

64143-3

64143-3

COA NO. 64143-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SAFFORD,

Appellant.

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

The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to grant appellant's motion to suppress evidence obtained as a result of an unlawful strip search.
2. Appellant received ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Did the warrantless strip search violate appellant's constitutional and statutory right to privacy because police lacked an individualized, reasonable suspicion that appellant concealed contraband in an area requiring such a search?
2. Was the warrantless strip search illegal because police failed to obtain the supervisory approval required by statute, resulting in a search conducted without the requisite "authority of law" mandated by article I, section 7 of the Washington Constitution?
3. Was defense counsel ineffective in failing to properly challenge the legality of the strip search on the basis that police did not obtain the supervisory approval required by statute?

B. STATEMENT OF THE CASE

1. CrR 3.6 Hearing

The facts are undisputed. 1RP 2-5.¹ Seattle police were

¹ The verbatim report of proceedings is referenced as follows: 1RP - 8/10/09; 2RP - 9/9/09.

conducting narcotics surveillance in the Belltown neighborhood of Seattle, an area known for a significant amount of drug activity. CP 52. An officer noticed two males, later identified as Michael Safford and Dion Duggins, loitering next to a tavern on Third Avenue and Bell Street. CP 2. Safford and Duggins looked up and down the street and spoke to a few people as they walked by. CP 2.

At one point, Safford spoke to a man in a red jacket and walked a short distance with him. CP 2. The man handed Safford something and Safford gave him something in return. CP 2. The man put what he was given into his mouth and left the area. CP 2. Based on training and experience, the surveillance officer knew drug users and dealers often conceal narcotics in their mouth as a way to avoid detection. CP 2. Duggins stood next to Safford during this transaction, looking around. CP 2.

Duggins and Safford returned to the corner of Third and Bell. CP 2. A few minutes later, Safford was talking on a cell phone when he ran into the street to flag down a pickup truck. CP 2. Safford entered the truck, which drove off. CP 2.

Duggins continued to loiter at Third and Bell, at one point speaking to a man wearing a driving cap for a few minutes. CP 2. Police thought this person was going to locate other drug users in return for being

paid in money or drugs. CP 2.

Duggins then walked down the sidewalk, stopped near a restaurant, looking left to right. CP 2. He opened his palm and swept something around with his finger. CP 2-3. He then put what he had in his mouth. CP 3.

Duggins next spoke with the man in the driving cap, who had returned with three people. CP 3. Duggins removed something from his mouth and handed it to the man. CP 3. Based on training and experience, the surveillance officer believed Duggins was paying the man in narcotics for locating drug customers. CP 3.

Safford made contact with the group. CP 3. He held something small in front of him and started unfolding the item in his hands, which police believe contained rocks of crack cocaine. CP 3. Safford took pieces from the unfolded item, handed it to a person, and took something in return. CP 3. He did this twice. CP 3.

The surveillance officer advised the arrest team that there was probable cause to arrest Safford and Duggins for "Drug Traffic Loitering." CP 3.

Duggins was arrested. CP 3. An object recovered from his mouth field tested positive for cocaine. CP 3.

Sergeant Hazard and Officer Diamond arrested Safford for drug

loitering under the Seattle Municipal Code. 1RP 9, 12; Supp CP __ (sub no. 52, State's Trial Brief at 3, 8/10/09). In a search incident to arrest, police located \$45 in crumpled up bills in Safford's pants pocket. Supp CP __ (sub no. 52, supra at 3).

Police stripped searched Safford at the West Precinct. CP 3; Supp CP __ (sub no. 52 at 3, supra). Officers recovered 7.9 grams of suspected cocaine from his butt cheeks, which field tested positive for cocaine. CP 3, 54. The State charged Safford with possession of cocaine with intent to deliver. CP 1.

Safford's attorney moved to suppress evidence of cocaine recovered during the strip search based on lack of probable cause to arrest. CP 59-66; 1RP 8-9. The trial judge broke down the lawfulness of the search into three issues: (1) whether police had probable cause to arrest for drug loitering; (2) if police had probable cause, whether they could lawfully arrest Safford for drug loitering; (3) if drug loitering was an arrestable offense, whether the strip search was permissible. 1RP 10-11.

Defense counsel conceded drug loitering was an arrestable offense. 1RP 11.² The trial judge responded this meant that "once they can book you into jail, they can search you." 1RP 11. The judge then asked defense

² Drug traffic loitering is a gross misdemeanor under the Seattle Municipal Code. SMC 12A.20.050(E).

counsel to clarify her position on each of the three issues he articulated. 1RP 11. Defense counsel reiterated there was no probable cause to arrest for drug loitering but if there was, police could arrest him for drug loitering and book him into jail. 1RP 11-12. Counsel further argued the strip search was illegal because police lacked reasonable suspicion that Safford was concealing drugs on his body, citing State v. Audley, 77 Wn. App. 897, 894 P.2d 1359 (1995). 1RP 15-17.

The trial judge concluded police had probable cause to arrest Safford for drug loitering. 1RRP 19. The judge further concluded the strip search was lawful. 1RP 19-20. In reaching that conclusion, the judge reviewed Audley. 1RP 17, 20.

The judge stated "Given the fact that he was involved in passing cocaine, and they were putting -- they put him into a detention facility there, in this court's judgment, is a reasonable suspicion that he would have drugs on him somewhere, because there was certainly reason to believe that he was passing drugs, and he had to get those drugs from somewhere. I'm fully aware of the fact that contraband is hidden in many places, including the crotch area, and between the cheeks. And, I mean, even in State v. Audley, it says in footnote eleven where the Court of Appeals was recognizing the crotch area is a place where drugs are sometimes frequented. So, all in all, I find that the police acted

appropriately, and the Motion to Dismiss is denied. Motion to exclude is denied." 1RP 20.

2. Bench Trial on Stipulated Facts

After losing his motion to suppress, Safford consented to a bench trial on stipulated facts. 1RP 21. These facts included all the police reports generated from the event and a laboratory test showing the substance recovered during the strip search was cocaine. 1RP 21; CP 6-50. The court found Safford guilty of cocaine possession with intent to deliver and imposed a prison based Drug Offender Sentencing Alternative of 20 months confinement. 1RP 27-30; CP 67-75. This appeal timely follows. CP 76-81.

C. ARGUMENT

1. THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE THE STRIP SEARCH VIOLATED SAFFORD'S CONSTITUTIONAL AND STATUTORY RIGHT TO PRIVACY.

The strip search was illegal for two reasons. First, evidence in the record did not establish reasonable, individualized suspicion that Safford had concealed drugs in an area of his body that necessitated a strip search. For this reason, the search violated the individualized suspicion requirement of article I, section 7 of the Washington Constitution and the

Fourth Amendment to the United States Constitution as well as the strip search statute.

Even if police had individualized suspicion to conduct a strip search, the search was still illegal because it was conducted without first obtaining approval from the jail unit supervisor as required by statute. For this reason, the search violated the strip search statute and lacked the "authority of law" required by article I, section 7. Safford's attorney provided ineffective assistance of counsel in the event this Court determines the issue was not properly raised below.

a. Standard of Review

The trial court's conclusions of law in a suppression hearing are reviewed de novo. State v. Einfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). The trial court's findings must support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Factual findings based on a written record are reviewed de novo. State v. Neff, 163 Wn.2d 453, 461, 181 P.3d 819 (2008).

b. Warrantless Searches Are Per Se Unconstitutional And The State Bears The Burden Of Proving Otherwise.

Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Fourth Amendment of the United States

Constitution establishes the peoples' right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

A warrantless search is per se unconstitutional under article I, section 7 and the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); Minnesota v. Dickerson, 508 U.S. 366, 372, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). The State carries the burden of proving a warrantless search is valid. State v. Mathe, 102 Wn.2d 537, 540-41, 688 P.2d 859 (1984).

A person's genitalia is a private affair protected by article I, section 7 and the Fourth Amendment. "Strip searches unquestionably implicate significant privacy concerns because they involve a considerable intrusion into a person's privacy." Audley, 77 Wn. App. at 903 (citing State v. Sweeney, 56 Wn. App. 42, 49, 782 P.2d 562 (1989) (court could not "conceive of anything more intrusive to a person's right to privacy than a strip search"). Strip searches involving visual inspection of the genital areas are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir.1983).

As a general principle, "a search warrant or subpoena must be issued by a neutral magistrate to satisfy the authority of law requirement"

under article I, section 7. State v. Miles, 160 Wn.2d 236, 247, 156 P.3d 864 (2007). In the absence of a warrant, the "authority of law" required by article I, section 7 may, in some circumstances, be "granted by a valid (i.e., constitutional) statute." State v. Gunwall, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986).

The Legislature has authority to enact legislation permitting warrantless strip searches. Audley, 77 Wn. App. at 901. The statute governing strip searches is located in Chapter 10.70 RCW.

A strip search means "having a person remove or arrange some or all of his or her clothing so as to permit an inspection of the genitals, buttocks, anus, or undergarments of the person or breasts of a female person." RCW 10.79.070 (1). A strip search indisputably occurred when police ordered Safford to remove his clothing and spread his buttocks for inspection.

RCW 10.79.060 provides "It is the intent of the legislature to establish policies regarding the practice of strip searching persons booked into holding, detention, or local correctional facilities. It is the intent of the legislature to restrict the practice of strip searching and body cavity searching persons booked into holding, detention, or local correctional facilities to those situations where such searches are necessary." RCW 10.79.060 "clearly expresses the Legislature's intent to 'restrict' strip

searches of persons booked into local correctional facilities to 'situations where such searches are necessary.'" Plemmons v. Pierce County, 134 Wn. App. 449, 460, 140 P.3d 601 (2006).

Under RCW 10.79.120, the strip search statute applies to "any person in custody at a holding, detention, or local correctional facility, other than a person committed to incarceration by order of a court." Safford was arrested and strip searched at the police precinct. The strip search statute applies to him.

Specific statutory safeguards govern the circumstances under which a strip search may be carried out. 10.79.130 provides:

(1) No person to whom this section is made applicable by RCW 10.79.120 may be strip searched without a warrant unless:

(a) There is a reasonable suspicion to believe that a strip search is necessary to discover weapons, criminal evidence, contraband, or other thing concealed on the body of the person to be searched, that constitutes a threat to the security of a holding, detention, or local correctional facility;

(b) There is probable cause to believe that a strip search is necessary to discover other criminal evidence concealed on the body of the person to be searched, but not constituting a threat to facility security; or

(c) There is a reasonable suspicion to believe that a strip search is necessary to discover a health condition requiring immediate medical attention.

(2) For the purposes of subsection (1) of this section, a reasonable suspicion is deemed to be present when the person to be searched has been arrested for:

(a) A violent offense as defined in RCW 9.94A.030 or any successor statute;

(b) An offense involving escape, burglary, or the use of a deadly weapon; or

(c) An offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute.

(emphasis added).

RCW 10.79.140 provides:

(1) A person to whom this section is made applicable by RCW 10.79.120 who has not been arrested for an offense within one of the categories specified in RCW 10.79.130(2) may nevertheless be strip searched, but only upon an individualized determination of reasonable suspicion or probable cause as provided in this section.

(2) With the exception of those situations in which reasonable suspicion is deemed to be present under RCW 10.79.130(2), no strip search may be conducted without the specific prior written approval of the jail unit supervisor on duty. Before any strip search is conducted, reasonable efforts must be made to use other less-intrusive means, such as pat-down, electronic metal detector, or clothing searches, to determine whether a weapon, criminal evidence, contraband, or other thing is concealed on the body, or whether a health condition requiring immediate medical attention is present. The determination of whether reasonable suspicion or probable cause exists to conduct a strip search shall be made only after such less-intrusive means have been used and shall be based on a consideration of all information and circumstances known

to the officer authorizing the strip search, including but not limited to the following factors:

- (a) The nature of the offense for which the person to be searched was arrested;
- (b) The prior criminal record of the person to be searched; and
- (c) Physically violent behavior of the person to be searched, during or after the arrest.

(emphasis added).

- c. The Strip Search Was Unlawful Because Police Lacked Individualized, Reasonable Suspicion That Such A Search Was Necessary To Locate Contraband.

Audley held RCW 10.79.130(1)(a), the section of the statute relied on by the trial court in that case, is constitutional under article 1, section 7 and the Fourth Amendment. Audley, 77 Wn. App. at 899-900, 908. According to Audley, article I section 7 and the Fourth Amendment offer co-extensive protections when it comes to strip searches of arrestees. Id. at 899.

Warrantless strip searches must, at a minimum, "be based on individualized, reasonable suspicion that the arrestee is concealing contraband. Reasonable suspicion to conduct a strip search may be based on factors such as the nature of the offense for which a suspect is arrested and his or her conduct." Id. at 908. "Requiring particularized suspicion to

strip search misdemeanor arrestees balances institutional security needs with individual privacy, which includes 'a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or to have [one's] 'private' parts observed or touched by others.'" Wood v. Hancock County Sheriff's Dep't, 354 F.3d 57, 62 (3d Cir. 2003) (quoting Justice v. City of Peachtree City, 961 F.2d 188, 191 (11th Cir. 1992)).

Audley recognized "Unlike RCW 10.79.130(1)(a), RCW 10.79.130(2) contains no requirement that the suspicion be individualized." Audley, 77 Wn. App. at 902. That is, the mere fact that someone has been arrested for one of the enumerated offenses in RCW 10.79.130(2) does not give rise to the level of individualized suspicion needed to constitutionally justify a strip search for contraband. The particular conduct of the individual must give rise to the suspicion.

In Audley, the individualized reasonable suspicion standard was satisfied under RCW 10.79.130(1)(a) in light of the crime for which Audley was arrested (possession of a controlled substance with intent to deliver) *and* his conduct prior to arrest. Audley, 77 Wn. App. at 908. This conduct consisted of reaching down the front of his pants at least twice while he was under surveillance and retrieved what an officer suspected was rock cocaine. Id. at 908 n.11. The officer also testified that the crotch area is a common place for dealers to hide drugs. Id.; *cf.* Kraushaar v.

Flanigan, 45 F.3d 1040, 1045-46 (7th Cir. 1995) (reasonable suspicion for strip search where man arrested for driving under influence attempted to put something down his pants).

The court in State v. Harris concluded a strip search was supported by reasonable suspicion where (1) the officer noticed Harris was holding his buttocks tightly together during a pat down; (2) the officer believed Harris was involved with narcotics based on prior dealings; (3) Harris asked to be taken directly to the Youth Services Center and, when this request was not honored, asked to use the bathroom immediately upon arrival at the precinct. State v. Harris, 66 Wn. App. 636, 639, 643, 833 P.2d 402 (1992).

The offense for which Safford was arrested (drug traffic loitering under the Seattle Municipal Code) could form part of the basis justifying a strip search under RCW 10.79.130(1)(a), but by itself could not satisfy the constitutional individualized suspicion standard. Unlike Audley or Harris, Safford did not do anything to show he attempted to conceal drugs on or in an area of his body that made a strip search necessary to find them. Officers did not see Safford put anything down his pants or otherwise draw attention to his genital region by words or action.

The trial court stated "the fact that he was involved in passing cocaine" gave rise to the reasonable suspicion "that he would have drugs

on him *somewhere*, because there was certainly reason to believe that he was passing drugs, and he had to get those drugs from somewhere." 1RP 20 (emphasis added). The court's remarks miss the mark. Strip searches are supposed to take place only when *necessary*. RCW 10.79.060; Plemmons, 134 Wn. App. at 460. There may have been reason to believe Safford had drugs on him "somewhere," but the facts did not show an individualized, reasonable suspicion that he was hiding them in his genitalia, as was the case in Audley and Harris.³

The court also stated "I'm fully aware of the fact that contraband is hidden in many places, including in the crotch area, and between the cheeks." 1RP 20. The trial judge may be personally aware of this "fact," but it was not a fact in evidence and therefore cannot be used to support reasonable suspicion. Substantial *evidence* must support findings of fact. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). No officer testified, based on training and experience, that those involved in narcotics

³ Officer Harris submitted "strip search records" for Safford and Duggins in which he explained the specific facts upon which he formed a reasonable suspicion that the strip search was necessary. CP 20-23. These records were part of the police report packet given to the trial court for the stipulated facts trial. 1RP 21. For Safford, Harris wrote "Safford was dealing in the 2200 block of 3rd Avenue, when he saw Officers, he concealed something on his person." CP 20. For Duggins, Harris wrote "Officers had arrested Duggins with crack cocaine in his mouth and belived [sic] he may have hiding more on his person, as he had made a reaching motion towards his waistband when arrested." CP 22.

transaction typically hide drugs in butt cracks. And no evidence in fact showed any officer witnessed Safford place anything down his pants.

Trial judges sitting as triers of fact are not allowed to rely on personal knowledge to compensate for missing evidence. Dep't of Licensing v. Sheeks, 47 Wn. App. 65, 72, 734 P.2d 24 (1987); cf. Choate v. Swanson, 54 Wn.2d 710, 716-17, 344 P.2d 502 (1959) (rejecting contention that trial judge unfairly allowed personal knowledge and experience to influence his decision in part because the judge expressly disclaimed reliance on personal knowledge).

This prohibition is based on the recognition that a trial judge in his deliberations is limited to the record made before him at trial, and to draw conclusions based on facts outside the record denies the accused constitutional due process of law. People v. Harris, 57 Ill. 2d 228, 231, 314 N.E.2d 465 (Ill. 1974) (citing People v. Wallenberg, 24 Ill. 2d 350, 354, 181 N.E.2d 143 (Ill. 1962) (determination made by the trial judge based private knowledge, untested by cross-examination, or any of the rules of evidence constitutes a denial of due process of law); see also State v. Dorsey, 701 N.W.2d 238, 249-50 (Minn. 2005) ("An impartial trial requires that conclusions reached by the trier of fact be based upon the facts in evidence . . . and prohibits the trier of fact from reaching

conclusions based on evidence sought or obtained beyond that adduced in court.").

Based on the evidence before the trial court, police lacked individualized, reasonable suspicion that a strip search was necessary to recover hidden contraband. The search was therefore illegal and the court erred in denying Safford's motion to suppress.

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999). This Court should vacate Safford's conviction for possession of cocaine with intent to deliver and dismiss the charge with prejudice because no evidence remains on which to find guilt beyond a reasonable doubt. State v. Kinzy, 141 Wn.2d 373, 3893-94, 5 P.3d 668 (2000) (no basis remained for conviction because Court concluded motion to suppress evidence should have been granted); State v. Boethin, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (dismissing charges because remaining evidence insufficient to prove guilt beyond a reasonable doubt).

d. The Strip Search Was Unlawful Because Officers Did Not Obtain Permission From The Jail Unit Supervisor Before Conducting It.

The trial court reviewed Audley and concluded the strip search of Safford was based on reasonable suspicion but did not address the

requirement under RCW 10.79.140(2) that specific approval needed to be obtained from the jail unit supervisor before conducting the search. The search was illegal under RCW 10.79.140 because no such permission was obtained. The strip search therefore lacked the "authority of law" required by article I, section 7 of the Washington Constitution.

RCW 10.79.140(2) provides "With the exception of those situations in which reasonable suspicion is deemed to be present under RCW 10.79.130(2), no strip search may be conducted without the specific prior written approval of the jail unit supervisor on duty." This Court in Audley recognized "Some of the searches authorized by the statute require either approval of the jail unit supervisor or a judicial warrant. For example, under RCW 10.79.140(2), written permission is required to conduct a strip search where reasonable suspicion is not deemed automatically present under RCW 10.79.130(2)." Audley, 77 Wn. App. at 906.

Safford is not subject to RCW 10.79.130(2) because he was not arrested for "[a]n offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute." RCW 10.79.130(2)(c). Safford was arrested for violating Seattle Municipal Code (SMC) 12A.20.050, which prohibits "drug traffic

loitering." Drug traffic loitering is not a statutory offense enumerated in RCW 10.79.130(2).

The plain language of the statute compels this conclusion. Questions of statutory interpretation are reviewed de novo. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). "[C]ourts are to give effect to that plain meaning as an expression of legislative intent." State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004). For this reason, courts "may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." Kilian, 147 Wn.2d at 21. The reviewing court does not resort to canons of statutory interpretation if a statute is unambiguous. Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

RCW 10.79.130(2) lists specific offenses that give rise to a strip search when an individual is arrested for one of them. Safford was not in fact arrested for any of those offenses. If the legislature had wanted to include violations of city ordinances related to drug activity under RCW

10.79.130(2), it could have done so by inserting language indicating just that. State v. Salavea, 151 Wn.2d 133, 144, 86 P.3d 125 (2004). An appellate court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." Salavea, 151 Wn.2d at 144 (quoting Delgado, 148 Wn.2d at 727).

The plain language of RCW 10.79.140, meanwhile, requires the "no strip search may be conducted without the specific prior written approval of the jail unit supervisor on duty" where, as here, RCW 10.79.130(2) is inapplicable. No such specific approval from "the jail unit supervisor on duty" was present in Safford's case.

Requiring permission from a supervising officer uninvolved in the arrest of a suspect makes sense. Officers in the field, "engaged in the often competitive enterprise of ferreting out crime,"⁴ may lack detached judgment as to whether a strip search is truly necessary. Requiring permission from the jail unit supervisor acts as a safeguard against abuse of a practice that ought to be carefully circumscribed.

The complete record of the strip search was available to the trial court. CP 6-50.⁵ Seattle Police Sergeant Mark Hazard was assigned as

⁴ Johnson v. United States, 333 U.S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436 (1948).

⁵ Evidence relating to the strip search was part of the police report packet given to the trial court for the stipulated facts trial. 1RP 21.

the supervisor of the West Precinct Anti-Crime Team that conducted surveillance at Third and Bell on the night in question. CP 12. Hazard was part of the "arrest team" that arrested Safford for drug loitering. CP 12. Officers Harris, Lee and Pasquan were on the other arrest team working that night. CP 12.

At the West Precinct, Hazard "directed and supervised" Safford's strip search.⁶ CP 12. Harris, one of the officers in the Anti-Crime Team working Third and Bell, submitted a "strip search record." CP 20. Hazard is named as the "Supervisor who screened and witnessed the search." CP 20. Officers saw suspected crack cocaine between Safford's butt cheeks during the strip search. CP 12. Police booked Safford into the King County Jail for "Investigation of VUCSA" after they strip searched him at the precinct. CP 11.

Under RCW 10.79.140(2), "no strip search may be conducted without the specific prior written approval of the jail unit supervisor on duty." Hazard screened, directed, and supervised the search. But he was not the "jail unit supervisor." The strip search violated the statute because the jail unit supervisor did not specifically approve it. And because the only possible source for the "authority of law" required by article I,

⁶ Hazard also supervised the strip search of Duggins. CP 12. No evidence was found on Duggins. CP 12.

section 7 is the statute, it follows that the search was unconstitutional because it was carried out without the requisite authority of law provided by statute.

"[U]nlike the Fourth Amendment, article I, section 7 is not based on a reasonableness standard." York v. Wahkiakum School Dist. No. 200, 163 Wn.2d 297, 299, 178 P.3d 995 (2008). Article I, section 7 goes further than the Fourth Amendment and "requires actual authority of law before the State may disturb an individual's private affairs." State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007).

Suppression is required because the evidence was recovered as a result of an unconstitutional search. Ladson, 138 Wn.2d at 359-60. Suppression is also required for evidence tainted by the statutory violation, regardless of whether the search independently violated Safford's constitutional right to privacy. See State v. Turpin, 94 Wn.2d 820, 826, 620 P.2d 990 (1980) (excluding evidence where police failed to inform defendant of her statutory right to independent blood testing, because "[e]vidence obtained unlawfully is excluded"); State v. Copeland, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996) ("Where there is a violation of the court rule right to counsel, the remedy is suppression of evidence tainted by the violation"). "Exclusion provides a remedy for the citizen in

question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence." Ladson, 138 Wn.2d at 359.

In Harris, the court determined suppression of evidence is not an appropriate remedy for violation of the *writing requirement* of RCW 10.79.140(2). Harris, 66 Wn. App. at 644. "The purpose of the statutory requirement is to provide proof the officer consulted his or her supervisor and obtained permission to conduct the search." Id. In Harris, suppression was not required because the officer in fact obtained oral permission from the proper supervisor before conducting the strip search. Id.

In Safford's case, no permission for the strip search was obtained from the "jail unit supervisor" in any form, written or oral. The detailed record shows Sergeant Hazard, the supervisor of the narcotics surveillance squad, authorized the search at the precinct. Hazard lacked authority to authorize the strip search because he was not the "jail unit supervisor on duty." Suppression is required.

- e. In The Alternative, Defense Counsel Was Ineffective In Failing To Properly Raise The Issue Of Lack Of Permission From The Jail Unit Supervisor.

If this Court determines defense counsel did not properly challenge the legality of the strip search on the ground that police officers did not

obtain required approval from the jail unit supervisor, then counsel was ineffective in failing to properly challenge the search on that ground.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

A defendant demonstrates prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. Prejudice is established where there is a reasonable probability the trial court would have granted a suppression motion. State v. McFarland, 127 Wn.2d 322, 337, 337 n.4, 899 P.2d 1251 (1995). A motion to suppress evidence based on the illegality of the strip search would have succeeded for the reasons set forth at C. 2. d., supra. Prejudice is therefore established.

The strong presumption that defense counsel's conduct is not deficient is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126,

130, 101 P.3d 80 (2004) (defense counsel's failure to move for suppression of drugs abandoned in vehicle after defendant was unlawfully seized was both deficient and prejudicial). There is no evidence in Safford's case that counsel's failure to properly challenge the strip search was the product of deliberate strategy. Defense counsel challenged the legality of the strip search but failed to articulate the correct ground for suppression.

Reasonable attorney conduct includes a duty to investigate and research the relevant law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). Competent counsel also knows the facts of the case so that legal challenges can be properly raised. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). A close reading of the statutory provisions would have revealed the permission requirement of RCW 10.73.140(2) applied to the strip search in Safford's case. Competent counsel would have raised the lack of permission issue had the strip search statute been properly researched and applied to the facts of Safford's case.

"A criminal defendant receives constitutionally ineffective assistance of counsel where no legitimate strategic or tactical explanation can be found for a particular trial decision." State v. Meckelson, 133 Wn. App. 431, 433, 135 P.3d 991 (2006). "Failure to bring a plausible motion

to suppress potentially unlawfully obtained evidence is one such decision." Id. Safford has established deficient performance.

"[B]oth Strickland prongs will be satisfied if counsel fails to seek suppression where the record suggests that a motion likely would have succeeded." State v. Horton, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006). Suppression is required because Safford has established both deficient performance and prejudice.

2. THE COURT ERRED IN FAILING TO ENTER
WRITTEN CrR 3.6 FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

The trial court must enter written findings of fact and conclusions of law after a hearing on a motion to suppress evidence. CrR 3.6(b); State v. Tagas, 121 Wn. App. 872, 875, 90 P.3d 1088 (2004). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996). The trial court erred in failing to enter written findings and conclusions on the suppression ruling.

The primary purpose of requiring findings is to allow the appellate court to fully review the questions raised on appeal. State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984). Written findings are essential to permit meaningful and accurate appellate review. State v. Alvarez, 128

Wn.2d 1, 16, 904 P.2d 754 (1995); State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996).

Equally important, written findings "allow the appealing defendant to know precisely what is required in order to prevail on appeal." State v. Smith, 68 Wn. App. 201, 209, 842 P.2d 494 (1992). "A court's oral opinion is not a finding of fact." State v. Hescoek, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Rather, an oral opinion is no more than a verbal expression of the court's informal opinion at the time rendered and "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (quoting State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)). "An appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." Head, 136 Wn.2d at 624.

A trial court's failure to enter written findings of fact and conclusions of law requires a remand for entry of written findings and conclusions. Id. at 623. Findings and conclusions may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. State v. Hillman, 66 Wn. App. 770, 773-74, 832 P.2d 1369 (1992).

Reversal of conviction and dismissal is proper if prejudice can be shown from the initial lack of written findings. Head, 136 Wn.2d at 624; State v. Royal, 122 Wn.2d 413, 422-23, 858 P.2d 259 (1993). One example of prejudice is where written findings appear tailored to meet the errors asserted on appeal. Tagas, 121 Wn. App. at 875; Head, 136 Wn.2d at 624-25. Tailoring can be shown if the written findings and conclusions fail to track the oral opinion on the issues material to the appeal. State v. Ritter, 149 Wn. App. 105, 109, 201 P.3d 1086 (2009).

D. CONCLUSION

For the reasons stated, this Court should vacate Safford's conviction and dismiss the charge with prejudice. In the event this Court declines to do so, then the case should be remanded for entry of written CrR 3.6 findings and conclusions if they are not submitted beforehand.

DATED this 31st day of December 2009.

Respectfully Submitted,

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