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No. 35848-8-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 17-1-00092-3

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

LANNY LEE GRIFFITH,
Defendant/Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

“A safe courthouse environment is fundamental to the administration of justice. Employees, case participants, and members of the public should expect safe and secure courthouses.” GR 36(a). This case presents a question of first impression in Washington: under what circumstances are warrantless, suspicionless, courthouse security screenings constitutional administrative searches?

The issue of courthouse security first arose in the mid-20th century amid bombings of several federal building and hundreds more bomb threats, “resulting in substantial damage to property and massive evacuations of federal property.” 5 W. LAFAYE, *Search and Seizure* § 10.7(a), p. 367 (5th ed. 2012). Following these events, the General Services Administration (GSA) directed in 1970 that

at all entrances to federal property under the charge and control of GSA, where there are guards on duty, all packages shall be inspected for bombs or other potentially harmful devices. Admittance should be denied to anyone who refuses to voluntarily submit packages for examination.

Downing v. Kunzig, 454 F.2d 1230, 1231 (6th Cir. 1972), quoting GSA’s message of October 15, 1970. Long before the airplane hijackings on September 11, 2001, these incidents marked the beginning of the enhanced security measures we now take for granted at courthouses nationwide.

Despite nearly half a century of enhanced courthouse security screenings, the United States Supreme Court has never addressed these searches, except in dicta. In *Chandler v. Miller*, the Court implicitly approved of such searches when it stated: “We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’—for example, searches now routine at airports and at entrances to courts and other official buildings.” *Chandler v. Miller*, 520 U.S. 305, 323, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). The Supreme Court issued a similar caveat in favor of courthouse security searches in *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000) (“Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.”).

Nor has any Washington appellate court weighed in on this issue. It was in 2018 that Washington’s Supreme Court promulgated GR 36 to help guide efforts to deal with the evolving security issues faced by our courts.

Against this backdrop, the parties ask this Court to review the constitutionality of courthouse security screenings under both the State and Federal Constitutions.

II. COUNTER-STATEMENT OF ISSUES

1. Did the superior court err when holding that the courthouse security screening constituted a valid search for weapons under the Fourth Amendment?
2. Did the superior court err when holding that the courthouse security screening constituted a valid search for weapons under Article I, § 7?
3. Did Mr. Griffith preserve for review his challenge to his jury waiver, and if so, did he validly waive his right to a jury trial?
4. Is this the appropriate venue for Mr. Griffith to challenge imposition of newly discretionary financial obligations?

III. STATEMENT OF THE CASE

On January 6, 2017, Lanny Griffith (defendant/appellant) entered the fifth floor of the Chelan County Superior Courthouse. CP 37; 1 RP 7. Upon entering the fifth floor, from either the stairs or the elevator, Mr. Griffith would have seen Exhibit 1, informing him that all visitors were subject to security screening. CP 37; 1 RP 24. In Chelan County, private security officers conduct screenings at the entrances to our Superior Court, District Court, and Juvenile Court. 1 RP 6-7. Mr. Griffith also would have seen a security station consisting of a magnetometer and a desk-like kiosk manned by private security Ofc. Jim Mattix. 1 RP 7, 9. The County

Commissioners have not purchased x-ray scanners, so all bag, clothing, and parcel searches are conducted manually. 1 RP 9.

Chelan County Sherriff's Dep. Elgin Shaw is in charge of security on the county campus. 1 RP 44. He has held this position for over 14 years. 1 RP 44. Dep. Shaw personally trains and supervises the private security officers on how to conduct security screenings. CP 38; 1 RP 46-47. Ofc. Mattix is a private security officer with over 12 years of experience. 1 RP 6. At the time of the motion hearing, four of those years were with Chelan County. 1 RP 6. Under Dep. Shaw's direction, Ofc. Mattix also supervises the other private security officers. 1 RP 6.

Under Dep. Shaw's training, security screenings are exclusively for weapons. CP 38. He provides training on how to identify weapons and how to discover concealed weapons. 1 RP 66. Dep. Shaw trains that all visitors must remove all heavy jackets for manual screening. 1 RP 50. All bags are similarly checked. 1 RP 50. Anyone declaring a weapon or other contraband, including illegal drugs, prior to submitting to screening is directed to leave and secure those items elsewhere. 1 RP 50.

When security officers find prohibited items, whether those items are drugs or weapons, security officers are trained to immediately inform Dep. Shaw. 1 RP 52. With drugs, Dep. Shaw often tells the officer to secure the drugs and let the person continue about their business in the

courthouse. 1 RP 52, 63-64. Dep. Shaw also occasionally instructs the officers to detain individuals with contraband until he or a member of the Wenatchee Police Department (WPD) can respond. 1 RP 52-53.

However, searching for drugs is not a purpose of the security screening. As Ofc. Mattix testified, his duty under the contract with the County is, "Keeping all members of the public and staff safe and secure." 1 RP 6. The trial court explicitly found that the discovery of drugs is purely incidental to the search for weapons and not a purpose or goal during these searches according to the training received by the security officers. CP 38 (F.F. 5), 40 (C.L. 10).

Any individual not wanting to submit to screening may leave at any time down the stairs or elevator, prior to passing through the magnetometer. CP 37; 1 RP 33. Prior to submitting to screening, individuals have access to an approximately 10 foot by 12 foot area of the Fifth Floor, accessible from both stairs and elevator. 1 RP 33.

Mr. Griffith chose to proceed with screening. CP 38. Ofc. Mattix observed that Mr. Griffith wore a heavy Carhartt-style jacket. CP 38; 1 RP 9. Ofc. Mattix uniformly requires all individuals with heaving jackets to remove them and submit to manual screening before the individual may pass through the magnetometer. CP 38; 1 RP 7, 8. Ofc. Mattix requires the same for all bags, purses, packages, and other containers. CP 38.

Mr. Griffith handed over the jacket. CP 38. While hand-searching the outside of the jacket, Ofc. Mattix felt a soft bulky object in one of the pockets and removed it. CP 38; 1 RP 10. The object was in a Ziploc-type bag and contained a crystalline substance that Ofc. Mattix suspected to be methamphetamine. 1 RP 11, 61. Mr. Griffith claimed it was ground aspirin for his teeth. 1 RP 12. Before Ofc. Mattix could continue asking about the suspected methamphetamine, Mr. Griffith exited the Fifth Floor. 1 RP 12-13.

Ofc. Mattix searches soft objects as well as hard objects because of the risk that the object could be used as a weapon. 1 RP 37-38. Ofc. Mattix gave the example of fentanyl as a soft object that he worries could be weaponized. 1 RP 38. From Judge Small's further questioning, it is clear that Judge Small was also keenly aware of fentanyl's potential lethality. 1 RP 40-41.

As Ofc. Mattix testified: "I'm not just diving into people's things, looking for drugs. I'm looking for weapons" . . . "[a]nything that could harm somebody" and if it is drugs "incidental to that search for weapons" then he just "set[s] it aside" for Dep. Shaw to deal with. 1 RP 39, 41.

Ofc. Mattix's testimony on this point was supported by the statistics kept by Dep. Shaw on dangerous items and contraband discovered at the security stations. In January of 2017, security officers

seized: 223 knives, 43 Leatherman-type multi-tools, 7 sets of scissors, 27 containers of pepper spray, and 2 stun guns. 1 RP 54. These items were all found at the fifth floor security station manned by Ofc. Mattix in the same month Mr. Griffith sought entry. 1 RP 54. During that same time frame, only 6 items of drugs or drug paraphernalia were found by Ofc. Mattix (e.g. marijuana, heroin, methamphetamine, marijuana pipes, meth pipes, syringes, spoons with burnt drug residue, foil with burnt drug residue). 1 RP 54. For all of calendar year 2016, the fifth floor security station reported 1,972 knives compared to only 45 total instances of drugs or drug paraphernalia. 1 RP 55. Another 963 knives were reported at the district court security station, and 82 at the juvenile court station. 1 RP 55. For all three court levels, there were two instances where people arrived with firearms. 1 RP 55.

In 2015, the superior court security station reported 1,919 knives, district court reported 1,023 knives, and juvenile court reported 49 knives. 1 RP 56. There were also 6 stun guns among the three court levels. 1 RP 56. During 2015, the fifth floor security station only reported 72 instances of drugs/paraphernalia. 1 RP 56. In 2014, the superior court security station reported 2,282 knives, 14 stun guns, one firearm, and only 38 instances of drugs or drug paraphernalia. 1 RP 56-57.

Dep. Shaw also recounted an incident from a few years earlier where a local attorney brought a loaded handgun through the fifth floor security station. 1 RP 70. That attorney had the firearm in a zipped up nylon case within a hard briefcase. 1 RP 70. That attorney was subsequently convicted. 1 RP 70.

When people do not wish to submit to screening of their person, Ofc. Mattix asks them to leave. 1 RP 13. When people do not want their items searched, Ofc. Mattix directs them to store their items in one of the courthouse lock boxes or to leave the items in their car. 1 RP 14. Mr. Griffith did not make any statements indicating he did not want his jacket screened. 1 RP 14.

Ofc. Mattix made no attempts to prevent Mr. Griffith from leaving. 1 RP 13. When he left, Mr. Griffith took the jacket, but left his cell phone, wallet, pocket change, and other items he had placed on the kiosk upon approaching the security station. 1 RP 13. The object turned out to be a container of methamphetamine. CP 39. At the time Ofc. Mattix pulled it out, he did not know what it was and suspected it could have been a weapon. 1 RP 33. Specific to heavy jackets, he has discovered knives hidden in secret sewn-in pockets. 1 RP 33. Ofc. Mattix then secured the items and radioed to Dep. Shaw to respond. 1 RP 53. Dep. Shaw arrived,

and radioed to dispatch for WPD to respond.¹ 1 RP 53. WPD Ofc. Shawndra Duke responded. 1 RP 53-54, 75-77.

The State thereafter charged Mr. Griffith with one count of unlawful possession methamphetamine. CP 1-2. On June 21, 2017, Mr. Griffith filed a CrR 3.6 motion and memorandum in support of suppressing the drugs as the result of an illegal search. CP 16-22. The court took testimony on September 28th. CP 27; 1 RP 3-73. On October 12th, the court took additional testimony and argument from the parties. CP 34-35; 1 RP 74-107.

The trial court ultimately denied Mr. Griffith's motion. In denying the motion, the court relied on three independent bases. First, implied consent.² CP 39 (C.L. 5); 1 RP 78-79. Second, an administrative search wherein the discovery of drugs is only incidental to the search for weapons and not an objective of the search. CP 39 (C.L. 6-10); 1 RP 85-87. Third, an administrative search wherein the discovery of drugs is an actual objective of the search and permissibly so because of the ability to weaponize modern drugs. CP 40 (C.L. 11); 1 RP 87-88. Mr. Yedinak moved to strike the date already set for jury trial. 1 RP 88. He did this so

¹ WPD has investigatory jurisdiction over crimes occurring on the county campus.

² The State does not argue in support of implied consent. In the proceedings below, the State acknowledged that the implied consent justification for administrative searches was abandoned in recent decades. CP 31.

he could talk to his client about his options moving forward, including for a stipulated facts trial. 1 RP 88.

On November 7, 2017, the trial court entered written findings of fact and conclusions of law. CP 37-40; 1 RP 91. At that same hearing, Mr. Griffith's lawyer announced their intent to proceed with a stipulated facts trial. CP 41; 1 RP 91. The court scheduled the stipulated facts trial for December 13th. 1 RP 92. Eventually, the matter was rescheduled to January 24th.

On January 17, 2018, Mr. Griffith personally sent a letter to the court stating his disagreement with the court's findings and asking the court to dismiss his case. CP 42. Mr. Griffith made no statement concerning the plan to proceed with a stipulated facts trial.

On January 24th, Mr. Yedinak informed the court Mr. Griffith had reservations about going forward with a stipulated facts trial and asked for more time to talk to his client on how to proceed. CP 45. The court set the next hearing for January 29th. CP 45.

On the 29th, Mr. Yedinak represented that he and Mr. Griffith met and discussed whether to proceed without a jury trial. 2 RP 8. The parties attempted to proceed with the stipulated facts trial. CP 46. The parties submitted written stipulated facts for trial. CP 47-48. Mr. Griffith personally signed the document. CP 48. The court continued the matter

to allow time to research whether the court could stay the anticipated sentence pending appeal, as the parties were requesting. CP 46.

On February 7th, the court filed the written stipulation and conducted a bench trial on that stipulation. 1 RP 96-97. The court found Mr. Griffith guilty and proceeded to sentencing. CP 61; 1 RP 97. During sentencing, Mr. Griffith declined to make a statement, instead saying: “I don’t got nothing to say. I think Nick [Yedinak] covered everything.” 1 RP 102. The court followed the parties’ agreed recommendation. 1 RP 102. As agreed, the court stayed Mr. Griffith’s sentence pending appeal. CP 57, 61; 1 RP 99. Mr. Griffith concurrently filed a notice of appeal. CP 56. That notice only challenged the CrR 3.6 ruling. On March 9th, Mr. Griffith filed an amended notice of appeal also seeking review of the judgement and sentence and the stipulated facts. CP 62.

IV. ARGUMENT

Mr. Griffith presents four issues on appeal. First, he challenges the constitutionality of courthouse security searches under the Fourth Amendment. Second, he challenges the same under Art. I, § 7. Third, he seeks to vacate his conviction on the grounds that he did not knowingly waive his right to a jury trial. Finally, he seeks to strike discretionary legal financial obligations. That State addresses each of these issues in turn.

A. Courthouse Security Searches Do Not Violate the Fourth Amendment.

1. The Standard of Review is Mixed.

This Court reviews constitutional questions *de novo*, including warrantless searches. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.2d 513 (2002). The underlying factual circumstances are reviewed for substantial evidence. *Raven v. Dep't of Social & Health Services*, 167 Wn. App. 446, 461, 273 P.3d 1017 (2012). “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Price v. Kitsap Transit*, 125 Wn.2d 456, 464, 886 P.2d 556 (1994). This court will not review challenges to weight and credibility. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Thomas*, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004).

2. This Issue Is a Question of First Impression, Guided by Persuasive Federal and Out-of-State Precedent.

In order to be valid, a warrantless search must fall within a valid exception to the Fourth Amendment’s warrant requirement. *Id.* One such exception is the “area-entry search”—a subset of the broader administrative search exception. *United States v. Aukai*, 497 F.3d 955, 959 (9th Cir. 2007), discussing *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

Here, the State argued and the superior court agreed, that Ofc. Mattix's search fell within the bounds of the administrative search exception to the Fourth Amendment. CP 37-40. Noting this was a question of first impression in Washington, the superior court relied on persuasive federal and out-of-state authorities to craft its findings and conclusions. CP 39-40.

In such situations, this Court "has the same duty and authority as a federal circuit court to apply the United States Constitution and United States Supreme Court opinions in criminal matters." *State v. Lord*, 161 Wn.2d 276, 287, 165 P.3d 1251 (2007). "Decisions of the federal circuit courts are entitled to great weight but are not binding." *Schuster v. Prestige Senior Mgmt., LLC*, 193 Wn. App. 616, 628, 376 P.3d 412 (2016). "We have never held that an opinion from the Ninth Circuit is more or less persuasive than, for example, the Second, Sixth, Seventh, Eighth, or Tenth Circuits." *In re Pers. Restraint of Markel*, 154 Wn.2d 262, 271 n.4, 111 P.3d 249 (2005).

3. *United States v. Davis* Provides the Constitutional Framework for Assessing Area-Entry Administrative Searches.

In assessing the constitutionality of administrative searches under the Fourth Amendment, state and federal courts have applied the factors set forth by the Ninth Circuit in *Davis*:

[S]earches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.

* * *

Of course, routine airport screening searches will lead to discovery of contraband and apprehension of law violators. This practical consequence does not alter the essentially administrative nature of the screening process, however, or render the searches unconstitutional. . . .

* * *

To pass constitutional muster, an administrative search must meet the Fourth Amendment's standard of reasonableness. Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.

The need to prevent airline hijacking is unquestionably grave and urgent. The potential damage to person and property from such acts is enormous. The disruption of air traffic is severe. There is serious risk of complications in our foreign relations.

* * *

It is not fatal that the search of appellant's briefcase was conducted without a warrant. Under the indiscriminate screening procedures required by current regulations and applied in this case, the decision to search the carry-on luggage of a particular passenger is not subject to the discretion of the official in the field, and the only practical effect of a warrant requirement would be to frustrate the governmental purpose behind the search.

United States v. Davis, 482 F.2d 893, 908-911 (9th Cir. 1973)³ (citations and quotations omitted). Furthermore, “[t]he Fourth Amendment does not compel the Administration to employ the least invasive procedure or one fancied by [defendant].” *Corbett v. Transp. Sec. Admin.*, 767 F.3d 1171, 1182 (11th Cir. 2014); *Ruskai v. Pistole*, 775 F.3d 61, 69 (1st Cir. 2014) (same). In essence, the need for the search must be balanced against the degree of intrusion.

Furthermore, the parties generally agree on the constitutional framework for analyzing area-entry administrative searches. Br. of App. at 16-21. The only major difference is Mr. Griffith’s bald assertion that administrative searches are reviewed under “strict scrutiny,” not for reasonableness. Br. of App. at 16. But, “strict scrutiny” is a term of art from our First Amendment and Fourteenth Amendment case law. *E.g.* *Skinner v. Okla.*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).

Contrary to Mr. Griffith’s position, the block quote in his brief cited for this proposition clearly states that this Court reviews the search for necessity and reasonableness. *Id.* at 16, quoting *McMorris v. Alioto*,

³ The 4th Amendment justification discussed above comes from Part III of the *Davis* opinion. In Part V of that opinion, the *Davis* court also discussed an alternative justification for its result—a form of implied consent. *Davis*, 482 F.2d at 913-14. It is now widely-accepted that the *Davis* opinion’s alternative rationale based on implied consent is no longer good law, and furthermore that consent is not a necessary element under the Fourth Amendment. *See generally* 5 W. LAFAVE, Search and Seizure § 10.6(g) (5th ed. 2012); *United States v. Aukai*, 497 F.3d 955, 959-960 (9th Cir. 2007) (discussing *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972)).

567 F.2d 897, 899 (9th Cir. 1978). Although the *McMorris* opinion hauled out the term “strict scrutiny” in the sentence immediately preceding that block quote, the Ninth Circuit obviously did not use it as a term of art in the constitutional context. *See McMorris*, 567 F.2d at 899. Otherwise, the court would have applied the three magic talismans of strict scrutiny: “compelling government interest,” “narrowly tailored,” and “least restrictive means,” rather than the words it actually applied: “necessary” and “reasonable.” *United States v. Windsor*, 570 U.S. 744, 812, 133 S. Ct. 2675, 186 L.Ed.2d 808 (2013). Many reasonable government regulations have been struck down under a true strict scrutiny analysis. *See Reed v. Town of Gilbert*, ___ U.S. ___, 135 S. Ct. 2218, 2238, 192 L. Ed. 2d 236 (2015) (J. Kagan concurring) (“we may do well to relax our guard so that ‘entirely reasonable’ laws imperiled by strict scrutiny can survive”). And, the Ninth Circuit’s focus on reasonableness in *Davis*, *McMorris*, *Aukai*, demonstrates that the court was not using that term in its actual legal sense. The State is not aware of any case law applying a strict scrutiny analysis to searches under the Fourth Amendment, and urges this Court to not misuse this term of art.

Furthermore, state and federal courts alike have applied the *Davis* framework in some form or another time and again over the last 45 years. *Ruskai v. Pistole*, 775 F.3d 61, 68-69 (1st Cir. 2014) (airport); *United*

States v. Hartwell, 436 F.3d 174, 177 (3rd Cir. 2006) (airport); *Corbett v. Transp. Sec. Admin*, 767 F.3d 1171, 1179-81 (11th Cir. 2014) (airport); *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (airport) (hereafter *E.P.I.C.*); *California v. Hyde*, 12 Cal.3d 158, 165-66, 524 P.2d 830 (1974) (airport); *Downing v. Kunzig*, 454 F.2d 1230, 1232-33 (6th Cir. 1972) (courthouse); *McMorris v. Alioto*, 567 F.2d 897, 899-900 (9th Cir. 1978) (courthouse); *Justice v. Elrod*, 649 F. Supp. 30, 32 (N.D. Ill. 1986) (courthouse); *Barrett v. Kunzig*, 331 F. Supp. 266, 274 (M.D. Tenn. 1971) (courthouse); *Massachusetts v. Harris*, 383 Mass. 655, 657, 421 N.E.2d 447 (1981) (courthouse); *New Hampshire v. Plante*, 134 N.H. 585, 588-89, 594 A.2d 165 (1991) (courthouse); *Ohio v. Book*, 165 Ohio App. 3d 511, 515, 847 N.E.2d 52 (2006) (courthouse); *Smith v. Wash. Cnty.*, 180 Ore. App. 505, 43 P.3d 1171 (2002) (courthouse); *Minich v. Cnty. of Jefferson*, 919 A.2d 356, 359 (Commw. Ct. of Penn. 2007) (courthouse); *Rhode Island Defense Attorneys Ass'n v. Dodd*, 463 A.2d 1370, 1372 (1983) (courthouse); *Gibson v. Texas*, 921 S.W.2d 747, 762-63 (Tex. App. 1996) (courthouse); *Davis v. United States*, 532 A.2d 656, 662 (D.C. App. 1987) (federal building). In none of these cases was a “strict scrutiny” analysis applied.

4. Ofc. Mattix Did Not Violate the Fourth Amendment.

Mr. Griffith concedes that the Fourth Amendment supports the search regime overseen by Dep. Shaw. Br. of App. at 21. He does not dispute the importance of the governmental interest at stake or the manner in which Dep. Shaw instructs the private security officers to conduct the searches. “There is no dispute a limited courthouse search for weapons is permissible under the Fourth Amendment.” Br. of App. at 26. Rather, he claims Ofc. Mattix had an improper secondary motive to search for drugs. Br. of App. at 22.

a. Ofc. Mattix’s Subjective Motives Are Irrelevant.

Mr. Griffith spends a substantial portion of his brief attempting to cajole this Court into reweighing Ofc. Mattix’s credibility and impose a new finding that he had an improper secondary motive to search for drugs.

This argument fails for several reasons explained below, but the first is because the officer’s subjective motive is not relevant. “When the police conduct would have been the same regardless of the officer’s subjective state of mind, no purpose is served by attempting to tease out the officer’s ‘true’ motivation.” *United States v. Bowhay*, 992 F.2d 229, 231 (9th Cir. 1993).

Mr. Griffith relies on *Bulacan* to argue that Ofc. Mattix’s subjective intent is relevant. *United States v. Bulacan*, 159 F.3d 963 (9th

Cir. 1998).⁴ However, the search scheme in *Bulacan* was explicitly multifaceted: looking for weapons, drugs, alcohol, and gambling materials. 159 F.3d at 966. Subjectively, the security officer “was admittedly also looking for drugs and alcohol.” *Id.* But, the Ninth Circuit did not strike down that search because of the officer’s subjective motive. *Id.* at 967 (“The issue is not whether the officer’s subjective motive invalidates the search. The issue is whether the regulation under which the search was conducted is constitution”). Thus, the problem was that the regulatory scheme violated the *Davis* factors. *Id.*

Outside of *Bulacan*, which does not deal with the officer’s subjective beliefs, Mr. Griffith has failed to identify any authority that puts Ofc. Mattix’s subjective intent at issue. Accordingly, Ofc. Mattix’s intent does not merit review.

b. Ofc. Mattix’s Credibility Is Not at Issue on Appeal.

Assuming, *arguendo*, Ofc. Mattix’s subjective intent is relevant, Mr. Griffith’s argument still fails because it rests on reweighing Ofc.

⁴ *Bulacan* is one of only three cases cited by the parties where an administrative search at a courthouse or airport was ruled unconstitutional. The other two cases are *Book* and *\$124,570*. *Book* is discussed in greater detail below. *Ohio v. Book*, 165 Ohio App. 3d 511, 847 N.E.2d 52 (2006). *\$124,570*, has no bearing here because the problem with that search scheme was that the DEA monetarily rewarded officers of a separate agency (Flight Terminal Security—a private company precursor to TSA) for finding general contraband—thus transforming the searches into general criminal detection. *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1247 (9th Cir. 1989).

Mattix's credibility and the remainder of the argument is not properly developed for appellate review.

For this argument, Mr. Griffith cites to several alleged contradictions in Ofc. Mattix's testimony. *Id.* at 22-23. Mr. Griffith's argument fails because Finding of Fact 5 resolves those alleged inconsistencies. CP 38. The court expressly found that there was no improper secondary motive to search for drugs.

Mr. Griffith thinks the State has the burden by clear and convincing evidence to prove otherwise. Br. of App. 22. This argument confuses appellate review standards with standards for the trial court, and also confuses standards legal standards with factual standards. On appeal, findings of fact are reviewed for substantial evidence. *Raven v. Dep't of Social & Health Services*, 167 Wn. App. 446, 461, 273 P.3d 1017 (2012).

Although Mr. Griffith assigned error to Finding of Fact 5, he does not make an argument that it is not supported by substantial evidence. The closest he comes is asking this court to reweigh Ofc. Mattix's credibility, which this court will not do. *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994). The trial court "is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying." *Id.* Merely assigning error to the finding is not sufficient. It is his burden on appeal to present argument and citation to authority

explaining why that finding is not supported by substantial evidence. “By failing to provide argument and supportive citations, [Mr. Griffith] has waived his objections to the challenged findings.” *State v. Inman*, 2 Wn. App. 2d 281, 287, 409 P.3d 1138 (2018).

Mr. Griffith also tries to reweigh Ofc. Mattix’s credibility because Judge Small did not make an express finding of credibility. Br. of App. at 24. But, Judge Small is not required to make an express finding of credibility because the finding is implicit in his ruling. If Judge Small thought Ofc. Mattix lied, he necessarily would have ruled in Mr. Griffith’s favor. Appellate courts routinely turn away attempts to reweigh credibility on appeal merely because the trial court’s credibility determination was implicit, rather than explicit. *E.g. State v. Rangel-Reyes*, 119 Wn. App. 494, 500, 81 P.3d 157 (2003); *Trotzer v. Vig*, 149 Wn. App. 594, 611, 203 P.3d 1056 (2009).

c. Substantial Evidence Supports Finding of Fact 5.

Regardless, Finding of Fact 5 is more than supported by substantial evidence. The thousands of knives and other dangerous objects found by Ofc. Mattix on an annual basis, compared to the few dozen incidents of drugs and paraphernalia, supports Ofc. Mattix’s testimony that his search is for weapons, not drugs. The regular practice that both Ofc. Mattix and Dep. Shaw testified to of securing suspected drugs and then permitting

people go about their business at the courthouse also undercuts Mr. Griffith's claims on appeal. If the search was intended to find run of the mill drug crimes, Ofc. Mattix would detain every visitor found with drugs and personally call WPD to investigate every drug case, instead of handing the matter off to Dep. Shaw. Whether another judge would have found otherwise based on the testimony presented is not for this court to decide. *Maxfield*, 125 Wn.2d at 385.

d. The Trial Court Did Not Need to Resolve Finding of Fact 13 Because the Area-Entry Search Exception Permits Unrestricted Searches of All Personal Belongings.

Mr. Griffith also seeks to reweigh Ofc. Mattix's credibility because of Finding of Fact 13, where the court declined to resolve whether Mr. Griffith also had a cell phone in his jacket pocket. But, this court does not get to make that finding for Judge Small. In the event this Court believes that finding is necessary, the remedy is to remand for the trial court to make that finding. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (failure to enter written findings after bench trial required remand).

But, as stated in Finding of Fact 14, that finding was not necessary. Whether Mr. Griffith had a hard bulky object (i.e. the cell phone) in his pocket or just a soft object is completely irrelevant. This is because Ofc.

Mattix is unquestionably permitted to pull all the contents out of Mr. Griffith's jacket pockets.

Although such a search is not permissible under *Terry*⁵, allusions to *Terry* and its progeny are inapposite. As explained at length in *Davis* and *Hyde*, the constitutionality of administrative searches does not rest on *Terry*, and furthermore most administrative searches would actually fail under a *Terry* analysis. *Davis*, 482 F.2d at 904-910; *Hyde*, 12 Cal. 3d at 163-165. It is because routine airport and courthouse security screenings cannot be justified under *Terry*, that state and federal courts have developed the alternative factors requiring such searches to be uniform, part of a general scheme, reasonably effective, quasi-voluntary, etc.

In none of the cases cited by the parties is there any requirement that screenings of belongings are limited to an outer pat-down for objects that feel like weapons. The only case cited by Mr. Griffith in support of this position is *United States v. Casado*, 303 F.3d 440, (2d Cir. 2002). Br. of App. at 27. But, *Casado* is not an area-entry case. It involved a frisk for weapons during the course of a *Terry* stop. *Casado*, 303 F.3d at 441. Moreover, the jacket at issue in that case was being worn by the suspect during the search; in this case, Mr. Griffith was not wearing the jacket when it was searched. *Casado*, 303 F.3d at 442. As explained in *Davis*

⁵ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)

and *Hyde*, the *Terry* frisk line of cases runs parallel to administrative search case law, and neither line of cases have any bearing on the other. For these same reasons, Mr. Griffith's brief citations to *Garvin* and *A.A.* also fail to have any bearing on this case. Br. of App. at 29 (quoting *State v. A.A.*, 187 Wn. App. 475, 349 P.3d 909 (2015) and *State v. Garvin*, 166 Wn.2d 242, 207 P.3d 1266 (2009)).

Contrary to Mr. Griffith's assertions, the most recent case law supports even more invasive searches than those commonly found in courthouses and airports over the last 40+ years. In *Ruskai*, *Corbett*, and *E.P.I.C.*, the First Circuit, the Eleventh Circuit, and the D.C. Circuit, each upheld the implementation of advanced imaging technology (AIT). *Ruskai*, 775 F.3d 61; *Corbett*, 767 F.3d 1171; *E.P.I.C.*, 653 F.3d 1. AIT includes the millimeter wave scanners that we now see in every major airport in the country. These scanners produce extremely detailed and revealing images of people's bodies beneath their clothes, enabling TSA to detect liquid and powder weapons that magnetometers could never detect. *E.P.I.C.*, 653 F.3d at 3-4. Although these scanners are now programmed to generate slightly blurred images that are no longer of "pornographic" quality, they are still far more revealing and invasive than magnetometers ever were and also more invasive than the hand-search conducted in this case.

Furthermore, if the administrative search exception does not permit Ofc. Mattix to fully search the contents of Mr. Griffith's jacket pockets, then this Court and many other courts around the state need to make immediate changes. This Court can take judicial notice of the fact that it requires all entrants on oral argument days to submit their bags, briefcases, purses, and heavy coats to x-ray scanning. The fact that Chelan County does not have x-ray scanners for each of its three security stations does not affect this court's analysis. X-ray scanners are more intrusive than hand searches of containers because of the ability to reveal hidden compartments. Without question, an x-ray scanner would have revealed the exact same information that Ofc. Mattix revealed and more. Hand searches of bags are also far less intrusive than the millimeter wave scanners described at length and upheld in *Ruskai*, *Corbett*, and *E.P.I.C.*

Other courts grappling with these same facts have uniformly affirmed the search procedures used in this case. In *Plante*, the New Hampshire Supreme Court upheld an indistinguishable courthouse search where all visitors had to relinquish their personal items for manual inspection by the bailiff. *Plante*, 134 N.H. at 586. The defendant handed the bailiff her purse and the bailiff opened it. *Id.* Inside, he found a mental Sucrets container, opened it, and discovered marijuana. *Id.* at 587. The bailiff testified that he suspected it contained either illegal drugs or

dangerous weapons. *Id.* Being only 3.5 inches by 4.5 inches, such containers are unlikely to contain traditional weapons. *Id.* at 587. But, the New Hampshire Supreme Court upheld the search under the administrative search exception because modern weapons, including explosives, can be concealed in containers that small. *Id.* at 588.

Aside from *Plante*, manual (non-x-ray) searches of personal belongings have been upheld in *McMorris*, 567 F.2d at 898; *Barrett*, 331 F. Supp. at 270, 274; *Davis*, 532 A.2d 656 at 658; *Colorado v. Troutt*, 5 P.3d 349, 350 (Colo. App. 1999); *Rhode Island Defense Attorneys Ass'n*, 463 A.2d at 1371; and *Downing*, 454 F.2d at 1231. Notably, the search in *Troutt* was the manual opening of a small cigarette case, despite the presence of an x-ray scanner. *Troutt*, 5 P.3d at 350.

e. The Administrative Search Exception Permits Searches for Dangerous Drugs and Other Non-Metallic Weapons.

As discussed above, Judge Small explicitly found that the administrative search in this case did not contain an improper motive to search for drugs, and that that finding is supported by substantial evidence. Independent of that ruling, Judge Small also ruled that the administrative search exception actually permits explicit searches for dangerous drugs. CP 40 (Conclusion of Law 11).

Mr. Griffith relies on the *Bulacan* decision to argue against Conclusion of Law 11. In *Bulacan*, the Ninth Circuit held that a search scheme instructing all officers to search for drugs fell outside the bounds of the administrative search exception. This was because security officers were instructed to search broadly for any regulatory violations, including any illegal drugs, alcohol, and gambling materials, and because the officers had too much discretion in deciding what objects to search. *Bulacan*, 156 F.3d at 966-67, 970.

However, it is important to note that the Ninth Circuit explicitly did not rule on whether a search for drugs could ever be a valid secondary purpose. *Id.* at 973. Rather, the court just noted that “the Government has not shown that its interest in search for these items outweighs the public’s interest in privacy” meaning, the government had not shown that illegal drugs “present an immediate threat to the occupants” of the federal building. *Id.* at 973-74.

Unlike in *Bulacan*, the trial court here heard testimony, and explicitly found that modern day designer drugs, like fentanyl, do present an immediate threat to people working at and visiting the courthouse. CP 39-40 (Finding of Fact 17, Conclusion of Law 11). In reaching this conclusion, the court looked to *Book* for guidance. CP 40, citing *Ohio v. Book*, 165 Ohio App. 3d 511, 847 N.E.2d 52 (2006). In *Book*, Ohio’s

court of appeals upheld a security officer's explicit search for drugs during security screenings because "[t]he presence of illegal drugs can jeopardize the safety of anyone in the courthouse." *Book*, 165 Ohio App. 3d at 516.

Mr. Griffith calls this dicta, but that is incorrect. Whether a search of drugs was permissible was directly at issue because the lower court had initially granted suppression because "the administrative search for the drugs 'went beyond the scope of a search for weapons.'" *Id.* at 513 (quoting the trial court's ruling). The fact that the appellate court in *Book* ultimately affirmed on other grounds⁶ does not transform the underlying issue into dicta—it was still necessary to rule on the underlying issue before seeking out alternative grounds on which to affirm.

Mr. Griffith also mischaracterizes the trial court's ruling in this case as a simply choosing *Book* over *Bulacan*, and because he believes *Book* is dicta, that this court should choose *Bulacan* instead. Br. of App. at 24-25. Again, that mischaracterizes both *Book* and *Bulacan*. For the reasons already stated, *Book* was not dicta and *Bulacan* did not hold that drugs could never be a basis for an administrative search. Rather, *Bulacan* simply held that the government had not presented evidence in that case concerning the physical risk that drugs posed to visitors—thus leaving

⁶ We know that the majority in *Book* affirmed on other not addressed below because the dissent chastised the majority for not remanding with instructions for the trial court to decide the issue in the first instance. *Book*, 165 Ohio App. 3d at 518.

open the possibility for the government to make such a showing in the future. *Bulacan*, 156 F.2d at 973-74.

To say that *Bulacan* foreclosed the possibility that advancements in drugs could be weaponized, and thus the proper object of a search, would be to commit the same error that the appellant did in *Ruskai*. There, the appellant challenged the implementation of millimeter wave scanners on the grounds that the *Albarado* decision definitively held that magnetometers were enough. *Ruskai*, 775 F.3d at 70-71 (discussing *United States v. Albarado*, 495 F.2d 799 (2nd Cir. 1974)). Rejecting that argument, the First Circuit explained:

Albarado rests on a presumption that the principal risk is metallic weapons, and thus implies that searches for nonmetallic weapons must be limited to situations in which airport security otherwise comes lawfully upon a container which may conceal such items. . . . Taken to its logical conclusion, those presumptions would mean that TSA could not search administratively for nonmetallic weapons without individualized suspicion, at least if there were no AIT technology available. We doubt that the *Albarado* court itself would so hold if it had the benefit of considering TSA's well-supported findings that nonmetallic weapons are now the principal threat.

Ruskai, 775 F.3d at 70-71 (quotations omitted). As recognized in *Ruskai*, *E.P.I.C.*, and *Corbett*, the credible threats to our safety are no longer limited to guns and knives. Courthouses and airports alike are threatened

by a host of modern nonmetallic objects, including explosives and corrosive acids. *Rhode Island Defense Attorneys Assn.*, 463 A.2d at 1372.

As evidence of these threats, many recent area-entry cases have relied on Homeland Security's 2013 findings in 78 FR 18287. *Ruskai*, 775 F.3d at 70; *Corbett*, 767 F.3d at 1180. These findings were the basis for TSA's implementation of AIT in airports. In this notice of proposed rulemaking, Homeland Security recounted the following incidents where standard screening failed or would have failed to protect the public:

- Dec. 22, 2001: a man on board an airplane attempted to detonate a non-metallic bomb in his shoe.
- 2006: a terrorist plot was uncovered to build a bomb mid-flight by using liquid explosives.
- Dec. 25, 2009: a terrorist attempted to blow up an airplane using a non-metallic explosive hidden in his underwear.
- 2010: terrorists attempted to blow up airplanes with non-metallic explosives hidden in printer cartridges.
- 2012: counterterrorism operatives successfully recovered a non-metallic explosive intended to be smuggled aboard an aircraft in a suicide bomber's underwear.

78 FR 18291. In *Gibson*, the Texas Court of Appeals took judicial notice of recent courthouse shootings and the Oklahoma City federal building bombing as evidence of the important government interest. *Gibson*, 921 S.W.2d at 755. Based on these cases and the events cited therein, it is clear that the Fourth Amendment has evolved to keep up with the current

world in which we live, where the principal threats to our safety are not limited to traditional weapons.

f. Fentanyl and Other Designer Drugs Are Readily Weaponized.

Implicitly acknowledging that dangerous drugs can be the basis for an administrative search, Mr. Griffith then claims “the myth that fentanyl can kill upon touch has largely been debunked.” Br. of App. at 26. In support, Mr. Griffith gives a cursory citation to a radio interview, an *opinion* piece in the New York Times, and a piece from CBS. *Id.* at fn. 4.⁷ Contrary to Mr. Griffith’s narrow focus on risk of death and non-official sources, fentanyl can kill, seriously injure, harm, and generally disrupt courthouse proceedings even in instances of small dose exposure. The administrative search exception is aimed at remedying all of these ills, not simply mitigating the risk of death alone. In support, the State directs this Court to actual facts from official government sources.

More importantly, Mr. Griffith’s sources only speak to the risk of *accidental* exposure to first responders. His sources are completely silent on the toxicity of fentanyl and similar drugs when used intentionally as a weapon.

⁷ Mr. Griffith also attempts—for the first time on appeal—to assail Ofc. Mattix’s qualifications to testify. But, any attack on Ofc. Mattix’s qualifications and testimony, was waived when Mr. Griffith failed to object to its admissibility. “Failure to object to evidence at trial precludes appellate review.” *State v. Brown*, 128 Wn. App. 307, 312, 116 P.3d 400 (2005).

In 2017, the National Institute for Occupational Safety and Health (NIOSH), an agency of the Centers for Disease Control and Prevention (CDC), published recommendations for how to “address a wide area release of fentanyl as a weapon of terrorism.” *FENTANYL: Incapacitating Agent*, NAT’L INST. FOR OCCUPATIONAL SAFETY AND HEALTH, (May 12, 2011), *available at* https://www.cdc.gov/niosh/ershdb/EmergencyResponseCard_29750022.html.⁸ According to the CDC, fentanyl can be absorbed via inhalation, ingestion, and skin contact. *Id.* It can be disseminated into indoor air as fine particles or liquid spray, it can be used to contaminate water, and it can be used to contaminate food. *Id.*

The CDC is not the only federal agency preparing for a terrorist attack involving high powered opioids. In 2018, the Biomedical Advanced Research and Development Authority (BARDA), an office of the United States Department of Health and Human Services (DHHS), penned a \$4.6 million contract with Opiant Pharmaceuticals to develop a more effective version of naloxone⁹ as a countermeasure in the event of an opioid-based attack by terrorist attack. *Opiant Pharmaceuticals Announces Contract with Biomedical Advanced Research and*

⁸ In this CDC report, NIOSH noted that the Russian military had already used a “fentanyl derivative” gas as a weapon during a hostage crisis in 2002.

⁹ Naloxone is the anti-overdose drug currently given to patients suspected of an opioid overdose. As indicated in this press release, it can take multiple doses of this and other existing drugs to reverse a fentanyl overdose.

Development Authority for Up to \$4.6 Million to Accelerate Development of OPNT003, Nasal Nalmefene, for Treatment of Opioid Overdose, OPIANT PHARMACEUTICALS, INC., (Sept. 20, 2018), available at <https://ir.opiant.com/news-releases/news-release-details/opiant-pharmaceuticals-announces-contract-biomedical-advanced>.

Furthermore, Mr. Griffith's news sources do not support his bold claim about a "debunked" "myth." At just before the 3-minute mark, the interviewee in the Vermont Public Radio article admitted that accidental fentanyl exposure is a real risk to first responders. The interviewee admits that it can be absorbed by the skin, but claims that it takes hours to absorb. Yet, the interviewee still recommended that first responders wear gloves to avoid absorption.

Regarding accidental inhalation, the interviewee says the risk of airborne exposure is small when walking into a room with fentanyl because it does not stay in the air long. The interviewee did not talk about toxicity if intentionally put into the air or accidentally like the officers in the DEA report. He just said these were "unlikely" scenarios. But whether or not these *accidental* events are likely to occur does not mean that when they occur that exposure would not be highly toxic and/or fatal.

Indeed, these events do occur. In May of 2018, an Ohio man pleaded guilty to assaulting a police officer who accidentally overdosed on

fentanyl following a vehicle search. *Ohio man pleads guilty after cop's accidental fentanyl overdose*, THE NEWS-HERALD, (Mar. 13, 2018), available at: https://www.news-herald.com/news/ohio/ohio-man-pleads-guilty-after-cop-s-accidental-fentanyl-overdose/article_7fbe9657-d86e-526d-a687-743dca060d86.html. The officer was wearing gloves and a mask when conducting the search, but later ingested fentanyl after touching some of the powder that had gotten onto his shirt. *Id.* It took four doses of naloxone to revive the officer. *Id.*

Even though absorption through the skin is not immediate, that is not the whole story. The real risk with skin contact is secondary ingestion through rubbing your eyes or putting your fingers in your mouth. In 2017, the American Council on Science and Health (a non-profit consumer advocacy organization of scientists and medical professionals), published an article on the fentanyl shopping cart scare. There was a rumor in the media that a child was killed from fentanyl left on the handle of a shopping cart. The Council stated that there was no evidence of this happening and that skin contact alone was unlikely to kill, but that people “are focusing on the wrong organ.” According to Dr. Josh Bloom, Director of Chemical and Pharmaceutical Science at the Council, there was a real risk to health from touching the substance and then absent-mindedly putting your fingers in your mouth. Dr. Josh Bloom, *Have a*

'Fentanyl on a Shopping Cart' Question? Call ACSH, AMER. COUNCIL ON SCI. AND HEALTH (Nov. 10, 2017), available at <https://www.acsh.org/news/2017/11/10/have-fentanyl-shopping-cart-question-call-acsh-12131>.

The opinion piece cited by Mr. Griffith from the New York Times, is just as narrowly focused on skin absorption as the opinions expressed in the Vermont Public Radio interview. The Times opinion, completely neglects the real fact that people regularly rub their eyes and put their fingers in their mouths without thinking. The authors' claim that fentanyl is only dangerous in "high quantities" is flat out contradicted by both the EPA and the DEA.

In 2016, the DEA issued a press release and instructional video for law enforcement officers on how to handle fentanyl. *DEA Warning To Police And Public: Fentanyl Exposure Kills*, DRUG ENFORCEMENT ADMIN. (June 10, 2016), available at <https://www.dea.gov/press-releases/2016/06/10/dea-warning-police-and-public-fentanyl-exposure-kills>.¹⁰ In the video, the DEA notes that the physical equivalent of a few grains of sand is enough to kill. Because of fentanyl's high toxicity, the DEA recommends that law enforcement agencies immediately stop field testing drugs suspected of containing fentanyl. The video includes an interview with

¹⁰ The referenced video can now be accessed from the Justice Department's official YouTube page. The Justice Dep't, *Roll Call Video Warns About Dangers of Fentanyl Exposure*, YOUTUBE (June 7, 2017), <https://www.youtube.com/watch?v=8MLsrleGLSw>.

two police officers from New Jersey who suffered respiratory distress and disorientation simply from breathing a small amount of fentanyl that was released into the air when one of the officers squeezed the air out of a bag while sealing it. *Id.* In the courthouse context, a similar scenario could be created to temporarily incapacitate jailers and security staff to permit an escape attempt of a high risk inmate during court proceedings. Or, in a less pernicious scenario, an accidental exposure in the courtroom could incapacitate a jailer or create confusion sufficient enough for an opportunistic inmate to disarm a jailer or attempt an escape.

The DEA notes that fentanyl is lethal at the 2-milligram range, depending on the exposure method. *DEA Issues Carfentanil Warning To Police And Public*, DRUG ENFORCEMENT ADMIN. (September 22, 2016), available at <https://www.dea.gov/press-releases/2016/09/22/dea-issues-carfentanil-warning-police-and-public>. According to the EPA, the absorption rate and biological efficacy of fentanyl exposure via inhalation is almost equal to intravenous exposure. *Fact Sheet for OSCs: Fentanyl and Fentanyl Analogs*, p. 3, ENVIRONMENTAL PROTECTION AGENCY (May 22, 2018) available at https://www.epa.gov/sites/production/files/2018-07/documents/fentanyl_fact_sheet_ver_7-26-18.pdf. The EPA also agrees with the DEA that fentanyl is lethal at the 2-milligram range. *Id.* Given that just a few grains of fentanyl can kill when introduced intravenously

and that fentanyl is almost just as potent when breathed, it is not a “myth” to say that fentanyl is dangerous and readily weaponized, especially in an enclosed area—such as a courtroom.

Fentanyl is not the only drug posing a serious security risk to courthouses. Now, the DEA is warning about the risks of carfentanil, which is approximately 100 times more potent than fentanyl. *DEA Issues Carfentanil Warning To Police And Public*. Ohmefentanyl is many times more potent than both. By one estimate, a poppy seed’s worth (300 micrograms) of ohmefentanyl is enough to kill 1,900 people. *See* Dr. Josh Bloom, *If You Think Fentanyl Is Bad . . .*, AMERICAN COUNCIL ON SCIENCE AND HEALTH (Jan. 17, 2017), *available at* <https://www.acsh.org/news/2017/01/17/if-you-think-fentanyl-bad-10663>.

The TSA, the DEA, the EPA, and the DHHS, are all preparing for the day when illegal drugs like fentanyl are used in an act of chemical terrorism. They are spending millions of dollars to develop countermeasures, to train law enforcement and first responders on how to not get poisoned themselves, and how to detect these threats before they occur. Whether it comes from an overt act of terrorism or just accidental exposure, the risk posed by modern designer drugs is real. Accordingly, the superior court did not err in finding that modern drugs justify being the object of a protective area-entry search in and of themselves.

B. Courthouse Security Searches Do Not Violate Art. I, § 7.

Mr. Griffith also challenges the constitutionality of the courthouse security searches under Article I, § 7, of the Washington State Constitution. It is now well-accepted that Washington's constitution generally provides greater protections against searches and seizures than the Fourth Amendment. *State v. Chenoweth*, 160 Wn.2d 454, 462, 158 P.3d 595 (2007) ("In some areas [this provision] provides greater protections than does the federal constitution."). As this quotation reminds us, not every Fourth Amendment issue receives greater protection under Article I, § 7. Thus, this Court's inquiry should be into whether Washington has afforded greater protections to area-entry searches.

1. Washington Relies on Federal Precedent for Guidance When Interpreting Art. I, § 7, in Area-Entry Search Cases.

In *Wadsworth*, our State Supreme Court took direct review of a case involving a courthouse search. *State v. Wadsworth*, 139 Wn.2d 724, 725, 991 P.2d 80 (2000). The search in that case involved the discovery of a weapon during the course of an x-ray bag search at the Kitsap County courthouse. *Id.* at 728. Notably, no one even questioned the constitutionality of the search. Instead, the only issue on appeal was whether the Legislature had impermissibly delegated the courts the ability to designate where weapons are prohibited. *Id.* at 725. While *Wadsworth*

is not precedential with respect to this case, it implies that such searches do not offend Washington's constitution.

This result is confirmed when looking at other Washington cases where administrative searches were directly at issue. While Washington's Supreme Court has never directly ruled on the constitutionality of courthouse searches, it has cited to federal case law with approval when analyzing administrative search cases under Art. I, § 7. In *York*, the 4-person lead opinion of Justice Sanders struck down suspicionless drug testing of student athletes. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 324, 178 P.3d 995 (2008) (lead opinion of J. Sanders). In that same lead opinion, the Court held up *Davis* and *Downing* as examples of searches that would be permissible under Art. I, § 7. *Id.* at 323-24.

Although the lead opinion struck down the drug testing, a majority of the Court made up of Justices Madsen, C. Johnson, Fairhurst, and Bridge in one opinion and Justice J. Johnson in another held that suspicionless testing would be permissible under the "special needs" exception under Article I, § 7, but not in the manner conducted by the district in that case. *Id.* at 316-329, 330-346. Thus, by looking at federal administrative search cases to interpret Art. I, § 7, and by holding that suspicionless drug testing of athletes *could be* constitutional under certain

circumstances, it appears that Washington does not provide much—if any—greater protection to citizens during administrative searches.

In *Jacobsen*, the Washington State Supreme Court reviewed whether pat-down searches at rock concerts were valid administrative searches under Article I, § 7. *Jacobsen v. Seattle*, 98 Wn.2d 668, 672, 658 P.2d 653 (1983). Relying on *Downing* as setting the standard for administrative searches, our Supreme Court found that pat-down searches at rock concerns were not valid. *Id.* The Court then contrasted the pat-down search with what it held up as acceptable conduct in *Downing*. *Id.* at 673-74. Again, the Court relied on federal precedent to rule on administrative searches under our State Constitution. Accordingly, our Supreme Court has a history of relying on federal precedent in the context of area-entry search cases.

2. General Rule 36 Promotes Interpreting Art. I, §7, to Permit Physical Examination of Personal Items at Courthouse Security Stations.

Additional support can be found in the Supreme Court’s newly promulgated General Rule 36:

Every Court shall endeavor to meet or exceed the following minimum standards. . . . (2) Weapons screening by uniformed security personnel at all public entrances. Uniformed security personnel shall perform weapons screening at all public entrances, using as a minimum metal-detector wand screening **and physical examination of bags, briefcases, packages, etc.**

GR 36(g)(2) (emphasis added). GR 36 demonstrates that our courts are now taking a critical look at the safety of all courthouse visitors.

To this end, GR 36 sets a minimum standard for courthouse entry searches and appears to encourage courts to adopt higher standards of thoroughness. Importantly, the floor set by GR 36 explicitly encourages “physical examination” of personal items, and does not limit itself to a *Terry*-style pat-down of the outside of personal belongings. The promulgation of this broad rule by our Supreme Court, after notice and comment rulemaking, is further evidence that Art. I, § 7, is largely co-extensive with the Fourth Amendment with respect to area-entry searches.

3. Other States Reviewing These Searches Uphold Them Under Their Unique Constitutional Provisions.

Like Washington, Oregon, New Hampshire, and Pennsylvania all provide greater protection from searches under their own constitutions than what the Fourth Amendment provides. All have upheld courthouse searches similar to that at issue here under their unique constitutional provisions. *Plante*, 134 N.H. at 589 (N.H.); *Smith*, 180 Ore. App. 507; *Minich*, 919 A.2d 356, 359 (Commonwealth Ct. of Penn). Moreover, the facts in *Plante* are almost indistinguishable from the facts in this case. Although none of these states’ constitutions are verbatim the same as Washington’s, the fact that other states providing greater protection than

the Fourth Amendment have upheld similar searches is persuasive authority that the search here does not offend Art. I, §7.

4. Mr. Griffith Misplaces His Reliance on *Mesiani*, *Kuehn*, and *Jorden*.

Mr. Griffith cites to *Mesiani* (striking down sobriety checkpoints) to argue that Art. I, § 7, does not support administrative searches like the one that occurred here. Br. of App. at 40 (discussing *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988)). But, *Mesiani* has no bearing on the constitutionality of area-entry administrative searches.

Under *Davis* and *Downing*—the cases cited by our Supreme Court as examples of proper administrative searches—the result in *Mesiani* would have been the same. That is because *Mesiani* was a search for run of the mill criminal activity, and it was for detection of criminal activity that is regularly detected under traditional reasonable suspicion standards. One of the justifications for administrative searches is that the ill that it seeks to remedy cannot be reliably detected under *Terry* and its reasonable suspicion standard. *Davis*, 482 F.2d at 907.

Moreover, the holding in *Mesiani* was partially premised upon Washington’s recognition of a “privacy interest of individuals and objects in automobiles.” *Mesiani*, 110 Wn.2d at 457. People visiting courthouses do not share the same privacy interests. A courthouse is owned by the

People and is a public place of business. Automobiles are private chattel. Except in very limited cases, everything that occurs in a courthouse is open to the public, and when business is conducted in private, the public still has a say prior to that closure. WA. CONST. ART. I, § 10; *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).

Although the United States Supreme Court subsequently approved of suspicionless DUI checkpoints, it did not do so on the basis of a valid administrative search. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 447-455, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990). Moreover, *Sitz* has no precedential value beyond its facts. It was a plurality opinion of four justices, with four dissenting, and the fifth vote came from Justice Blackmun who concurred in the judgment only—not the reasoning. *Id.* at 455-56. Reliance on *Sitz* in the administrative search context is misplaced.

Mr. Griffith also relies on *Kuehn* to argue that Art. I, §7, provides greater protection in the administrative search context. *Kuehn v. Renton Sch. Dist.*, 103 Wn.2d 594, 694 P.2d 1078 (1985). *Kuehn* involved suspicionless searches of student belongings prior to field trips for “disruptive” items, which could mean anything from weapons to whoopee cushions. *Kuehn*, however, was not an Art. I, §7, case—it was a Fourth Amendment case: “The school officials, subject to Fourth Amendment restrictions, did not comply with the reasonable belief standard.” *Id.* at

602. *Kuehn* is more like *Collier*, where a federal district court struck down suspicionless purse searches at college games because the searches were admittedly for contraband, not weapons. *Collier v. Miller*, 414 F. Supp. 1357, 1360 (S.D. Tex. 1976). For all these reasons, *Kuehn* has no bearing on this case.

Mr. Griffith also relies on *State v. Jorden*, 160 Wn.2d 121, 156 P.3d 893 (2007) (suspicionless search of motel registry). But, *Jorden* was not an *area-entry* case, or even any form of an administrative search case.

Accordingly, Mr. Griffith cannot cite to a single area-entry search case where our courts have diverged under Art. I, § 7, from Fourth Amendment precedent. To the contrary, *York* and *Jacobsen* show that our Supreme Court has historically looked to federal area-entry search cases when interpreting Art. I, § 7. Finally, the broad authority granted by GR 36 and the experience of other states similar to Washington further support finding that the search here does not offend Art. I, § 7.

C. Mr. Griffith Failed to Preserve His Claim Regarding Jury Waiver and Alternatively He Knowingly Waived His Right to a Jury Trial.

Mr. Griffith claims he is entitled to remand for a new trial because the trial court did not extract a valid waiver of Mr. Griffith's right to a jury trial. Mr. Griffith's argument fails first because he did not preserve this

error for review and second because the record sufficiently demonstrates his knowing and voluntary wish to waive his right to a jury trial.

Concerning preservation, neither Mr. Griffith, nor his lawyer, objected to the use of a stipulated facts trial. This court “do[es] not consider unpreserved errors raised for the first time on review.” *State v. Chacon*, No. 95194-2, slip op. at 2 (Wash. 2018). The only exception is if Mr. Griffith can demonstrate that this is a “manifest error affecting a constitutional right” per RAP 2.5(a)(3). *Chacon*, slip op. at 2.

In order to be manifest, there must be some evidence in the record below that “the substance of a constitutional error be readily identifiable at the time of trial, based on the record before the court.” *State v. Aljaffar*, 198 Wn. App. 75, 88, 392 P.3d 1070 (2017). In the *Aljaffar* case, this Court found that use of an uncertified interpreter at trial was not manifest because the record contained no evidence that the interpreter provided meaningfully inaccurate interpretations. *Id.* Similarly, there is no evidence in this record that failure to obtain a valid waiver of the defendant’s right to a jury trial was readily identifiable to the trial court. To the contrary, Mr. Griffith’s lawyer represented to the lower court on January 24th that a waiver had already been obtained. 2 RP 3 (1-24-18).

Prejudice is a high burden. In other cases, new theories for suppression have been held not to be manifest even though success would

mean dismissal of the entire case. *E.g. State v. Trout*, 125 Wn. App. 313, 315, 103 P.3d 1278 (2005); *State v. Contreras*, 92 Wn. App. 307, 312, 966 P.2d 915 (1998). Moreover, the error must not be one “that the appellant *deliberately* chose not to litigate below.” *Trout*, 125 Wn. App. at 318. If there was an error it was one that Mr. Griffith deliberately chose not to litigate below, as evidenced by his lawyer’s representations to the court and Mr. Griffith’s personal signature on the stipulated facts.

Furthermore, neither the notice of appeal, nor the amended notice, seek review of the waiver of Mr. Griffith’s right to a jury trial. CP 56, 62. The amended notice of appeal “seek[s] review . . . [of the] stipulated facts,” but it does not specifically state that Mr. Griffith seeks review of his waiver/non-wavier of jury trial. CP 62. By its plain terms, the amended notice of appeal only seeks review of the physical document entitled “Stipulated Facts” found at CP 47-48. This suggests that Mr. Griffith did in fact wish to waive his right to a jury trial. Alternatively, if any error did occur it is a matter of ineffective assistance of counsel—but, Mr. Griffith does not claim that he received ineffective assistance.

If the Court finds this insufficient, it should remand for a reference hearing. In *Wicke*, the Supreme Court contemplated a reference hearing, but did not because it was an “uncomplicated” case. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). As indicated in the report of

proceedings, Mr. Griffith's lawyer was under the impression in late January that the court had already conducted a waiver colloquy with Mr. Griffith near the time that we had conducted the motion hearing. 2 RP 3 (1-24-18). Furthermore, at that same hearing on the 24th, the transcript indicates that there was a discussion held off the record immediately following the discussion about the stipulated facts trial. 2 RP 4 (1-24-18). The State recalls this being a hushed attorney-client discussion presumably about whether to proceed with a stipulated facts trial, and that is why it was not reported. If the Court remanded for a reference hearing, the trial court could take evidence on the conversations Mr. Yedinak had with Mr. Griffith concerning waiver of his right to a jury trial.

At the outset of this motion, Mr. Yedinak stated: "And just as I've mentioned, before, this motion is dispositive. There will be no trial, either way it goes." 1 RP 4 (9-27-18). Mr. Yedinak also noted several times that the stipulated facts trial was part of an overall agreement to stay the case pending appeal. 2 RP 10, 12 (1-29-18); 1 RP 95, 98 (2-7-18). At sentencing, Mr. Yedinak also alluded to the fact that there was a joint recommendation to impose the low-end of the standard range. 1 RP 101 (2-7-18). That is accurate. Although there was not a plea bargain—because the defendant did not plead guilty—the parties struck a bargain to recommend the low end of the standard range and to stay the sentence

pending appeal in exchange for Mr. Griffith agreeing to a stipulated facts trial. The fact that Mr. Griffith's trial counsel did not designate the stipulated facts trial in his notice of appeal, is further evidence that Mr. Griffith made a knowing and voluntary waiver of his right to a jury trial. Again, a reference hearing could put on the record the details of the parties' pre-trial negotiations in this matter. All of these things could help the court decide whether Mr. Yedinak adequately advised his client concerning waiver of his right to a jury trial.

D. This Court Should Either Decline to Review Mr. Griffith's LFO Claims or Remand to Reassess Mr. Griffith's Legal Financial Obligations.

For the first time on appeal, Mr. Griffith challenges the imposition of legal financial obligations. This Court may decline to review such challenges when raised for the first time on appeal:

A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review. It is well settled that an 'appellate court may refuse to review any claim of error which was not raised in the trial court.' RAP 2.5(a).

State v. Blazina, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Declining to review this issue does not foreclose the defendant from ever obtaining review. It just requires him to file a motion to remit under RCW 10.01.160 or wait until the State seeks enforcement.

If the Court chooses to review this issue, this Court applies the “abuse of discretion standard of review . . . to the broad question of whether discretionary LFOs were validly imposed” *State v. Ramirez*, 191 Wn.2d 732, 741-42, 426 P.3d 714 (2018).

Mr. Griffith specifically challenges the imposition of the \$200 criminal filing fee and the \$100 DNA collection fee. At the time of sentencing, these fees were mandatory. *See* former RCW 36.18.020(2)(b) and former RCW 43.43.7541. Accordingly, the trial court neither erred, nor abused its discretion, at sentencing. But, during the pendency of this appeal, the law has changed, making these two fees discretionary; the latter is only discretionary when the defendant DNA has been previously taken and typed. LAWS OF 2018, c 269. Per *Ramirez*, this change applies prospectively to Mr. Griffith’s case and this court may remand for the trial court to consider whether Mr. Griffith is entitled to relief with respect to the \$200 filing fee. *Ramirez*, 191 Wn.2d at 750.

With respect to the DNA collection fee, the State refers the Court to *State v. Thibodeaux*, No. 76818-2-I (2018). It is improper for this Court to order the trial court to strike this fee when the record does not contain any evidence that the defendant’s DNA was ever taken and typed. *Thibodeaux*, slip op. at 8. The fact of a prior felony conviction does not mean the defendant actually ever had his DNA taken and typed. *Id.* at 8-9.

(“Because the existing record does not establish that the State has already collected Thibodeaux’s DNA, he has not demonstrated that it was impermissible to impose the collection fee.”). Accordingly, the defendant has not met his burden of proof with respect to this claimed error.

V. CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully asks this Court to affirm the judgment of the Superior Court that the search in this case was a valid area-entry search for weapons under both the Fourth Amendment and Art. I, §7. Regarding the other issues, the Court should hold that Mr. Griffith failed to preserve his claim regarding jury waiver and affirm the imposition of Mr. Griffith’s legal financial obligations.

DATED this 11th day of January, 2019.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



By: Andrew B. Van Winkle WSBA #45219
Deputy Prosecuting Attorney

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

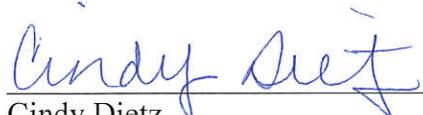
STATE OF WASHINGTON,)
) No. 35848-8-III
 Plaintiff/Respondent,) Chelan Co. Superior Court No. 17-1-00092-3
)
 vs.) DECLARATION OF SERVICE
)
 LANNY LEE GRIFFITH,)
)
 Defendant/Appellant.)
)

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 11th day of January, 2019, I caused the original BRIEF OF RESPONDENT to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 11th day of January, 2019.



Cindy Dietz
Legal Administrative Supervisor
Chelan County Prosecuting Attorney's Office

CHELAN COUNTY PROSECUTING ATTORNEY

January 11, 2019 - 2:18 PM

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