, and not just weapons and explosives. CP 40 (Conclusion of Law 11).

2. The trial court erred in finding Griffith guilty following a stipulated facts bench trial absent a valid waiver of Griffith's constitutional right to a jury trial.

3a. The trial court erred in imposing discretionary legal financial obligations (LFOs) and the \$200 criminal filing fee, where Griffith was indigent at the time of sentencing.

3b. The trial court erred in imposing the \$100 DNA collection fee where the State has previously collected Griffith's DNA.

Issues Pertaining to Assignments of Error

1a. Did the courthouse search of Griffith's jacket pocket violate the Fourth Amendment, where it extended to an impermissible search for drugs, necessitating suppression of the evidence and reversal of Griffith's conviction?

1b. Does article I, section 7 independently forbid courthouse searches for drugs, where it prohibits broad suspicionless searches and is unconcerned with reasonableness or good faith, also requiring reversal?

2. Did the trial court err in finding Griffith guilty following a stipulated facts bench trial absent a valid waiver of Griffith's constitutional right to a jury trial, necessitating reversal?

3a. Should discretionary LFOs and the \$200 criminal filing fee be stricken where Griffith was indigent at the time of sentencing?

3b. Should the \$100 DNA collection fee be stricken where the State has previously collected Griffith's DNA due to prior convictions?

B. STATEMENT OF THE CASE

The State charged Griffith with one count of unlawful possession of a controlled substance (methamphetamine), contrary to RCW 69.50.4013(1). CP 1-2. The State alleged private security officer James Mattix found methamphetamine in Griffith's jacket pocket when Griffith attempted to pass through a security checkpoint at Chelan County Superior Court. CP 4.

Before trial, Griffith moved to suppress the evidence found in Mattix's search and dismiss the charge. CP 16, 28-33. Griffith contended the courthouse search impermissibly extended to a search for drugs and not

just for weapons and explosives. CP 28-33; 1RP 84-85.¹ Judge T.W. Small presided over a CrR 3.6 hearing held on September 28, 2017. 1RP 3.

1. Substantive CrR 3.6 Evidence

Mattix works for Pacific Security, a private company that contracts with Chelan County for security services. 1RP 6. Mattix is stationed at the security checkpoint for access to Chelan County Superior Court. 1RP 6-7. A sign is posted nearby that states, “SECURITY CHECK REQUIRED FOR ALL PEOPLE ON THIS FLOOR.” Ex. 1; 1RP 24-25. There are no signs specifying the public will be searched for weapons or drugs in order to access the courthouse. 1RP 25-26. The security station consists of a magnetometer, or walk-through metal detector, but no x-ray device. 1RP 8-9. Mattix explained he first sends individuals through the metal detector and then uses a hand wand if they set it off. 1RP 9-10.

Griffith came to the courthouse on January 6, 2017 to pay his LFOs, wearing a “heavier Carhart” jacket. 1RP 7-9, 75; CP 24. At security, Mattix instructed Griffith “to empty all of his pockets, and to remove his jacket, and set it on the desk.” 1RP 7. Mattix testified he has people remove heavy jackets because they typically set off the metal detector. 1RP 8-9. Mattix

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – September 28, October 12, November 7 2017, February 7, 2018; 2RP – January 24, 29, 2018.

believed Griffith “placed his wallet, his hat,” and “some change or something” in the basket on the desk. 1RP 9.

Griffith also turned over his jacket. 1RP 9. Mattix explained: “if they set the jacket up there, alls I need to do is feel. If there’s anything hard, that’s going to lead me to the pocket, I’m going to check the pocket. If there’s nothing there, there’s no reason to check the pockets.” 1RP 10. Mattix testified he felt something in Griffith’s inside jacket pocket and “[p]ulled it out, to see what it was.” 1RP 10. Mattix claimed he removed a cellphone, as well as a Ziploc bag that contained what he suspected to be methamphetamine. 1RP 10-11. After discovering the methamphetamine, Mattix had Griffith walk through the metal detector. 1RP 12. Griffith did so, took his jacket, and walked back through the metal detector towards the exit, leaving his other belongings behind. 1RP 12-13.

Mattix testified his “main goal” in searching jackets is discovering weapons: “I’m going for weapons.” 1RP 36-37. But Mattix later agreed he engages in a “dual-purpose search” for both weapons and drugs. 1RP 38-39. He confirmed his “primary purpose is to search for weapons; but, secondary, is contraband.” 1RP 38. Mattix later reiterated, though, “I’m looking for weapons. Guns, knives,” not drugs. 1RP 41.

Mattix again contradicted himself, explaining that even when he feels soft items, “I’m still going to look, yes.” 1RP 37-38. His reason:

“Curiosity. Got to know what it is.” 1RP 38. Mattix continued, “Especially now, with everything going on, in the drug world. Fentanyl. That stuff will drop me on the floor. I’m going to know. I’m not going to let somebody take me out with that stuff.” 1RP 38. Mattix explained he had “been reading and doing research on [fentanyl], myself.” 1RP 40. He believed “just a couple micrograms” could “drop me on the floor, overdose.” 1RP 41. Mattix admitted, however, he did not have any training “regarding chemical or biological weapons.” 1RP 39.

Deputy Elgin Shaw oversees courthouse security. 1RP 42-27. Shaw explained the county commissioners verbally inform him of individuals who may bypass the security checkpoint—there is no written policy or manual. 1RP 47, 65. These individuals are: county employees, delivery personnel, the bail bondsman, the legal process server, and on-duty law enforcement officers. 1RP 47-49. Everyone else must go through security. 1RP 48-49.

Shaw trains the security officers on the following process for security screenings. 1RP 42-27. All individuals who wish to access the courthouse must empty their pockets and put any items “into the basket.” 1RP 49-50. “All bags get checked”; coats must be removed and “handed over.” 1RP 50. The officers then “pat” or “physically check the coats”—“If they feel something rigid or hard, that could be a weapon, then they will further reach in a pocket -- wherever at -- to make sure it’s not a weapon.” 1RP 50.

Once the security officers search any bags or coats, they then direct individuals to go through the metal detector. 1RP 50. If someone sets off the metal detector, the officers conduct a “hand scan, with the hand wand.” 1RP 51. The officers will then ask individuals to “raise their pant legs, if they’re wearing pants,” and have them pull any belt buckle back, “so [they] can see behind it.” 1RP 51. Once cleared, individuals are “allowed to retrieve their items and go about their business.” 1RP 51.

Shaw testified the security officers are trained to search for and identify weapons, not drugs. 1RP 66, 72. Shaw instructs the officers, “[i]f it isn’t rigid, and you cannot believe it might be a weapon, then you’re not to reach in that pocket.” 1RP 69. If the officers nevertheless find drugs, they are to secure them, advise the individual he or she is not free to leave, and then contact the Wenatchee Police Department. 1RP 52-53.

Wenatchee Police Officer Shawndra Duke responded to the courthouse following Mattix’s discovery of drugs. 1RP 18, 75. Mattix told Duke that Griffith removed his cellphone from his jacket and placed it in the basket. 1RP 19-20. Mattix denied this at the CrR 3.6 hearing, explaining the cellphone was “what led [him] to the jacket.” 1RP 20. He claimed, “when I was patting the jacket down, I felt the cellphone in there.” 1RP 20.

However, Duke testified from her police report that Mattix told her Griffith put both his wallet and cellphone in the basket. 1RP 76. Shaw also

did not include anything in his incident memo about Mattix discovering a cellphone in Griffith's jacket pocket. 1RP 61-62; Ex. 2. Notably, Mattix did not write a report following the incident and admitted he did not have much chance to refresh his recollection before the hearing. 1RP 16-17.

2. Trial Court's Denial of Motion to Suppress

The court acknowledged Mattix engaged in a warrantless search of Griffith's jacket. 1RP 81, 85. The court explained, "the only disputed fact here is whether or not he removed the drugs with the cellphone, or if the cellphone was removed, by Mr. Griffith, and placed in the basket. And -- and he only removed the baggy of drugs." 1RP 82; CP 38 (Finding 13). The court believed "[t]he evidence really wasn't overwhelming either way." 1RP 87. The court ultimately did not resolve this issue "because the Court does not believe it necessary for this motion." CP 38 (Finding 14).

Instead the court found that, even if Mattix was searching for drugs, the search was justified because "illegal drugs present a safety threat to everyone in the Chelan County Courthouse in that newer drugs, such as Fentanyl, can kill or seriously impair bodily functions with minimal absorption through skin or inhalation." CP 39 (Finding 17). The court concluded "modern drugs such as Fentanyl pose a sufficient danger to the public so as to justify being the object of an administrative search in the courthouse setting in and of themselves." CP 40 (Conclusion 11). The court

also found, however, that the security officers are not trained to search for drugs. CP 48 (Finding 5).

The trial court further concluded Griffith impliedly consented to the courthouse search because “he willingly gave Mr. Mattix his jacket for screening and had the opportunity to leave if he did not want to submit to that screening.” CP 39 (Conclusion 5). The court accordingly concluded the search “was authorized by Art. I, § 7, as an administrative search,” and denied Griffith’s motion to suppress. CP 39 (Conclusions 6-7).

3. Stipulated Facts Bench Trial and Sentencing

At the end of the CrR 3.6 hearing, defense counsel asked Judge Small to strike the current trial date so “Mr. Griffith and I can discuss the possibility of a stipulated facts situation, or a plea, if we get there.” 1RP 88. The trial court did so and continued the case. 1RP 88-90. On November 7, 2017, Judge Small signed the written CrR 3.6 order and the parties discussed a date for the stipulated facts hearing. 1RP 92-93.

On January 17, 2018, the court received a letter from Griffith stating, “I can’t take a charge that don’t real[l]y belong to me.” CP 42. Griffith wrote, “I did not have any clue that stuff was in the coat,” explaining he would not have given it to Mattix otherwise. CP 42. He claimed Mattix lied at the CrR 3.6 hearing, emphasizing “I’m about to get hung for som[e]thing that was not in my control – and did not know nothing about.” CP 42.

A brief hearing was held on January 24, 2018 in front of Judge Kristin Ferrera. 2RP 3. Defense counsel explained “this was originally set for a stipulated facts trial,” but “Mr. Griffith has since filed a letter with the Court indicating, I believe, he doesn’t want to go through with the stipulated facts trial.” 2RP 3. Counsel also noted, “I believe there should have been a waiver of jury trial in there as well.” 2RP 3. Counsel told the court, “I’m just kind of confused as to how to proceed,” and asked for a hearing to be set before Judge Small. 2RP 3.

The parties appeared in front of Judge Leslie Allan on January 29, 2018. 2RP 6-8. Defense counsel explained:

But so we had kind of an impromptu settlement conference on how to get this case resolved this way, and this is what we talked about. Judge Small indicated that he thought it was a unique issue and that -- so we proposed doing a stipulated facts trial where we could stay the judgment and Mr. Griffith, as long as he diligently pursued the appeal, could remain out of custody while we did that.

....

. . . And so that’s kind of the agreement that we reached Thursday afternoon in Judge Small’s chambers, I prepared the documents for entry today to do that, and that’s where we’re at.

2RP 9-10. There was no indication as to whether Griffith was present at the settlement conference. The parties agreed to a continuance so they could research the proper procedure for an appellate bond. 2RP 10-15.

The parties reconvened again on February 7, 2018 in front of Judge Robert McSeveney. 1RP 94. Defense counsel presented written stipulated facts, signed by the prosecutor, defense counsel, and Griffith:

1. On January 6th, 2017, Mr. Lanny Griffith entered the 5th Floor of the Chelan County Courthouse;

2. That Security Officer, Jim Mattix, asked the defendant to remove and hand over his jacket for searching and Mr. Griffith complied;

3. While searching the outside of the jacket, Mr. Mattix felt a soft, bulky object in one of the pockets and removed it;

4. The object was a plastic baggie containing a small amount of Methamphetamine;

5. Defendant, Lanny Griffith, further incorporates and adopts the Findings of Fact and Conclusions of Law previously entered herein regarding Defendant's Motion to Suppress and Dismiss.

CP 47; 1RP 96.

The parties waived argument and the court took a moment to review the stipulated facts. 1RP 96-97. After doing so, the court ruled:

I've reviewed the stipulated facts. I've also reviewed the previous history of this case, regarding the record.

These stipulated facts establish the essential elements of the crime of Possession of -- in this case, methamphetamine.

I'm going to find that the defendant was present, in Chelan County, State of Washington, on January 6th of 2017; he had actual possession of a substance that turned out to be

methamphetamine; and it isn't -- contrary to the Statute, RCW 69.50.4013(1).

So I do find the essential elements have been established in the stipulated facts, beyond a reasonable doubt. Which also incorporates the previous findings, by the Court.

1RP 97. Defense counsel stated, "So the Court finds my client guilty," to which the court responded, "Correct." 1RP 97-98.

Griffith said nothing during this exchange. 1RP 96-98. Nor did the court engage in any colloquy with Griffith before finding him guilty. 1RP 97-98. No written jury trial waiver was entered into the record.

The parties proceeded immediately to sentencing. 1RP 98. The court signed the parties' agreed order staying execution of the judgment and sentence pending Griffith's appeal. 1RP 98-99; CP 57. The court sentenced Griffith to six months and a day of confinement. 1RP 102; CP 50. The court imposed \$1,600 in LFOs, including \$800 in discretionary LFOs, a \$200 criminal filing fee, and a \$100 DNA collection fee. 1RP 102-04; CP 51. Griffith appealed. CP 56, 62.

C. ARGUMENT

1. GRIFFITH'S CONVICTION MUST BE DISMISSED BECAUSE THE SUSPICIONLESS COURTHOUSE SEARCH VIOLATED THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7.

Mattix's intrusive, suspicionless search of Griffith's jacket pocket violated both the Fourth Amendment and article I, section 7. The search

impermissibly extended to a search for drugs, and not just weapons and explosives. Such broad courthouse searches have already been condemned by the Ninth Circuit. The unconstitutional search mandates suppression of the evidence and dismissal of Griffith's conviction.

When reviewing the denial of a suppression motion, appellate courts must determine whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial when it is sufficient “to persuade a fair-minded person of the truth of the stated premise.” Id. (quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). Conclusions of law are reviewed de novo. Id.

a. No Washington court has decided this issue.

“As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article 1, section 7 of the Washington State Constitution.” State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). “[T]he State bears a heavy burden to prove by clear and convincing evidence that a warrantless search falls within one” of the “narrowly drawn exceptions” to this rule. State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014).

Washington courts have recognized, though not expressly held, that administrative searches at courthouses and airports are an exception to the

warrant requirement under the Fourth Amendment. In Jacobsen v. City of Seattle, 98 Wn.2d 668, 669-70, 658 P.2d 653 (1983), the court held warrantless pat-down searches of concert goers to be unconstitutional. The court distinguished such searches from “airport and courthouse searches,” which are “narrow exceptions to the requirement of a warrant.”² Id. at 672 (citing United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972)).

Courthouse and airport searches were instituted following an “unprecedented wave of bombings and other acts of violence which inflicted death or serious injury to a large number of persons in the late 1960’s and early 1970’s.” Id. at 673 (quoting Wheaton v. Hagan, 435 F. Supp. 1134, 1145 (M.D.N.C. 1977)). To determine the constitutionality of such searches, “courts have considered three factors of public security: efficacy of the search and the degree and nature of the intrusion involved.” Id. at 673. Jacobsen emphasized these searches employ only “a brief stop and a visual examination of packages, pocketbooks, and briefcases.” Id. at 674. The

² See also York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 324, 178 P.3d 995 (2008) (Madsen, J., concurring) (noting the “requirement of individualized suspicion may be unworkable” in certain contexts, including courthouse searches); State v. O’Connor, 155 Wn. App. 282, 291, 229 P.3d 880 (2010) (“[O]ur Supreme Court has repeatedly noted such searches are permissible.”); Robinson v. City of Seattle, 102 Wn. App. 795, 813, 10 P.3d 452 (2000) (recognizing “[o]ther exceptions” to the warrant requirement “include airport and courthouse searches”).

court contrasted minimally intrusive courthouse and airport searches with the far more intrusive physical pat-downs employed in Jacobsen. Id. at 673-74.

Notwithstanding this discussion in Jacobsen, no Washington court has considered the proper scope of warrantless, suspicionless courthouse searches. Other jurisdictions, particularly the Ninth Circuit, therefore provide useful guidance on this issue.

- b. To pass constitutional muster, courthouse searches must be both reasonable and limited to a search for weapons and explosives.

“While administrative searches are an exception to the Fourth Amendment’s warrant requirement, they are not an exception to the Fourth Amendment’s standard of reasonableness.” United States v. Bulacan, 156 F.3d 963, 967 (9th Cir. 1998).

The courthouse search exception appears to have been first articulated in Downing. As the Jacobsen court noted, courthouse searches were instituted following “an outburst of acts of violence, bombings of federal buildings and hundreds of bomb threats.” Downing, 454 F.2d at 1231. Downing held the limited courthouse search at issue was reasonable because it was “cursory in nature and made for the strictly limited purpose of determining that no explosives or dangerous weapons were transported into the building.” Id. at 1232. To require a warrant, the court explained, “would

as a practical matter seriously impair the power of government to protect itself against ruthless forces bent upon its destruction.” Id. at 1233.

Since Downing, the Ninth Circuit has repeatedly considered—and cabined—the proper scope of courthouse and airport searches. In McMorris v. Alioto, 567 F.2d 897, 899 (9th Cir. 1978), the court emphasized the limited nature of courthouse searches, noting “[c]are must be taken so that the exception is not unduly extended.” The court accordingly applied strict scrutiny to courthouse searches and articulated the following rules:

The search must be clearly necessary to secure a vital governmental interest, such as protecting sensitive facilities from a real danger of violence. The search must be limited and no more intrusive than necessary to protect against the danger to be avoided, but nevertheless reasonably effective to discover the materials sought. The inspection must be conducted for a purpose other than the gathering of evidence for criminal prosecutions. To indicate this, we have designated limited searches at sensitive facilities as “administrative searches.”

Id. (citations omitted).

The McMorris court found a “serious threat of violence” to the courthouse at issue, noting references in the record to bomb threats and attacks on government buildings, as well as a recent terrorist incident involving a neighboring county superior court. Id. at 900. As such, there was “a sufficient basis for instituting the challenged search procedure.” Id. The record was, on the other hand, “devoid of any indication that the search

was a mere subterfuge designed to gather evidence to be used in criminal prosecutions.” Id. Instead, security officers limited their inspection to “the detection of weapons,” avoiding “any further search of persons or property.” Id. The search was also limited to a magnetometer, a “relatively inoffensive method of conducting a search.” Id. The courthouse search at issue was therefore reasonable under the Fourth Amendment. Id. at 901.

In Bulacan, 156 F.3d at 974, the Ninth Circuit expressly denounced courthouse searches for drugs. The court again noted the “vast potential for abuse” inherent in administrative searches, explaining “courts must take care to ensure that an administrative search is not subverted into a general search for evidence of crime.” Id. at 967. This requires courts to “balance the need to search against the invasion which the search entails.” Id. To meet the Fourth Amendment test of reasonableness, “an administrative screening search must be as limited in its intrusiveness as is consistent with satisfaction of the administrative need that justifies it.” Id. (quoting United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973)).

Courthouse security officers in Bulacan were instructed to search for anything “dangerous,” including not only weapons and explosives but also “narcotics, alcohol, or gambling materials.” Id. at 966. The “unreasonably broad” search for these latter items significantly intruded into citizens’ private lives. Id. at 973-74. And, “[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. The Ninth Circuit therefore held “[a]n administrative search for alcohol, narcotics, and gambling materials . . . is not permissible under the Fourth Amendment because the intrusiveness of the search outweighs the Government’s need to conduct such a search.” Id. at 974.

The Ohio Court of Appeals disagreed with the holding of Bulacan in State v. Book, 847 N.E.2d 52 (Ohio Ct. App. 2006). The Book court concluded, in dicta, that a courthouse search for drugs was reasonable:

We find that this type of security screening is consistent with the overall purpose of providing safety to those who work in, or visit, the court. But, see, [Bulacan], 156 F.3d 963 (holding that a court officer could search for weapons but not drugs). The reason that a security officer can search for drugs, in addition to weapons, is because of the stated purpose of the search—i.e., to provide for the safety of the employees and visitors. The presence of illegal drugs can jeopardize the safety of anyone in the courthouse.

Id. at 56. The Book court did not engage in any further analysis. Nor did the court cite the record or take judicial notice of any recent safety threats to government buildings involving drugs. The court ultimately reversed the challenged courthouse search on another basis (the screeners had too much discretion in determining who to search). Id. at 56-57.

Notably, no court outside of Ohio has followed the dicta in Book. Nor has any other jurisdiction rejected the holding of Bulacan that

courthouse searches may not extend to drugs. The Book court did not apply strict scrutiny as demanded by the Fourth Amendment, nor did it balance the need to search for drugs against the significant intrusion into individual privacy. The broad statement in Book is therefore of little persuasive value and should not be followed by this Court.

The Ninth Circuit in United States v. Aukai, 497 F.3d 955, 962 (9th Cir. 2007), again reiterated the scope of administrative searches “is not limitless.” Consistent with the demands of the Fourth Amendment, the airport search procedures at issue in Aukai “were neither more extensive nor more intensive than necessary under the circumstances to rule out the presence of weapons or explosives.” Id.

After passing through a magnetometer, Aukai was directed to a secondary screening because his boarding pass was marked “No ID.” Id. Aukai then underwent a standard wand scan, which sounded as it passed over his pants pocket. Id. The screening officer did not feel the outside or reach into Aukai’s pocket, instead asking Aukai if he had something in there. Id. The officer repeated the wand scan when Aukai denied he had anything in his pocket. Id. Only after the wand alarm sounded again did the officer “employ a more intrusive search procedure by feeling the outside of Aukai’s pocket and determining that there was something in there.” Id. Aukai was then repeatedly asked to empty his pocket until he finally removed an object

wrapped in tissue paper. Id. Suspecting it might be a weapon, another officer unwrapped the item, discovering drug paraphernalia. Id. The court held these “minimally intrusive” procedures met the reasonableness standard. Id. at 962-63.

Finally, in United States v. McCarty, 648 F.3d 820, 832-33 (9th Cir. 2011), the court held the screener’s secondary, subjective motive in finding contraband is typically irrelevant so long as the *programmatic* goals of the search are permissible. The court emphasized, however, this general rule does not “provide[] carte blanche to the searching officers to snoop to their hearts’ content without regard to the scope of their actions.” Id. at 834. The court accordingly articulated the following test:

So, as long as (1) the search was undertaken pursuant to a legitimate administrative search scheme; (2) the searcher’s actions are cabined to the scope of the permissible administrative search; and (3) there was no impermissible programmatic secondary motive for the search, the development of a second, subjective motive to verify the presence of contraband is irrelevant to the Fourth Amendment analysis.

Id. at 834-35 (emphasis added). The Fourth Amendment therefore requires “the individual screener’s actions be no more intrusive than necessary to determine the existence or absence of explosives that could result in harm to the passengers and aircraft.” Id. at 831 (emphasis added).

In summary, the Ninth Circuit has articulated the following rules for courthouse searches. The search at issue must be reasonable, requiring courts to balance the need to search and the invasion of privacy involved. The search must be limited to detecting weapons and explosives—it cannot extend to drugs and other contraband. It must be no more extensive or intrusive than necessary to rule out weapons or explosives. The search cannot be conducted for the purpose of gathering evidence. And, finally, the screener’s actions must fall within the proper scope of the limited search.

- c. The search of Griffith’s jacket pocket was unreasonable and beyond the scope of a permissible courthouse search.

Applying the above rules to Griffith’s case leads to the conclusion that Mattix’s search of Griffith’s jacket pocket was unconstitutional under the Fourth Amendment.

The programmatic goals of the courthouse search are largely permissible under the case law discussed above. Deputy Shaw testified the security officers are trained to search for weapons, not for drugs. 1RP 66-72. He explained individuals are first sent through the metal detector and then scanned with the hand wand if they set off the metal detector. 1RP 50-51. Shaw instructs the security officers to pat down jackets for weapons. 1RP 50. They are not to reach into jacket pockets unless they feel something rigid and believe it might be a weapon. 1RP 69.

However, Shaw also trains the security officers to detain individuals and contact the Wenatchee Police Department if they find illegal contraband during the security screening. 1RP 52-53. This policy suggests the courthouse searches are carried out not only for a permissible reason (to protect the public) but also an impermissible reason (to gather evidence for criminal prosecutions). McMorris, 567 F.2d at 899; see also York, 163 Wn.2d at 311 (plurality opinion) (“[A]ny evidence garnered from [an administrative search] should not be expected to be used in any criminal prosecution against the target of the search.”).

The key issue with the courthouse search, though, is Mattix exceeded the permissible scope of a search for weapons and engaged in an unconstitutional search for drugs. First and foremost, the State failed to establish by clear and convincing evidence that Mattix was searching only for weapons when he reached into Griffith’s jacket pocket.

Mattix repeatedly contradicted himself. Mattix claimed his “main goal” is to discover weapons, such as guns and knives. 1RP 36-37, 41. But Mattix confirmed he engages in a “dual-purpose search” for both weapons and drugs. 1RP 38-39. Mattix went even further, testifying he also searches for soft items, “I’m still going to look, yes.” 1RP 37-38. He does so out of “[c]uriosity. Got to know what it is.” 1RP 38. This is plainly at odds with

both Shaw's training and the constitutional requirement that courthouse searches be no more intrusive than necessary to rule out weapons.

Mattix's credibility was further undermined. He testified he reached into Griffith's jacket pocket because he felt a hard object inside and "[t]here's always [the] possibility" it could be a weapon. 1RP 32. Mattix claimed he found Griffith's cellphone inside. 1RP 10-11. However, Mattix told Officer Duke that Griffith removed his cellphone from his pocket and placed it in the basket. 1RP 19-20, 76. Shaw also did not include anything in his incident memo about Mattix discovering a cellphone in Griffith's pocket.³ 1RP 61-62; Ex. 2. The likelihood Griffith removed his cellphone is high, given that he removed other items from his pockets, including his wallet. 1RP 9. There would be no reason to leave his cellphone concealed in his pocket, as there would be with the methamphetamine. Moreover, Mattix admitted he did not have much chance to refresh his recollection before the CrR 3.6 hearing. 1RP 16-17. Nor did he write a report following the incident. 1RP 16-17.

Thus, the record does not clearly establish whether Griffith removed his cellphone from his pocket or whether Mattix searched Griffith's pocket because he felt the cellphone. The trial court agreed "[t]he evidence really

³ Shaw wrote: "PSO Mattix directed the male subject to empty all his pockets, place the items in a basket and also to remove his coat. The male subject complied. PSO Mattix searched the male subject's green heavy duty Carhart jacket and located a clear plastic ziplock baggy inside a pocket within the inside of the jacket." Ex. 2.

wasn't overwhelming either way, whether he placed the -- whether he found the cellphone in the pocket or not." 1RP 87. The court ultimately did not resolve this critical disputed fact, believing it was unnecessary to do so. CP 38 (Finding 14). Nor did the court make any finding that Mattix's testimony was credible.

The absence of an affirmative finding is held against the State, consistent with the requirement that the State must show a warrant exception applies by clear and convincing evidence. State v. Webb, 147 Wn. App. 264, 270, 274, 195 P.3d 550 (2008). "When the State successfully resists a motion to suppress, it is obligated to procure findings of fact and conclusions of law that, standing on their own, will withstand appellate scrutiny." State v. Watson, 56 Wn. App. 665, 666, 784 P.2d 1294 (1990). Thus, the trial court's failure to resolve the disputed fact is, alone, fatal to the State.

The trial court was incorrect the disputed fact was unnecessary to its resolution of the suppression motion. The Ninth Circuit has held a courthouse search for drugs to be unconstitutional. Bulacan, 156 F.3d at 974. Weapons and explosives pose a real and serious threat to public safety. McMorris, 567 F.2d at 899-900 (requiring "real danger" and "serious threat" of violence to justify limited courthouse searches). On the other hand, the presence of drugs in government buildings "does not present an immediate

threat to the occupants,” and so the government’s interest in searching for drugs does not outweigh the public’s interest in privacy. Id. at 973-74.

The trial court disagreed with the Ninth Circuit, instead electing to follow the cursory dicta in Book. 1RP 88. For the reasons discussed in section 1.c. above, the trial court erred in following Book and concluding courthouse searches may include searches for drugs and any “other dangerous objects.” CP 39. Furthermore, the Book court justified the courthouse search for drugs as consistent with its stated purposes: “to provide for the safety of the employees and visitors.” 847 N.E.2d at 56. By contrast, Deputy Shaw was emphatic that the purpose of the courthouse search was to find weapons. 1RP 66, 69, 72. He does not train the security officers to search for drugs. 1RP 72. Thus, the trial court’s justification for the search is inconsistent with the programmatic goals of the search, contrary to the Book.

Not only does the case law militate against the trial court’s approval of courthouse drug searches, the record is also devoid of any evidence that drugs pose the same type of real and serious threat as weapons or explosives. The trial court found persuasive the purported dangers of fentanyl. CP 39 (Finding 17), 40 (Conclusion 11). Mattix testified, “I’ve been reading and doing research on [fentanyl], myself,” believing “just a couple micrograms” could “drop [him] on the floor, overdose.” 1RP 41. But Mattix admitted he

did not have any training “regarding chemical or biological weapons.” 1RP 39. Thus, Mattix had no formal training regarding fentanyl and had only researched it on his own time. It is impossible to know Mattix’s sources and, indeed, the myth that fentanyl can kill upon touch has largely been debunked.⁴ At the very least, Mattix’s non-expert, untrained opinion on fentanyl is hardly sufficient to meet the standard for substantial evidence. Moreover, it makes little sense if Mattix worried fentanyl could kill upon contact that he immediately reached his hand into Griffith’s jacket pocket to pull out the baggie of unidentified substance.

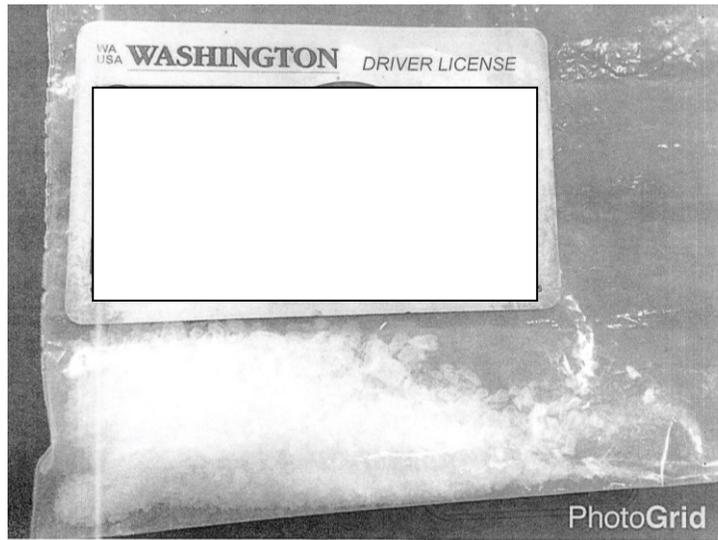
Nor does the record otherwise discuss any recent incidents involving fentanyl or weaponized drugs. Shaw testified thousands of knives (although very few firearms) are discovered at the courthouse security checkpoint each year. 1RP 54-56 (1,972 knives found in 2016; 1,919 knives found in 2015). There is no dispute a limited courthouse search for weapons is permissible under the Fourth Amendment. By contrast, Shaw testified only 45 items of

⁴ See, e.g., Jane Lindholm & Sam Rosen, Can You Really Overdose on Fentanyl Just by Touching It? (No), VT. PUB. RADIO (Sept. 4, 2018), <http://digital.vpr.net/post/can-you-really-overdose-fentanyl-just-touching-it-no#stream/0> (explaining fentanyl overdose through skin contact or inhalation is “very unlikely”); Jeremy Faust & Edward Boyer, Opinion, Opioid Hysteria Comes to Massachusetts Courts, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/opinion/opioid-fentanyl-hysteria-massachusetts.html> (rejecting as “patently false” the claim that “even miniscule amounts of skin exposure to [fentanyl] can be life-threatening”); Jennifer Earl, Fact Check: Can You Overdose from Fentanyl Left on Shopping Carts, CBS NEWS (Nov. 9, 2017), <https://www.cbsnews.com/news/fact-check-can-you-overdose-from-fentanyl-left-on-shopping-carts/> (noting experts have found overdosing from fentanyl residue is “completely impossible”).

drug paraphernalia were found in 2016. 1RP 54-56. Shaw did not say what kind of drugs or drug paraphernalia were discovered, nor whether there was any fentanyl or chemical weapons discovered.

There is simply not enough evidence to conclude fentanyl poses a public safety hazard legitimate and substantial enough to warrant the significant intrusion into privacy. Drugs will undoubtedly be more difficult than weapons to detect, as they do not contain metal that will set off the magnetometer and may not be hard objects easily felt with a pat-down search. See United States v. Casado, 303 F.3d 440, 447-49 (2d Cir. 2002) (holding that reaching into an individual's pocket is "more intrusive" and "more serious" than a pat-down search, and "this difference has constitutional significance").

Courts have upheld searches for weapons and explosive because they are minimally intrusive—requiring only passing through a magnetometer or x-ray device and perhaps a brief visual inspection or pat-down search. A search for drugs will require much more. The methamphetamine discovered in Griffith's pocket was contained in a thin Ziplock bag—the crystalline substance smaller than a driver's license and not much thicker:



Ex. 2. Such contraband could be concealed nearly anywhere. Can security guards therefore perform strip searches of individuals seeking access to the courthouse? Can they rifle through any pocket, no matter how small? Can they search inside a woman's bra or inside a man's briefs? The answer must be no, without more evidence that drugs truly threaten public safety to such an extent that vast intrusions into personal privacy are warranted.

Even if this Court concludes Mattix properly reached into Griffith's pocket to confirm the cellphone was not a weapon, the record does not establish why Mattix also removed the plastic baggie. Mattix testified only that, when he felt something inside Griffith's pocket, he pulled it out and discovered "[a] cellphone and a bag." 1RP 10. Mattix explained "[t]here's always [the] possibility" the cellphone could have been a weapon. 1RP 32. But he did not explain whether he believed the Ziploc baggie could also have

been a weapon or why he removed it. The State therefore failed to establish Mattix's discovery of the drugs was incidental to his search for weapons.

Case law is clear that once officers dispel their suspicion that a weapon may be inside a pocket, they cannot manipulate the pocket's contents, reach into the pocket, or remove the contents. Garvin, 166 Wn.2d at 255 (“We hold it is unlawful for officers to continue squeezing—whether in one slow motion or several—after they have determined a suspect does not have a weapon, to find whether the suspect is carrying drugs or other contraband.”); State v. A.A., 187 Wn. App. 475, 488, 349 P.3d 909 (2015) (“Here, the particular circumstances did not justify the search of A.A.'s pockets. Once the officer conducted the pat-down search and determined that A.A. did not have a weapon, the search should have stopped.”). Once Mattix determined the hard object was not a weapon but a cellphone, the search should have ceased.

Finally, reaching into Griffith's pocket was more intrusive than necessary to ferret out potential weapons. Aukai demonstrates the appropriate “stairstep approach” to searching for weapons. McCarty, 648 F.3d at 835 (discussing Aukai). Once Mattix purportedly identified a hard object in Griffith's pocket, he should have asked Griffith to remove the item. See Aukai, 497 F.3d at 962. Only if Griffith refused to empty his pocket should Mattix have reached inside. See id. This more gradual approach is

“both minimally intrusive and respectful of personal privacy.” McCarty, 648 F.3d at 835. It also would have given Griffith a better opportunity to leave the courthouse if he did not wish to proceed with the search.

This Court should hold courthouse searches must be limited to weapons and explosives, and may not extend to drugs and “other dangerous objects,” at the trial court concluded. CP 39-40. The search of Griffith’s jacket pocket was unreasonable and therefore unconstitutional under the Fourth Amendment. This Court should so hold.

d. Courts hold consent is not a valid basis for an administrative search.

The trial court concluded Griffith gave “implied consent” to the courthouse search, reasoning he “willingly gave Mr. Mattix his jacket for screening and had the opportunity to leave if he did not want to submit to the screening.” CP 39 (Conclusion 5). The Washington Supreme Court has suggested, and other courts have held, that consent is not a valid justification for administrative searches. The trial court’s conclusion to the contrary was erroneous.

Consent to search is an exception to the warrant requirement. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). The State bears the burden of demonstrating, by clear and convincing evidence, that consent was voluntarily given. State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927

(1998). Whether consent is voluntary is question of fact that depends on the totality of the circumstances, including (1) whether Miranda⁵ warnings were given prior to consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of the right to refuse consent. Reichenbach, 153 Wn.2d at 132. “A consensual search may go no further than the limits for which the consent was given.” Id. at 133.

“[T]he Supreme Court has held that the constitutionality of administrative searches is not dependent upon consent.” Aukai, 497 F.3d at 959 (discussing United States v. Biswell, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972)). In Aukai, the Ninth Circuit considered the impracticality of authorizing airport screenings based on consent:

[R]equiring that a potential passenger be allowed to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world. Such a rule would afford terrorists multiple opportunities to attempt to penetrate airport security by “electing not to fly” on the cusp of detection until a vulnerable portal is found. This rule would also allow terrorists a low-cost method of detecting systematic vulnerabilities in airport security, knowledge that could be extremely valuable in planning future attacks. Likewise, given that consent is not required, it makes little sense to predicate the reasonableness of an administrative airport screening search on an irrevocable implied consent theory. Rather, where an airport screening search is otherwise reasonable and conducted pursuant to statutory authority, all

⁵ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

that is required is the passenger's election to attempt entry into the secured area of an airport.

Id. at 960-61 (footnotes and citation omitted). The Aukai court overruled its prior cases to the extent the reasonableness of administrative searches was predicated on consent. Id. at 962.

Some of the same considerations apply to courthouse searches. An individual could approach a courthouse security checkpoint with a bomb in a briefcase, revoke consent to screening, and then leave the briefcase behind—posing a serious safety threat to everyone nearby. Consent should not matter under the circumstances, as it could seriously diminish the safety goals of courthouse searches. Rather, the focus of the inquiry must be on whether the search was “otherwise reasonable and conducted pursuant to statutory authority.” Id. at 961.

Even if there is implied consent to search for weapons and explosives, individuals submitting to courthouse searches do not consent to broad searches for any potential contraband. The Ninth Circuit has again made this clear. In United States v. \$124,570 U.S. Currency, 873 F.2d 1240, 1247 (9th Cir. 1989), considering airport screenings, the court explained “the scope of the consent is perforce limited by the nature of the search to which the subject submits.” Airline passengers “can fairly be said to have consented to a search for weapons and explosives.” Id. “But,” the court

emphasized, “passengers would be surprised to learn that they are also submitting to a more generalized search for contraband or, broader yet, things that are not in themselves illegal but merely look suspicious.” Id. The court was doubtful the government “could extract so broad a consent as a condition for boarding an airplane.” Id. Accordingly, the court held the airport search at issue could not be justified by consent.⁶ Id. at 1248.

Similar to \$124,570, our supreme court has expressed doubt that consent, under such circumstances, is voluntary. Returning to Jacobsen, the City (defendants) did not assert the concert goers consented to pat-down searches. 98 Wn.2d at 672. The court noted “that even if the consent issue had been raised by defendants it is extremely doubtful, given the circumstances of this case, that they could have prevailed.” Id. at 674. The court cited Wheaton, Gaioni v. Folmar, 460 F. Supp. 10 (M.D. Ala. 1978), and Nakamoto v. Fasi, 635 P.2d 946 (Haw. 1981), for this proposition. Jacobsen, 98 Wn.2d at 674.

All three cases held rock concert patrons did not voluntarily consent to warrantless searches. In Gaioni, for instance, there were signs posted at entrances to the Civic Center warning patrons they were liable to be searched. 460 F. Supp. at 14. The court held, however, the city “cannot

⁶ Notably, this holding of \$124,570 was likely overruled by Aukai, to the extent it condoned airport screenings for weapons and explosives based on consent.

condition public access to the Civic Center on submission to a search and then claim those subjected to the searches voluntarily consented.” Id. The court explained, “[a]ny consent obtained under such circumstances was an inherent product of coercion, since people undoubtedly felt if they refused to be searched they would forfeit their right to attend the concert.” Id. The Nakamoto court likewise held “[c]onsent given in the belief that one would forfeit her right to attend the concert, if she refused to be searched, is an inherent product of coercion and will not validate an otherwise improper intrusion.” 635 P.2d at 22.

The Gaioni court additionally noted “[t]he atmosphere at the Civic Center was hardly conducive to people making a free and unconstrained choice whether to allow themselves to be searched.” 460 F. Supp. at 15. Upon entering, patrons were confronted with uniformed, armed police who “possessed apparent authority to conduct the searches.” Id. Similarly, in Wheaton, armed officers exercised “apparent authority” to search, given warnings signs and statements on the patrons’ concert tickets. 460 F. Supp. at 1147. In neither case did patrons know they could refuse to be searched, nor were they given an opportunity to do so. Id.; Gaioni, 460 F. Supp. at 15. Under such circumstances, any consent to search could not be deemed voluntary. Gaioni, 460 F. Supp. at 15; Wheaton, 435 F. Supp. at 1147.

These cases demonstrate the search of Griffith's jacket pocket cannot be upheld on the theory of consent. A sign near the security station stated only, "SECURITY CHECK REQUIRED FOR ALL PEOPLE ON THIS FLOOR." Ex. 1; 1RP 24-25. Mattix believed a sign somewhere else in the building warned, "No Marijuana, or No THC." 1RP 25. No other signs specified individuals would be subject to searches for not only weapons, but also drugs, if they wanted to gain access to the superior court. 1RP 25-26. Mattix also acknowledged individuals were not given any warning that "you either proceed through the search, or you can leave." 1RP 26.

There was also a significant show of authority by the security officers, standing guard at the entrance to the courthouse, demanding individuals empty all their pockets, turn over coats and bags, and pass through a metal detector. 1RP 7-9, 49-51. The record does not demonstrate how many security officers were stationed at the checkpoint or whether they were armed. As in \$124,570, it is possible individuals wishing to access the courthouse understood they were consenting to a search for weapons, but almost certainly not a search for any potential contraband, let alone Mattix rifling through pockets out of "[c]uriosity." 1RP 38.

Consent also cannot justify a courthouse search because, as in Gaioni, Wheaton, and Nakamoto, individuals must consent to the search or forfeit their right to access the courthouse. This is even more significant than

forfeiting the right to access a rock concert, because the courthouse signifies access to justice. The courthouse is where people appear for criminal court hearings, obtain no-contact orders, settle child custody disputes, and so on and so forth. Indeed, the police report stated Griffith told Mattix he was at the courthouse to pay his LFOs. CP 24; 1RP 103. Griffith could be subject to contempt of court and arrest for willfully failing to pay his LFOs. RCW 10.01.180. An individual may likewise feel compelled to consent to the search in to avoid a bail jumping charge, for example. As the Washington Supreme Court has impliedly recognized by citing to Wheaton, Gaioni, and Nakamoto, any such consent is the inherent product of coercion.

It is critical to remember the State bears the burden of demonstrating Griffith's consent to search was voluntary. Ferrier, 136 Wn.2d at 116. The State has failed to do so in Griffith's case, where the record fails to establish voluntariness and persuasive case law militates against a finding of voluntariness. This Court should reject the trial court's conclusion that the courthouse search was authorized by Griffith's implied consent.

- e. Even if the Fourth Amendment permits suspicionless courthouse searches for drugs, article I, section 7 does not.

Even if this Court holds, contrary to the Ninth Circuit, that the Fourth Amendment permits courthouse searches for drugs, article I, section 7 does not allow for such broad, suspicionless searches. Drug detection is

completely untethered from the originating rationale for courthouse searches—bomb threats, terrorist attacks, and other violent incidents at government buildings—and so cannot be sustained under our own nearly categorical exclusionary rule.

Article I, section 7 guarantees “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The Fourth Amendment, by contrast, protects only against “unreasonable searches and seizures.” “It is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution.” State v. Chenoweth, 160 Wn.2d 454, 462, 158 P.3d 595 (2007). As such, “a Gunwall^[7] analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis.” State v. Surge, 160 Wn.2d 65, 71, 156 P.3d 208 (2007) (footnote omitted); State v. Eisfeldt, 163 Wn.2d 628, 636 & n.5, 185 P.3d 580 (2008).

Rather than conduct a rote Gunwall analysis, “[t]he only relevant question is whether article I, section 7 affords enhanced protection in the particular context.” Surge, 160 Wn.2d at 71. The focus of this inquiry “is on whether the language of the state constitutional provision and its prior interpretations actually compel a particular result.” State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002).

⁷ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

- i. *Reasonableness and good faith do not justify warrantless searches under article I, section 7.*

The Fourth Amendment is concerned only with the reasonableness of a search, “leaving individuals subject to any manner of warrantless, but reasonable searches.” Eisfeldt, 163 Wn.2d at 634. The administrative search exception is a creature of the Fourth Amendment—the ultimate test of whether an administrative search passes constitutional muster is whether it was reasonable. Bulacan, 156 F.3d at 967; Davis, 482 F.2d at 910.

Article I, section 7, on the other hand, is “unconcerned” with reasonableness, as the word “reasonable” does not appear anywhere in its text. Eisfeldt, 163 Wn.2d at 634-35. “Rather, it prohibits any disturbance of an individual’s private affairs without authority of law.” State v. Snapp, 174 Wn.2d 177, 194, 275 P.3d 289 (2012). Thus, the “paramount concern” of our state exclusionary rule “is protecting an individual’s right of privacy.” State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). “With very few exceptions, whenever the right of privacy is violated, the remedy follows automatically.” Id.

Controlled by the Fourth Amendment’s reasonableness standard, administrative searches require courts to “balance the need to search against the invasion which the search entails.” United States v. Gonzalez, 300 F.3d 1048, 1053-54 (9th Cir. 2002) (quoting Bulacan, 156 F.3d at 967). Under

article I, section 7, however, “the balancing of interests should not be carried out when evidence is obtained in violation of a defendant’s constitutional rights.” State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009).

The Fourth Amendment also requires administrative searches to be “confined in good faith” to the purpose of detecting weapons and explosives. McCarty, 648 F.3d at 831 (quoting Aukai, 497 F.3d at 962). But good faith is irrelevant under article I, section 7.⁸ The Washington Supreme Court has rejected the federal good faith exception as “incompatible with the nearly categorical exclusionary rule under article I, section 7.” Afana, 169 Wn.2d at 184; see also State v. Betancourth, 190 Wn.2d 357, 367, 413 P.3d 566 (2018) (“[B]ecause the paramount concern of our state’s exclusionary rule is protecting an individual’s right of privacy, we have explicitly declined to adopt a good faith or reasonableness exception to the exclusionary rule under article I, section 7.”).

Constitutional courthouse searches are largely premised on reasonableness and good faith, which do not matter under article I, section 7. This Court must therefore be wary of stretching the exception any further than strictly necessary. Expansive courthouse searches for any contraband,

⁸ “Good faith” means “‘objectively reasonable reliance’ on something that appeared to justify a search or seizure when it was made.” Afana, 169 Wn.2d at 180 (quoting Herring v. United States, 555 U.S. 135, 142, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009)).

including drugs, is at odds with the more protective language and purpose of article I, section 7.

- ii. *Washington courts have long condemned broad suspicionless searches under article I, section 7.*

The U.S. Supreme Court “has repeatedly upheld the constitutionality of so-called ‘administrative searches.’” Aukai, 497 F.3d at 959. The Aukai court noted the example of sobriety checkpoints, which the Supreme Court upheld as consistent with the Fourth Amendment in Michigan Department of State Police v. Sitz, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990). Aukai, 497 F.3d at 959. Before Sitz, however, our state supreme court had already condemned suspicionless sobriety checkpoints. City of Seattle v. Mesiani, 110 Wn.2d 454, 460, 755 P.2d 775 (1988). The Mesiani court held, absent individualized suspicion, such searches were “highly intrusive” and violated “the right to not be disturbed in one’s private affairs guaranteed by article 1, section 7.” Id. Mesiani remains good law in Washington.

The Washington Supreme Court has denounced broad suspicionless searches in other contexts, too. In Kuehn v. Renton School District No. 403, 103 Wn.2d 594, 601-02, 694 P.2d 1078 (1985), for instance, the court held a suspicionless search of students’ luggage as a condition of participation in a school-sponsored trip to Canada violated both the Fourth Amendment and article I, section 7. The court stressed, “[i]n the absence of individualized

suspicion of wrongdoing, the search is a general search. “[W]e never authorize general, exploratory searches.” Id. at 599 (quoting State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)).

In State v. Jorden, 160 Wn.2d 121, 131, 156 P.3d 893 (2007), the court condemned suspicionless searches of motel registries under article I, section 7. The court emphasized it “has consistently expressed displeasure with random and suspicionless searches, reasoning that they amount to nothing more than an impermissible fishing expedition.” Id. at 127.

The plurality in York likewise noted “we have a long history of striking down exploratory searches not based on at least reasonable suspicion.” 163 Wn.2d at 314 (plurality opinion). The plurality explained, “[t]he few times we have allowed suspicionless searches, we did so either relying entirely on federal law or in the context of criminal investigations or dealing with prisoners.” Id. at 315. Consistent with this, the plurality struck down a school district policy that allowed for random, suspicionless drug testing of student athletes as violative of article I, section 7.⁹ Id. at 316.

Put simply, our supreme court has “not been easily persuaded that a search without individualized suspicion can pass constitutional muster.” Robinson, 102 Wn. App. at 815.

⁹ The concurrence agreed the school’s drug testing program could not withstand constitutional scrutiny, but disagreed with the plurality to the extent it cast doubt on the validity of suspicion-based school searches. Id. (Madsen, J., concurring).

The risk to public safety from weapons and explosives is “substantial and real,” justifying limited courthouse searches. McCarty, 648 F.3d at 831 (quoting Aukai, 497 F.3d at 958). But there is no similar demonstration that drugs pose the same substantial or real threat to public safety. Whatever remote possibility there is of weaponized drugs, it cannot override the robust privacy protections article I, section 7 guarantees. As discussed, drug searches could be exceedingly broad, given that drugs can be concealed just about anywhere. Our state constitution does not permit such broad, suspicionless searches, particularly where they are premised on reasonableness and good faith. This Court should therefore reject the courthouse search for drugs as inconsistent with article I, section 7.

f. Griffith’s conviction must be dismissed with prejudice.

“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.” Duncan, 146 Wn.2d at 176. The methamphetamine in Griffith’s jacket pocket was discovered as a result of Mattix’s unlawful search. The evidence must therefore be suppressed. Garvin, 166 Wn.2d at 254. Without the evidence, the State cannot prove Griffith’s unlawful possession of a controlled substance. This Court should reverse Griffith’s conviction and remand for dismissal of the charge with prejudice. Id. at 255.

2. REVERSAL IS REQUIRED BECAUSE THE RECORD FAILS TO SHOW GRIFFITH VALIDLY WAIVED HIS RIGHT TO A JURY TRIAL.

“Every criminal defendant has a right under both the State and federal constitutions to a jury trial.” State v. Ramirez-Dominquez, 140 Wn. App. 233, 239, 165 P.3d 391 (2005). Courts review de novo whether a defendant validly waived the right to a jury trial. Id. The State bears the burden of demonstrating a valid waiver. State v. Stegall, 124 Wn.2d 719, 730, 881 P.2d 979 (1994).

Courts must indulge every reasonable presumption against waiver. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). “Waiver of the jury trial right must be “voluntary, knowing, and intelligent.” Id. Waiver “must either be in writing, or done orally on the record.” State v. Treat, 109 Wn. App. 419, 427, 35 P.3d 1192 (2001). Though a written waiver or colloquy is not required, the record must reflect “a personal expression of waiver from the defendant.” Stegall, 124 Wn.2d at 725. Silent acquiescence does not by itself give the court any basis for concluding that the defendant’s election met constitutional standards.” Id.

Griffith was found guilty after a stipulated facts bench trial. 1RP 97-98. However, the record in Griffith’s case is silent as to any jury trial waiver. Griffith did not sign a written waiver. State v. Pierce, 134 Wn. App. 763, 771, 142 P.3d 610 (2006) (recognizing a written waiver “is not

determinative but is strong evidence that the defendant validly waived the jury trial right”).

Griffith signed the stipulated facts, but this is not dispositive. A stipulated facts trial is not tantamount to a guilty plea. State v. Wiley, 26 Wn. App. 422, 427, 613 P.2d 549 (1980). Rather:

In a stipulated facts trial, the judge or jury still determines the defendant’s guilt or innocence; the State must prove beyond a reasonable doubt the defendant’s guilt; and the defendant is not precluded from offering evidence or cross-examining witnesses but in essence, by the stipulation, agrees that what the State presents is what the witnesses would say.

State v. Johnson, 104 Wn.2d 338, 342, 705 P.2d 773 (1985). A defendant may still exercise his jury trial right even if he proceeds on stipulated facts. See id. at 343 (emphasizing defendant “executed a written waiver of a jury trial” before stipulated facts bench trial). Griffith’s signature on the stipulated facts says nothing about whether he waived his jury trial right.

The trial court did not conduct any colloquy with Griffith about waiving his jury trial right. State v. Castillo-Murcia, 188 Wn. App. 539, 548, 354 P.3d 932 (2015) (considering “whether the trial court informed the defendant of the right to a jury trial”). At none of the status hearings did the court discuss the jury trial right with Griffith. See 1RP 92-93; 2RP 2-3, 6-15. Nor did the court do so at the stipulated facts bench trial. 1RP 94-98. Rather, defense counsel presented the stipulated facts and the court found

Griffith guilty based on those facts. 1RP 96-98. Griffith said nothing during this entire exchange. 1RP 96-98. The parties proceeded immediately to sentencing after the court's finding of guilty. 1RP 98.

There was no representation from defense counsel that Griffith was waiving his jury trial right. Pierce, 134 Wn. App. at 771 (“An attorney’s representation that his client knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant.”). But see State v. Hos, 154 Wn. App. 238, 250, 225 P.3d 389 (2010) (“[C]ounsel’s waiver on the defendant’s behalf is not sufficient.”). On January 17, 2018, after the CrR 3.6 hearing, Griffith wrote a letter to the court denying the methamphetamine was his and contesting the charge. CP 42. This suggested Griffith did not want to waive his jury trial right.

The parties met on January 24, 2018, at which time defense counsel expressed uncertainty as to whether Griffith wanted to proceed on stipulated facts. 2RP 3-4. Counsel noted, “I believe there should have been a waiver of jury trial in there as well,” but did not warrant that Griffith had or wanted to waive his jury trial right. 2RP 3. No waiver was thereafter executed.

The parties met again on January 29. 2RP 6. Defense counsel explained they had an impromptu settlement conference in Judge Small’s chambers, where they agreed to stay Griffith’s sentence if he proceeded to a stipulated facts trial. 2RP 9-10. But the record does not indicate whether

Griffith was present for this settlement conference. Nor was there any representation Griffith himself agreed to the proposed procedure or that he wanted to waive his jury trial right.

At the February 7 stipulated facts bench trial, defense counsel again did not make any representation that Griffith waived his jury trial right. 1RP 94-98. Griffith did not say anything on the record until sentencing, when the trial court asked if he wished to allocute. 1RP 102. In short, Griffith made no personal expression of any kind that he wished to waive his jury trial right. As the Stegall court recognized, “[s]ilent acquiescence” is not enough. 124 Wn.2d at 730.

Hos is directly on point. Just like here, Hos proceeded to a stipulated facts bench trial after losing a CrR 3.6 suppression motion. Hos, 154 Wn. App. at 243-44. At the beginning of the bench trial, Hos’s attorney informed the court, in Hos’s presence, that Hos’s “intent [was] to ask the Court to review . . . a couple of documents on stipulated facts for a bench trial. It’s Ms. Hos’ intent to appeal a pre-trial suppression order denying her motion, and this is the most efficient way to get that up on appeal.” Id. at 244.

The court held this did not constitute a valid jury trial waiver. Id. at 251-52. Hos did not sign a written waiver. Id. at 252. “Nor did the trial court question Hos on the record to determine whether she knowingly, intelligently, and voluntarily waived her right to a jury trial, or even whether

she had discussed the issue with her defense counsel or understood what rights she was waiving.” Id. The record lacked “Hos’s personal expression of waiver of her constitutional right to a jury trial,” necessitating reversal. Id.

Like Hos, Griffith did not validly waive his jury trial right where the record does not reflect any personal expression of waiver. The proper remedy is to reverse Griffith’s conviction and remand for a new trial. State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979).

3. THE TRIAL COURT ERRED IN IMPOSING SEVERAL LEGAL FINANCIAL OBLIGATIONS.

In State v. Ramirez, __ Wn.2d __, __ P.3d __, 2018 WL 4499761, at *6 (2018), the Washington Supreme Court discussed and applied House Bill 1783, which took effect on June 7, 2018 and applies prospectively to cases on direct appeal. House Bill 1783 amended RCW 10.01.160(3) to mandate: “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” Laws of 2018, ch. 269, § 6. The bill also amended RCW 36.18.020(2)(h) to prohibit imposing the \$200 criminal filing fee on indigent defendants. Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(c), a person is “indigent” if he or she receives an annual income after taxes of 125 percent or less of the current federal poverty level.

These amendments “conclusively establish[] that courts do not have discretion to impose such LFOs” on individuals “who are indigent at the time of sentencing.” Ramirez, 2018 WL 4499761, at *8. In Ramirez, the court struck discretionary LFOs and the \$200 filing fee because Ramirez was indigent at the time of sentencing, i.e., his income fell below 125 percent of the federal poverty guideline. Id. at *5, *7.

The trial court similarly erred in imposing \$800 in discretionary LFOs¹⁰ as well as the \$200 filing fee, where Griffith was indigent at the time of sentencing. CP 51; 1RP 102. Griffith told the trial court he worked construction, but he had “been looking for work” and “plan[ned] on getting back to work, here, real soon.” 1RP 103. In other words, Griffith was not currently employed. 1RP 103. Griffith’s financial declaration reflected the lack of an income source. Griffith reported, “I work for my landlord to pay my rent. I am not employed outside of that.” CP 80. Griffith’s rent was only \$400 a month. CP 81. For other sources of income, Griffith reported, “I work for family members here and there to pay for other needs.” CP 80. Aside from rent, Griffith’s remaining living expenses were \$400. CP 81.

¹⁰ The trial court imposed a \$450 court-appointed attorney fee, a \$250 drug enforcement fund fee, and a \$100 crime lab fee. CP 51; RCW 43.43.690(1) (crime lab fee discretionary); In re Pers. Restraint of Dove, 196 Wn. App. 148, 155, 381 P.3d 1280 (2016) (court-appointed attorney fees discretionary), review denied, 188 Wn.2d 1008 (2017); State v. Hunter, 102 Wn. App. 630, 634-35, 9 P.3d 872 (2000) (drug enforcement fund fee discretionary).

Thus, at most, Griffith's annual income covered only his living expenses, which amounted to \$9,600 for the entire year. CP 80-81. In 2018, the federal poverty level for an individual was \$12,140.¹¹ Griffith was therefore indigent at the time of sentencing, as defined by RCW 10.101.010(3)(c), because he received an annual income of 125 percent or less of the "current federally established poverty level." Under Ramirez, the LFO amendments apply prospectively to Griffith because his direct appeal is still pending. As such, the trial court erred \$800 in discretionary LFOs and the \$200 criminal filing fee, and those fees should be stricken.

House Bill 1783 also amended RCW 43.43.7541 to "establish[] that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction." Ramirez, 2018 WL 4499761, at *6. Mandatory biological sampling for all adults convicted of felony offenses took effect on July 1, 2002. Laws of 2002, ch. 289, §§ 2, 4.

The trial court imposed the \$100 DNA collection fee in Griffith's case. CP 51; 1RP 101. The record demonstrates, however, that Griffith was convicted of three felonies committed after 2002. CP 49. Griffith would necessarily have had a DNA sample collected pursuant to former RCW 43.43.7541. Because Griffith's DNA sample was previously collected, the

¹¹ U.S. DEP'T OF HEALTH & HUMAN SERVS., Poverty Guidelines, <https://aspe.hhs.gov/poverty-guidelines> (last visited Sept. 26, 2018).

DNA fee in the present case is discretionary under RCW 43.43.7541. Pursuant to the amended version of RCW 10.01.160(3), discretionary fees may not be imposed on indigent defendants. The trial court therefore lacked authority to impose the \$100 DNA fee, so it should be stricken.

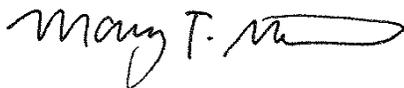
D. CONCLUSION

For the reasons stated above, this Court should suppress the evidence discovered in Mattix's search, reverse Griffith's conviction, and remand for dismissal of the charge with prejudice. Alternatively, this Court should reverse Griffith's conviction and remand for a new trial because he did not validly waive his jury trial right. Finally, this Court should remand for the trial court to strike discretionary LFOs, the \$200 criminal filing fee, and the \$100 DNA collection fee from the judgment and sentence.

DATED this 12th day of October, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Office ID No. 91051

Attorneys for Appellant

Appendix

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**KIM MORRISON
CHELAN COUNTY CLERK**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON,)	
)	NO. 17-1-00092-3
Plaintiff,)	
)	
vs.)	
)	FINDINGS OF FACT,
LANNY LEE GRIFFITH,)	CONCLUSIONS OF LAW, AND
)	ORDER DENYING CRR 3.6 MOTION
Defendant.)	
)	

The Honorable T.W. Small, having considered the testimony in this case of witnesses James Mattix, Deputy Elgin Shaw, and Officer Shaundra Duke, the exhibits admitted on September 28, 2017, the memoranda submitted by counsel, and the arguments of counsel, now enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On January 6, 2017, Mr. Lanny Griffith entered the 5th Floor of the Chelan County Superior Courthouse;
2. Upon entering the 5th Floor from either the stairs or the elevator, Mr. Griffith would have seen the sign, a picture of which was admitted as Exhibit 1, informing him that all visitors were subject to security screening;
3. Any individual not desiring to pass through screening may leave at any time back down the stairs or elevator prior to passing through the magnetometer;

- 1 4. Security screenings are conducted by private security officers who are trained and
2 supervised by Chelan County Jail Deputy Elgin Shaw to search for weapons;
- 3 5. Security officers are also trained to recognize drugs, but the Court finds that the discovery
4 of any drugs is incidental to the search for weapons and not a purpose for which the
5 security officers are trained to conduct searches;
- 6 6. Mr. Griffith approached the security screening station, staffed by private security officer
7 James Mattix;
- 8 7. Mr. Mattix observed that Mr. Griffith wore a heavy Carhartt-style jacket;
- 9 8. Although not a formal policy or directive, Mr. Mattix uniformly requires all individuals
10 with heavy jackets to remove the jacket for individual screening before the individual
11 passes through the magnetometer;
- 12 9. Mr. Mattix uniformly requires the same for all briefcases, purses, backpacks, and other
13 containers;
- 14 10. In the present case, Mr. Mattix asked Mr. Griffith to remove and hand-over the jacket for
15 screening and Mr. Griffith complied;
- 16 11. While hand-searching the outside of the jacket, Mr. Mattix felt a soft bulky object in one
17 of the pockets and removed it;
- 18 12. The object was a plastic baggie containing a small amount of methamphetamine;
- 19 13. There is some dispute whether Mr. Mattix also removed a cell phone from that same
20 pocket in that Mr. Mattix testified that he did, but Officer Duke and Deputy Shaw testified
21 that Mr. Mattix had told them that the cell phone had been handed over prior to the coat
22 search;
- 23 14. The Court does not resolve this dispute of fact because the Court does not believe it
24 necessary for this motion;
- 25 15. Some individuals are allowed to pass through security without undergoing screening,
including mail and parcel delivery personnel, the local legal process server, the local bail
bondsman, on-duty law enforcement officers, and current county employees;
16. Although not in writing, these exceptions are authorized by the County Commissioners
and security screening personnel do not have discretion to except other individuals, nor is
there evidence that the screening personnel vary from these authorized exceptions; and

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2 17. Finally, the Court finds that illegal drugs present a safety threat to everyone in the Chelan
3 County Courthouse in that newer drugs, such as Fentanyl, can kill or seriously impair
4 bodily functions with minimal absorption through skin or inhalation.

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CONCLUSIONS OF LAW

1. This court has jurisdiction over the above named defendant and the subject matter of each of this case;
2. No Washington court has directly addressed the constitutionality of warrantless courthouse security screenings;
3. In addressing the constitutionality of similar administrative searches under Art. I, §7, the Washington Supreme Court has cited with approval foreign cases upholding the constitutionality of such courthouse searches, *e.g. York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 324, 178 P.3d 995 (2008); *Jacobsen v. Seattle*, 98 Wn.2d 668, 672, 658 P.2d 653 (1983);
4. Relying on out of state cases, this Court finds persuasive *Downing v. Kunzig*, 454 F.2d 1230 (6th Cir. 1972); *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978); *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007); *Ohio v. Book*, 847 N.E.2d 52, 165 Ohio App. 3d 511 (2006); and *Commonwealth v. Harris*, 383 Mass. 655, 657, 421 N.E.2d 447 (1981) (“it was also reasonable to inspect any packages for such lethal nonmetallic contents as explosives or corrosive acid.”);
5. Looking to *McMorris*, the Court concludes that the search conducted here complied with Art. I, §7, based on implied consent by Mr. Griffith in that upon request he willingly gave Mr. Mattix his jacket for screening and had the opportunity to leave if he did not want to submit to the screening;
6. The Court also concludes that the search here was authorized by Art. I, §7, as an administrative search;
7. The search here qualifies as an administrative search because it was conducted as a part of a uniform scheme to search for weapons and other dangerous objects;
8. Although there are exceptions to these searches, this case is sufficiently different from *Book* because Mr. Mattix does not have discretion to decide who to let pass through security without screening and because Mr. Mattix screens everyone else uniformly;

1 9. Accordingly, the authorized exceptions in this case are more like those upheld in *Kunzig*
2 and *McMorris*;

3 10. Although an unlawful secondary purpose may invalidate an otherwise lawful
4 administrative search, the Court concludes that is not the situation here because the court
5 credits the testimony of Deputy Shaw that these are searches for dangerous objects only
6 and that the discovery of drugs is incidental to the search for dangerous objects; and

7 11. The court further agrees with *Book* that modern drugs such as Fentanyl pose a sufficient
8 danger to the public so as to justify being the object of an administrative search in the
9 courthouse setting in and of themselves and that such searches are also similar to the
10 search for nonmetallic explosives and acids authorized in *Harris*.

11 **ORDER**

12 The court denies Mr. Griffith's CrR 3.6 motion to suppress challenging the
13 constitutionality of the courthouse security search.

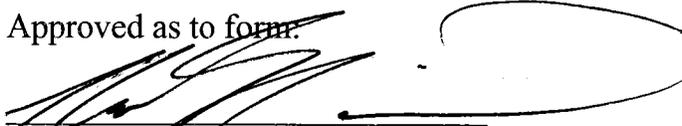
14 Entered in open court this  day of November, 2017.

15 
T.W. Small, Chelan County Superior Court Judge

16 Presented by:

17 
18 Andrew B. Van Winkle, WSBA #45219
19 Deputy Prosecuting Attorney
20 Chelan County

21 Approved as to form:

22 
23 Nicholas Yedinak, WSBA #20113
24 Attorney for Mr. Griffith
25

NIELSEN, BROMAN & KOCH P.L.L.C.

October 12, 2018 - 3:27 PM

Transmittal Information

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