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COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**BRANDON ANTONIO SCALISE,**

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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## TABLE OF CONTENTS

### TABLE OF AUTHORITIES

CASES	ii
CONSTITUTIONAL PROVISIONS	iii
STATUTES	iii
RULES AND REGULATIONS	iii
ASSIGNMENTS OF ERROR	1
ISSUES RELATING TO ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
CONCLUSION	18
APPENDIX “A”	

**TABLE OF AUTHORITIES**

**CASES**

*Arizona v. Hicks*, 480 U.S. 321,  
107 S. Ct. 1149, 94 L. Ed.2d 347 (1987) ..... 13

*Colon* 6 Conn. Cir. Ct. 722, 316 A.2d 797 (1973)..... 14

*Personal Restraint of Yung-Cheng Tsai*,  
183 Wn.2d 91, 351 P.3d 138 (2015)..... 8, 19

*State v. Bean*, 89 Wn.2d 467, 572 P.2d 1102 (1978)..... 17

*State v. Boyer*, 124 Wn. App. 593, 102 P.3d 833 (2004)..... 12

*State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980) ..... 11

*State v. Johnson*, 94 Wn. App. 882, 974 P.2d 855 (1999)..... 10

*State v. Johnson*, 104 Wn. App. 489, 17 P.3d 3 (2001)..... 13

*State v. Jones*, 22 Wn. App. 447, 591 P.2d 796 (1979) ..... 17

*State v. Lair*, 95 Wn.2d 706, 630 P.2d 427 (1981) ..... 13

*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995)..... 7

*State v. Michaels*, 60 Wn.(2d) 638, 347 P.(2d) 989 (1962) ..... 10

*State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007) ..... 16

*State v. Moore*, 29 Wn. App. 354, 628 P.2 522 (1981)..... 17

*State v. Morgan*, 193 Wn.2d 365 (2019) ..... 12

*State v. Murray*, 84 Wn.2d 527, 527 P.2d 1303 (1974),  
*cert. denied*, 421 U.S. 1004 (1975)..... 13

*State v. Perrone*, 119 Wn.2d 538, 834 P.2d 611 (1992)..... 17

<i>State v. Richards</i> , 136 Wn.2d 361, 962 P.2d 118 (1998).....	9
<i>State v. Simmons</i> , 35 Wn. App. 421, 667 P.2d 133 (1983).....	8
<i>State v. Simpson</i> , 95 Wn.2d 170, 622 P.2d 1199 (1980).....	14
<i>State v. Singleton</i> , 9 Wn. App. 327, 511 P.2d 1396 (1973) .....	9
<i>State v. Sistrunk</i> , 57 Wn. App. 210, 787 P.2d 937 (1990) .....	15
<i>State v. Witkowski</i> , 3 Wn. App.2d 318, 415 P.3d 639 (2018).....	16
<i>State v. Wolohan</i> , 23 Wn. App. 813, 598 P.2d 421 (1979).....	18
<i>Strickland v. Washington</i> , 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).....	8, 19

**CONSTITUTIONAL PROVISIONS**

Const. art. I, § 7.....	1, 6, 12
Const. art. I, § 22.....	1
United States Constitution, Fourth Amendment.....	1, 6, 12
United States Constitution, Sixth Amendment .....	1

**STATUTES**

RCW 10.31.030 .....	1, 5, 8
RCW 10.31.040 .....	1, 5

**RULES AND REGULATIONS**

CrR 3.6.....	1, 5, 7, 11, 15, 16
--------------	---------------------

## **ASSIGNMENTS OF ERROR**

1. Brandon Antonio Scalise did not receive effective assistance of counsel as mandated by the Sixth Amendment to the United States Constitution and Const. art. I, § 22. Defense counsel failed to recognize the appropriate basis for the CrR 3.6 motion to suppress evidence.

2. The arresting officers failed to substantially comply with all of the provisions of the knock and announce rule (RCW 10.31.030-.040).

3. The initial entry of law enforcement officers violated Mr. Scalise's constitutional right to privacy under the Fourth Amendment to the United States Constitution and Const. art. I, § 7 when they conducted a warrantless search.

4. Neither the plain view exception nor the open view exception to the search warrant requirement are applicable under the facts and circumstances of Mr. Scalise's case.

5. The search warrant exceeds the scope of what would otherwise have been authorized if a warrantless search had not occurred.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did defense counsel's failure to recognize the correct basis for the CrR 3.6 motion amount to ineffective assistance of counsel in violation of Mr. Scalise's constitutional rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 22?

2. Was strict compliance with the knock and announce rule required?

3. Are the trial court's Findings of Fact 6 and 7 supported by the evidence that the warrantless search exceptions of consent and search incident to arrest were applicable under the facts and circumstances of Mr. Scalise's case? (CP 240; Appendix "A")

4. Is the trial court's Conclusion of Law 2 supported by the Findings of Fact and the law?

5. Does either the plain view exception or the open view exception to the search warrant requirement apply under the facts and circumstances of Mr. Scalise's case?

6. Was there a sufficient basis lawfully authorizing the search that was eventually conducted or was the scope of the search warrant excessive?

### **STATEMENT OF THE CASE**

Detective White of the Washington State Patrol and Detective Frizzell of the Stevens County Sheriff's Office were working together on January 18, 2018. They were attempting to locate Brandon Scalise who had a DOC warrant and an FTA warrant out of Pend Oreille County. (CP 55)

In October 2017 Detective White had received information that Mr. Scalise was involved with theft of ATVs (all terrain vehicles). The detective was aware that Mr. Scalise had previously been involved with and convicted of possessing stolen vehicles. (CP 53)

On December 12, 2017 Detective White was conducting an investigation involving a yellow Can-Am 4-wheeler. He obtained information that the individual who had left the 4-wheeler at 4453 Hesseltine Road was referred to as "Robin Hood." He later determined that this name had been used by Mr. Scalise. The ATV had been left at the Hesseltine

address by a person driving a two-door, red and silver Dodge 4x4, non-diesel. (CP 54; CP 55)

During the course of his prior investigation the detective also learned that Mr. Scalise would often drive a two-wheel drive, gray colored Ford F-150 with a dented body. (CP 55)

While traveling EB on Gardenspot Road in Stevens County the detectives saw an older single cab gray colored Chevrolet pickup (PU) driving up the driveway on the north side of the road. There was a sole male occupant with short hair. The detectives believed it might be Mr. Scalise. (CP 55)

The detectives proceeded up the driveway and arrived at a camp trailer with smoke coming from the chimney. They saw the PU parked next to the trailer. There was also a red and black Can-Am Outlander XT ATV parked between the PU and camp trailer. (CP 55; CP 56)

Detective Frizzell knocked on the rear door of the camp trailer. There were people moving inside. He knocked a second time and saw a curtain move adjacent to the door. After knocking a third time Stacy Scalise answered the door carrying her young child. (CP 56; CP 68)

Ms. Scalise advised the officers that Mr. Scalise had run up the hill. Detective Frizzell told Ms. Scalise that they were there to arrest Mr. Scalise on the warrants. He then opened the door to the camp trailer and announced his presence and the purpose for being there. (CP 68; CP 69)

Mr. Scalise was located inside the trailer. He was arrested on the warrants. Detective Frizzell conducted a pat-down search and discovered a used, capped syringe in a pocket on the left side of his pants. (CP 69)

Detective White, who did not enter the camp trailer, observed a Honda generator just off the driveway and located close to the camp trailer. He went to it and wrote down the serial number (EZCR1039753). The detective called Pape Machinery in Spokane County. He requested that the serial number on the generator be researched. It had been sold to a Bill Pancake in 1996. (CP 57)

Stevens County Sheriff's Office had previously learned of the theft of ATVs from Mr. Pancake's property in Idaho. Deputy Gagnon of the Bonner County Sheriff's Office received the report from Mr. Pancake on September 20, 2017. This information was learned during the search for the yellow ATV. (CP 47; CP 48; CP 50)

The detectives then contacted Deputy Gagnon. They obtained the serial numbers of three (3) ATVs which had been taken from Mr. Pancake's property. They then ran the VIN number for the red and black ATV. It was one of Mr. Pancake's. (CP 58)

Detective White then contacted Mr. Pancake. He learned that a Honda generator had also been stolen. (CP 58; CP 59)

Detective White obtained a search warrant from a Spokane County Superior Court Judge later that day. The warrant was executed at 8:40 p.m. (CP 59)

The search warrant authorized a search of the premises at 4191 Gardenspot Road. It included all structures, outbuildings, dwellings, and vehicles, along with the Honda generator. (CP 38)

The search of the PU revealed a small container with what later was determined to contain methamphetamine. (CP 64; CP 72; RP 199, ll. 9-12; RP 205, ll. 1-2; RP 206, ll. 11-17; ll. 19-21; RP 207, ll. 15-22)

During the search of a backpack found inside the camp trailer the officers also located a Ziploc bag with white residue. This was later determined to be methamphetamine. (CP 72)

Other generators were located during the search. Their serial numbers were noted. Two (2) of those generators were later determined to be stolen. (CP 65; CP 72; RP 157, ll. 2-5; RP 159, ll. 23-24; RP 219, ll. 3-16)

An Information was filed on January 23, 2018 charging Mr. Scalise with possession of a stolen motor vehicle and third degree possession of stolen property. (CP 1)

An Amended Information was filed on May 29, 2018 adding a count of possession of methamphetamine. (CP 122)

A Second Amended Information was filed on October 24, 2018. It changed Count II from possession of stolen property third degree to possession of stolen property second degree. (CP 170)

The original defense attorney appointed to represent Mr. Scalise filed a CrR 3.6 motion on April 23, 2018. The State filed its responsive pleading on May 3, 2018. (CP 33; CP 87)

A suppression hearing was conducted on May 29, 2018. The attorneys stipulated that a determination could be made by the trial court based upon the pleadings previously filed. Those pleadings pertained to whether or not the officers had the authority to make an arrest on a DOC warrant. (RP 20, ll. 7-13; RCW 10.31.030-.040)

The trial court entered an oral decision on the suppression motion on June 5, 2018. The motion was denied. Findings of Fact and Conclusions of Law were not entered until October 28, 2018. (CP 126; CP 239; RP 34, ll. 10-13)

Mr. Scalise signed a number of time for trial waivers. The trial was continued until October 23, 2018. (CP 28; CP 30; CP 119; CP 124)

Additional continuances were granted on June 5, 2018, July 31, 2018, August 28, 2018, and September 19, 2018. Mr. Scalise objected to the last three (3) continuances. (CP 127; CP 128; CP 130; CP 155)

A jury determined that Mr. Scalise was guilty of all three (3) counts. (CP 224; CP 225; CP 226)

Judgment and Sentence was entered on January 28, 2019. An exceptional sentence of ninety-six (96) months was imposed under the free crimes doctrine. An order of indigency was entered the same date. (CP 249; CP 251)

Mr. Scalise filed his Notice of Appeal on February 5, 2019. (CP 269)

### **SUMMARY OF ARGUMENT**

Warrantless searches are strictly prohibited under the Fourth Amendment and Const. art. I, § 7. There are a few “jealously and carefully drawn exceptions.”

Defense counsel failed to recognize that the officer’s writing down of a generator’s serial number constituted a warrantless search. Defense counsel’s theory that the DOC warrant did not authorize the officer’s actions overlooked the Pend Oreille County warrant.

The officers did not strictly comply with the knock and announce rule.

The search warrant that was issued should have been limited to a search for controlled substances only.

The facts and circumstances do not support any exception to the constitutional search warrant requirement with the exception of the search of Mr. Scalise's person at the time of his arrest.

## ARGUMENT

### I. INEFFECTIVE ASSISTANCE OF COUNSEL

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Mr. Scalise maintains that even though defense counsel recognized that a CrR 3.6 suppression issue existed they pursued the wrong issue.

The issue was not related to the DOC warrant. The record is clear that there was both a DOC warrant as well as a bench warrant out of Pend Oreille County Superior Court. Even though neither warrant has been made part of the record, their existence is reflected in the CrR 3.6 motion and attachments.

It is Mr. Scalise's position that the correct issue is a combination of a violation of the knock and announce rule and a warrantless search prior to obtaining a search warrant. Appropriate research would have pointed out to defense counsel that there was more than one issue.

Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient. ... Indeed, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland* [*Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)]." *Hinton v. Alabama*, 571 U.S. \_\_\_, 134 S. Ct. 1081, 1089, 188 L. Ed.2d 1 (2014).

*Personal Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015).

The following subsections of Mr. Scalise's brief will outline, in more detail, the underlying basis for the claim of ineffective assistance of counsel.

## II. KNOCK AND ANNOUNCE

RCW 10.31.030 states, in part:

The officer making an arrest **must** inform the defendant that he or she acts under authority of a warrant, and **must** also show the warrant: **PROVIDED**, That if the officer does not have the warrant in his or her possession at the time of arrest he or she **shall** declare that the warrant does presently exist and will be shown to the defendant as soon as possible on arrival at the place of intended confinement ....

(Emphasis supplied.)

Detective Frizzell announced that there was a warrant for Mr. Scalise's arrest. He did not have the warrant in his possession. The record does not reflect that the warrant was ever shown to Mr. Scalise.

As announced in *State v. Simmons*, 35 Wn. App. 421, 423, 667 P.2d 133 (1983):

The statute indicates a legislative preference for showing the warrant at the time of the arrest. However, it permits the arresting officer to make the arrest by declaration of the warrant's existence and promise of its display upon arrival at the place of confinement. The purpose of this twofold duty is to advise the arrestee of the authority and reason for his arrest

as soon as possible. *State v. Dugger*, 34 Wn. App. 315, 319, 661 P.2d 979 (1983). Substantial compliance with the statute is all that is required for a valid arrest. *State v. Singleton*, 9 Wn. App. 327, 330, 511 P.2d 1396 (1973); *State v. Dugger*, *supra*. The statute presumes that a valid warrant exists.

Initially, it may appear that the knock and announce rule was complied with under the facts and circumstances of Mr. Scalise's case. However, the substantial compliance requirement set out in *State v. Singleton*, *supra*, has been modified. In *State v. Richards*, 136 Wn.2d 361, 372, 962 P.2d 118 (1998) the Court stated:

**Strict compliance with the rule is required** unless the State can demonstrate that one of the two exceptions to the rule applies: exigent circumstances or futility of compliance.

(Emphasis supplied.)

The State, did not argue exigent circumstances. The officers did not indicate the presence of exigent circumstances.

There is nothing in the record to indicate that providing Mr. Scalise with a copy of either the DOC warrant or the Pend Oreille County warrant was a futile act.

Even though Mr. Scalise was validly arrested, the lack of strict compliance with the knock and announce rule is indicative of the loose manner in which the officers conducted his arrest on January 18, 2018.

The officers were obviously looking for Mr. Scalise. He was known to live in the area of Gardenspot Road. Nevertheless, on January 18 he was driving a PU that was not either of the PUs previously described for the officers by other individuals.

Additionally, the officers indicated that they were uncertain if Mr. Scalise was driving the PU. It was someone who looked similar to him. It was not until Stacy Scalise

exited the travel trailer that the officers had any positive information that Mr. Scalise may be present at that address.

“Failure to comply with the ‘knock and announce’ rule renders the entry illegal, and any evidence seized during the search inadmissible.” *State v. Johnson*, 94 Wn. App. 882, 889, 974 P.2d 855 (1999).

Mr. Scalise is pointing out these deficiencies because they have application to the warrantless search that occurred following his arrest.

Mr. Scalise is not challenging what was located in his pockets at the time of the arrest. He is not challenging his conviction for possession of methamphetamine.

Rather, the challenge is aimed at Counts I and II of the Second Amended Information.

### **III. WARRANTLESS SEARCH**

“An arrest may not be used as a pretext to search for evidence.” *State v. Michaels*, 60 Wn.(2d) 638, 644, 347 P.(2d) 989 (1962), referencing *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877, 52 S. Ct. 420; *Taglavore v. United States*, 291 F.(2d) 262 (C.A. 9<sup>th</sup>, 1961).

Under the facts and circumstances of Mr. Scalise’s case it is Detective White’s actions that need to be scrutinized. He remained outside the trailer with Stacy Scalise.

It is obvious from his report that he was conducting a cursory search of items outside the trailer. There was observation of the PU. He saw the ATV parked between the PU and the camp trailer. He noted a generator next to the camp trailer and copied down its serial number.

Detective White then contacted a Honda dealer to run a trace on that serial number. He also obtained information on stolen ATVs. It was only then that he learned that the generator had been reported stolen.

As a general rule, warrantless searches and seizures are per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed.2d 564, 91 S. Ct. 2022 (1971). Nonetheless, there are a few “‘jealously and carefully drawn’ exceptions” to the warrant requirement which “provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.” *Arkansas v. Sanders*, 442 U.S. 753, 759, 61 L. Ed.2d 235, 99 S. Ct. 2586 (1979). See *Jones v. United States*, 357 U.S. 493, 499, 2 L. Ed.2d 1514, 78 S. Ct. 1253 (1958). The burden is on the prosecutor to show that a warrantless or seizure falls within one of these exceptions. See *Arkansas v. Sanders, supra*.

*State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

The State argued in its response brief to the CrR 3.6 motion that the search incident to arrest exception applied to Mr. Scalise’s case.

The search incident to arrest exception has no application in this context.

Mr. Scalise was arrested inside the travel trailer. He was cuffed inside the travel trailer. He was searched inside the travel trailer.

There was no need to search further since the Honda generator was not a weapon. It was not evidence that could be destroyed.

The trial court’s Findings of Fact and Conclusions of Law are limited to what occurred in the travel trailer. Defense counsel failed to address anything beyond the initial arrest of Mr. Scalise. It is what occurred during and following the arrest that has impact on the validity of Mr. Scalise’s convictions of possession of a stolen motor vehicle and second degree possession of stolen property.

Finding of Fact 7 mentions the search incident to arrest. It is that search which resulted in finding the methamphetamine on Mr. Scalise's person.

Conclusion of Law 2 is of import to the rest of Mr. Scalise's argument. It provides:

2. Officers executing an arrest warrant may search the premises for the subject of that warrant, but must call off the search as soon as the subject is found. *State v. Boyer*, 124 Wn. App. 593, 102 P.3d 833 (2004). This is precisely what occurred in this case.

Mr. Scalise recognizes that an appeal court can affirm a trial court's ruling on any theory that is supported by the evidence. The only other potential exceptions to the search warrant requirement of the Fourth Amendment and Const. art. I, § 7, are either the plain view exception or the open view exception.

#### **IV. PLAIN VIEW**

“... [A] plain view seizure is legal when the police (1) have a valid justification to be in an otherwise protected area, provided that they are not there on a pretext, and (2) are immediately able to realize the evidence they see is associated with criminal activity.

*State v. Morgan*, 193 Wn.2d 365, 371 (2019)

The *Morgan* case modified and clarified the plain view exception under Washington law. It had previously required a third criteria of inadvertent discovery.

The critical component under consideration in Mr. Scalise's case is whether or not there was immediate recognition that the Honda generator was contraband.

Mr. Scalise contends that it was not. It took Detective White time to have a background check on the serial number which he had copied down and relayed to a Honda dealer.

Mr. Scalise contends that the presence of a generator providing power to a camp trailer is not unusual. It does not arise to a reasonable conclusion that the generator is stolen.

Objects are immediately apparent for purposes of a plain view seizure when, considering the surrounding facts and circumstances, the police can reasonably conclude that they have evidence before them.

*State v. Lair*, 95 Wn.2d 706, 716, 630 P.2d 427 (1981).

In rural areas of the State of Washington it is not unusual for homes and businesses to have a generator to provide power in emergency situations. Power outages in the rural areas of the state are common. Windstorms, fires, transformer failures and other events all impact the supply of power to homes and businesses.

If law enforcement is able to copy down serial numbers and/or VINs without validly recognizing an item as contraband then they are conducting a general warrantless search.

The plain view doctrine allows officers to seize an item, without a warrant, if, while acting in the scope of an otherwise authorized search, they acquire probable cause to believe the item is evidence of a crime. The doctrine does not allow an additional, unauthorized search, a restriction usually expressed by saying that the officers must have “immediate knowledge ... they [have] incriminating evidence before them.”

*Arizona v. Hicks*, [480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed.2d 347 (1987)] and *State v. Murray*, [84 Wn.2d 527, 527 P.2d 1303 (1974), *cert. denied*, 421 U.S. 1004 (1975)] exemplify cases in which officers conduct an additional unauthorized search. In each of those cases, officers were lawfully in the defendant’s home. They saw an item that they suspected was stolen (a stereo in *Hicks*, a TV in *Murray*), but they lacked probable cause to believe it was stolen. To acquire probable cause, they moved the item until its serial

number because visible; copied the serial number; and compared the serial number to their stolen property reports. The plain view doctrine did not justify their conduct because when they first saw the item they lacked “immediate knowledge” (probable cause to believe) that the item was evidence; and when they moved the item to acquire probable cause, they conducted an additional unauthorized search.

*State v. Johnson*, 104 Wn. App. 489, 501-02, 17 P.3d 3 (2001).

Mr. Scalise acknowledges that Detective White did not have to move the Honda generator in order to locate the serial number. Nevertheless, Detective White was conducting a search. The search was unnecessary since the officers were there to arrest Mr. Scalise. Mr. Scalise was located inside the travel trailer.

Mr. Scalise relies upon *State v. Simpson*, 95 Wn.2d 170, 186, 622 P.2d 1199 (1980) to support his argument. The Court noted:

These courts [*see fn 4* at 186] have, accordingly, tested the propriety of the search of the VIN with the standard established in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed.2d 889, 88 S. Ct. 1868 (1968), for searches which infringe upon limited privacy interests: police officer awareness of “specific articulable facts” which would lead a reasonable person of ordinary caution to believe that the action taken was appropriate. *See, e.g., Colon* [6 Conn. Cir. Ct. 722, 316 A.2d 797 (1973)] at 725-26; *see also, e.g., United States v. Powers*, 439 F.2d 373, 374-76 (4<sup>th</sup> Cir.), *cert., denied*, 402 U.S. 1011, 29 L. Ed.2d 434, 91 S. Ct. 2198 (1971).

Again, the officers were present to effect an arrest of Mr. Scalise pursuant to warrants. They legitimately conducted a search of his person at the time of the arrest. They later applied for a search warrant. The search warrant will be discussed in more detail in another section of this brief.

## **V. OPEN VIEW**

A law enforcement officer may ... seize contraband under the “open view” exception to the warrant rule. [Citations

omitted.] However, the object viewed must also be immediately apparent as evidence for a criminal prosecution. “An object in open plain view may be seized only where it is readily apparent that the object is contraband or evidence.” 3 W. LaFave, *Search and Seizure* § 7.5(b) at 129 (2<sup>nd</sup> ed. 1987) (quoting *State v. Meichal*, 290 So.2d 878 (La. 1974)). The term “immediately apparent” has been interpreted by the Supreme Court in *Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed.2d 502, 103 S. Ct. 1535 (1983) to mean “requiring probable cause for seizure in the ordinary case ....” *See also* 3 W. LaFave, at 130.

*State v. Sistrunk*, 57 Wn. App. 210, 214, 787 P.2d 937 (1990)

The immediately apparent requirement is applicable to both the plain view exception and the open view exception to the search warrant requirement. Detective White, under either of those exceptions, did not have any knowledge of the Honda generator being contraband or evidence.

## **VI. SEARCH WARRANT**

The search warrant affidavit is not in the record. It was not provided to the trial court at the time of arguing the CrR 3.6 motion. It cannot now be presented to the Court for any reason since the trial court did not have the opportunity to review it.

The search warrant was presented as part of the CrR 3.6 motion. It authorized a search not only for additional controlled substances in the camp trailer and PU; but it also authorized a search for stolen vehicles and stolen property derived from the serial number of the Honda generator. The detectives did not possess any information that day that any of the items observed at or around the residence were stolen.

The search warrant was valid insofar as a search of the PU and camp trailer for controlled substances. It is invalid beyond that since it exceeds the scope of the information that the officers had acquired solely upon the arrest of Mr. Scalise.

Warrant application and issuance by a neutral magistrate limit governmental invasion into private affairs. In part, the warrant requirement, ensures that some determination has been made which supports the scope of the invasion. *See, e.g., State v. Jackson*, 150 Wn.2d 251, 263-64, 76 P.3d 217 (2003) (without a warrant requirement there is no limitation on the State’s intrusion “whether criminal activity is suspected or not”); RCW 10.79.015; CrR 2.3(c). The scope of the invasion is, in turn, limited to that authorized by the authority of law.

*State v. Miles*, 160 Wn.2d 236, 247, 156 P.3d 864 (2007).

Detective White’s report, attached to the CrR 3.6 motion, indicates as follows:

While at the scene, Detective White observed a Honda Generator that was located just off the driveway and located in close proximity to the Jayco camp trailer (let it be noted that this was visible along the officer’s route being used to walk back and forth to the camp trailer). In plain view, White observed the serial number to the generator to be EZCR1039753. White called and spoke with Pape Machinery in Spokane County and spoke with employee Tyler McCoury. White requested McCoury to run the serial number obtained from the generator, which revealed the following: In 1996 the generator was sold to a Bill Pancake. Let it be noted that McCoury forwarded White information on the generator, which showed Pancake was the purchaser of the generator matching the serial number aforementioned.

(CP 57)

It is unknown whether this information was set forth in the search warrant affidavit.

“‘The’ authority of law’ required by article I, section 7 is a valid warrant unless the State shows that a search or seizure falls within one of the jealously guarded and carefully drawn exceptions to the warrant requirement.” [Citations omitted].

*State v. Witkowski*, 3 Wn. App.2d 318, 336, 415 P.3d 639 (2018).

The search warrant issued in Mr. Scalise’s case is a valid warrant insofar as a search for controlled substances is concerned. It is invalid as to any other articles set forth in that warrant.

Mr. Scalise concedes that under the severability doctrine that the warrant can still be held valid insofar as the discovery of drug paraphernalia and methamphetamine is concerned. These items were located in the PU and the camp trailer, as well as on his person.

However, under the severability doctrine the other items which were discovered and seized pursuant the search warrant must be suppressed.

Under the severability doctrine, “infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant” but does not require suppression of anything seized pursuant to valid parts of the warrant. *United States v. Fitzgerald*, 724 F.2d 633, 637 (8<sup>th</sup> Cir. 1983), *cert. denied*, 466 U.S. 950 (1984); *see State v. Cockrell*, 102 Wn.2d 561, 570-71, 689 P.2d 32 (1984) (severability doctrine applied to permit severability of parts of warrant describing particular places to be searched, where there was insufficient probable cause to search those places); *Commonwealth v. Lett*, 393 Mass. 141, 470 N.E.2d 110 (1984).

*State v. Perrone*, 119 Wn.2d 538, 556, 834 P.2d 611 (1992).

The search incident to arrest exception does not support that portion of the search warrant authorizing a search for stolen property or stolen vehicles.

The plain view exception does not support issuance of the search warrant for stolen property or stolen vehicles.

The open view exception does not support the search warrant for the search of stolen property or stolen vehicles.

In *State v. Moore*, 29 Wn. App. 354, 360-61, 628 P.2 522 (1981) the Court ruled:

*Bean* [*State v. Bean*, 89 Wn.2d 467, 572 P.2d 1102 (1978)] and *Jones* [*State v. Jones*, 22 Wn. App. 447, 591 P.2d 796 (1979)] stand for the proposition that the existence of probable cause to search prior to an unlawful search is insufficient to sustain a subsequent search pursuant to a warrant where the affiant participated in or knew of the illegal

search. ... We hold that a warrant to search personal luggage is valid despite the occurrence of a prior illegal search where the affiant does not request or know of the illegal search and has information demonstrating probable cause derived from sources independent of the illegal search. *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed.2d 441, 83 S. Ct. 407 (1963); *State v. O'Bremski*, 70 Wn.2d 425, 423 P.2d 530 (1967); *State v. Wolohan* [23 Wn. App. 813, 598 P.2d 421 (1979)], *supra*.

... The police may not obtain probable cause through illegal conduct and then attempt to conceal that conduct by presenting the facts to an officer unaware of the illegal behavior for presentation to a magistrate.

Detective White was the one conducting the illegal warrantless search. He exceeded the bounds of what is allowed in connection with the effect of Mr. Scalise's arrest. He did not have immediate knowledge that the Honda generator was stolen.

Mr. Scalise contends that when Detective White wrote down the serial number of the Honda generator it constituted an unlawful seizure of that item.

## CONCLUSION

The only basis for the issuance of the search warrant to search for stolen vehicles and stolen property evolves from Detective White's copying down the serial number of the Honda generator. Detective White had to leave direct access to the travel trailer in order to copy down the serial number.

The officers were present to effect an arrest of Mr. Scalise on outstanding warrants. They did not have a search warrant. They were limited to a search incident to arrest of Mr. Scalise's person and the inside of the camp trailer.

Neither the plain view exception nor the open view exception to the search warrant requirement are applicable under the facts and circumstances of Mr. Scalise's case.

Detective White did not have immediate knowledge that the Honda generator was stolen. In the absence of that knowledge the copying down of the serial number exceeded the scope of the authority under the arrest warrant.

The warrantless search requires that all evidence, with the exception of drug paraphernalia and controlled substances, seized under the search warrant be suppressed.

Defense counsel's failure to conduct appropriate research and recognize that the issue was not the validity of the arrest warrants; but the validity of the warrantless search adversely impacted the suppression hearing and resulted in the admission of evidence against Mr. Scalise at trial resulting in his conviction of Counts I and II.

“... [R]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *Personal Restraint of Yung-Cheng Tsai, supra, quoting State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland [Strickland v. Washington]*, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)].

Mr. Scalise respectfully requests that his convictions on Counts I and II be reversed and dismissed.

DATED this 19th day of August, 2019.

Respectfully submitted,

s/ Dennis W. Morgan  
DENNIS W. MORGAN WSBA #5286  
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(509) 775-0776

## **APPENDIX “A”**



2018 OCT 26 AM 10:50

PATRICIA A. GILBERT  
COUNTY CLERK

18-1-00015-1  
ORDYMT 75  
Order Denying Motion Petition  
4103854



IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF STEVENS

STATE OF WASHINGTON,

Plaintiff,

v.

BRANDON ANTONIO SCALISE,

Defendant

Cause No.: 2018-1-00015-1

CrR 3.6 FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This matter came before the Stevens County Superior Court on May 29, 2018, when the parties argued Defendant's Motion to Suppress Evidence under CrR 3.6. As announced on June 6, 2018, the Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On January 18, 2018, Stevens County Sheriff's Office Detective Travis Frizzell and Washington State Patrol Detective Steve White were aware of existing warrants issued for the arrest of the Defendant by the Washington Department of Corrections and Pend Oreille County Superior Court.

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- 1 2. While driving on Garden Spot Road in Stevens County, the detectives observed a vehicle  
2 similar but not exactly like that reported to be driven by the Defendant. The driver of the  
3 vehicle was similar in appearance to the Defendant.
- 4 3. The detectives followed the vehicle into a driveway, noting that the driveway was not  
5 posted or blocked in any way to establish an objective or subjective right of privacy.
- 6 4. The detectives observed the vehicle parked outside a camp trailer and approached the  
7 trailer.
- 8 5. A woman exited the trailer. One of the detectives recognized the woman as the  
9 Defendant's wife. The woman told the detectives that the Defendant had run up the hill.
- 10 6. The woman and her baby exited the trailer. About the time the woman was giving  
11 consent to search the trailer to Detective White, Detective Frizzell made entry into the  
12 trailer and found the Defendant inside.
- 13 7. As a result of search incident to arrest, contraband was found on the Defendant.
- 14 8. After the arrest of the Defendant, the detectives ended their entry into the premises.
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#### 17 CONCLUSIONS OF LAW

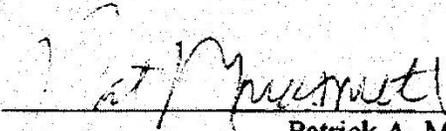
- 18 1. RCW 10.31.040 is on point authorizing a law enforcement officer with an arrest warrant  
19 to break down certain enclosures in order to affect the arrest warrant.
- 20 2. Officers executing an arrest warrant may search the premises for the subject of that  
21 warrant, but must call off the search as soon as the subject is found. *State v. Boyer*, 124  
22 Wn. App. 593, 102 P.3d 833 (2004). This is precisely what occurred in this case.
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ORDER

Based on the Findings of Fact and Conclusions of Law detailed above, the Defendant's Motion to Suppress Evidence under CrR 3.6 is denied.

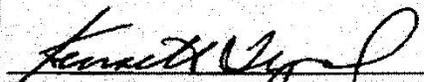
Dated this the 28 of ~~September~~<sup>October</sup>, 2018.

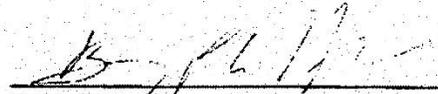
  
Patrick A. Monasmith  
Stevens County Superior Court Judge

*Patrick A. Monasmith*

Presented By:

Approved as to Form:

  
Kenneth Tyndal, WSBA #44031  
Deputy Prosecuting Attorney

  
Bryan Whitaker, WSBA #25199  
Attorney for Defendant

*Does not sign*  
Brandon Antonio Scarise  
Defendant

**NO. 36583-2-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	STEVENS COUNTY
Plaintiff,	)	NO. 18 1 00015 1
Respondent,	)	
	)	
v.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
BRANDON ANTONIO SCALISE,	)	
	)	
Defendant,	)	
Appellant.	)	
_____	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 19th day of August, 2019, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

COURT OF APPEALS, DIVISION III  
Attn: Renee Townsley, Clerk  
500 N Cedar St  
Stevens, WA 99201

E-FILE

STEVENS COUNTY PROSECUTOR'S OFFICE

Attn: Tim Rasmussen

[trasmussen@stevenscountywa.gov](mailto:trasmussen@stevenscountywa.gov)

E-FILE

Brandon Antonio Scalise #849497

Coyote Ridge Correction Center

PO Box 769

Connell, Washington 99326

U. S. MAIL

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

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Phone: (509) 775-0777

Fax: (509) 775-0776

[nodblspk@rcabletv.com](mailto:nodblspk@rcabletv.com)

**August 19, 2019 - 7:53 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36583-2  
**Appellate Court Case Title:** State of Washington v. Brandon Antonio Scalise  
**Superior Court Case Number:** 18-1-00015-1

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- trasmussen@stevenscountywa.gov

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