

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE
40

No. 68055-2-I

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

**STATE OF WASHINGTON,
Appellant,**

v.

**TIMOTHY LI-GEMINI FERGUSON
Respondent.**

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Appellant/Cross-Respondent
WSBA #22007**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court erred in finding that the impound statute didn't apply where the seizure of the car was lawfully based on probable cause to believe that it contained evidence of a crime.
2. Whether the trial court erred in finding that a 15 hour delay in obtaining a warrant to search the car was reasonable where the car was seized late on a Sunday night toward the end of the officer's shift and the officer started his shift early the next day to start the search warrant application process and there were no extraordinary circumstances surrounding the seizure.
3. Whether the record is sufficient for the appellate court to review the application for the search warrant regarding the cell phones where the testimony and evidence presented at the hearing clearly established probable cause for the warrant, and the tape recording and the record indicate that the judge signed the warrant after the testimony and indicated he had no other questions.
4. Whether the trial court abused its discretion in permitting the State to amend the information after the State had rested where the only change was to a statutory citation and defense never asserted any prejudice from the technical amendment.
5. Whether the defendant was sentenced for a crime he didn't commit where the judge imposed an appropriate sentence on the unlawful possession of cocaine with intent to deliver conviction but where the judgment and sentence contains a typographical error regarding the statutory citation for that conviction.

C. STATEMENT OF THE CASE¹

1. Procedural Facts

On Jan. 19, 2011, Appellant Timothy Ferguson was charged with one count of Unlawful Possession of a Controlled Substance, to-wit: Marijuana, in violation of RCW 69.50.401(2)(c), a class C felony; one count of Unlawful Possession of a Controlled Substance with Intent to Deliver, to-wit: Methamphetamine, in violation of RCW 69.50.401(2)(b), a class B felony; and one count of Maintaining a Vehicle for Drug Dealing, in violation of RCW 69.50.402(f), a class C felony, for his actions on or about Nov. 28, 2012. CP 76-78. On Aug. 15, 2011, the State amended Count II of the information to Unlawful Possession of a Controlled Substance with Intent to Deliver, to-wit: Cocaine. CP 71-73. Ferguson was arraigned on the amended information. Supp. CP ___, Sub. Nom. 30; 8/25/11, RP2.

Ferguson filed a motion to suppress which the trial court denied. CP 27-31, 47-67. After the motion to suppress was denied, the court inquired whether there were any amended informations, and the prosecutor informed the court with counsel present that the amended

¹ Ferguson has not asserted error regarding any of the findings of fact regarding the suppression motion or the bench trial. Therefore, those findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

information charged cocaine instead of methamphetamine because the lab results came back that the controlled substance was in fact cocaine. RP 65-66. At a bench trial on stipulated facts, Ferguson was found guilty of count II, not guilty of count I, and count III was dismissed at the request of the State. CP 27-35; RP 61-65, 72, 79-80. During argument on the stipulated record defense counsel asserted that Ferguson should be found not guilty because the information had been amended to charge cocaine but the statutory reference was still for methamphetamine. The prosecutor then moved to correct the statutory citation for count II. The court granted the motion. RP 67, 75-76. Ferguson was sentenced to 20 months on a standard range of 16-20 months. RP 83-84, 88.

2. Substantive Facts – 3.6 Motion

On November 28, 2010, around 10:30 p.m., a Sunday night, Western Washington University (“WWU”) Officer Wolf Lipson noticed a white Mitsubishi Eclipse car without a visible front license plate but with a very loud, illegally amplified, after-market exhaust system. RP 14, 15-16, 19, 28; Supp. CP __, Ex. 3; CP 27 (FF1). He followed the car for about a half mile and then pulled the car over on a public street. CP 28 (FF2); RP 16-17. The sole occupant of the car was the driver, Timothy Ferguson, whom he didn’t know. CP 28 (FF3); RP 18, 21. WWU Officer Lipson, who was alone, approached the car and informed Ferguson why he had

pulled Ferguson over. RP 17-18, 20. As soon as Ferguson rolled down his window, Officer Lipson immediately smelled the distinct odor of unburnt marijuana. CP 28 (FF3); RP 18, 32. Lipson told Ferguson that he smelled marijuana and asked him about it. RP 21. Ferguson said that he hadn't smoked any marijuana and didn't have any in the car. CP 28 (FF4); RP 21.

WWU Officer Lipson had previously been a law enforcement officer in Los Angeles and had nine years of experience in law enforcement. CP 28 (FF3); RP 14. He had had training in California regarding the smell of unburnt marijuana and had come into contact with the smell of burnt and unburnt marijuana dozens of times. CP 28 (FF3); RP 18-19. Once he smelled that smell, the nature of his investigation changed from a traffic infraction to possession of marijuana. RP 19. He called for back-up, recontacted Ferguson after back-up arrived one to two minutes later, had him exit the car and arrested him for possession of marijuana. CP 28 (FF4); RP 20. Lipson also called for a drug canine unit and Bellingham Police Officer Woodward and dog Justice arrived about five to ten minutes later. CP 28 (FF4); RP 21.

Justice was deployed, sat down briefly at the driver's side door and then tried to jump into the car through the open window. CP 28 (FF5); RP 22. Justice also sat down and looked at Officer Woodward mid-way down the passenger side of the car. CP 28 (FF5); RP 22. Officer Woodward told

Lipson that Justice had alerted very strongly to the driver's side which is why he tried to jump into the car and had also alerted along the passenger side. RP 23. Lipson could see into the car and noticed a briefcase located on the rear floorboard on the passenger side. RP 23. During the time Justice was deployed, Ferguson was handcuffed and seated in the patrol car. RP 23.

After Justice alerted to the car, Lipson decided to issue a citation to Ferguson regarding the exhaust traffic infraction but to release him pending further investigation regarding the marijuana because he wasn't sure exactly what the car contained and what the charge would be. RP 23, 37. He also decided to seize the car until he could obtain a search warrant. CP 28 (FF6); RP 23. Lipson put evidence tape across the doors and had a tow company tow it to a secure area at WWU's station. CP 28-29 (FF6); RP 24. He did not enter the car before it was towed, and instead did an inventory from outside the car. RP 42-43. Lipson denied "impounding" the car, asserting that the car was seized in order to get a warrant to conduct a proper search of the car. RP 40.

Lipson chose not to apply for a telephonic search warrant that night because it was between 11:00 and 11:30 p.m. on a Sunday night, there was no pressing urgency, and he thought it would be better to make the application the next day. CP 28 (FF6); RP 24-25. Lipson got off his

shift at 2:00 a.m. RP 27. The next day he started his shift two hours early in order to prepare the search warrant paperwork and called the prosecutor's office around 3:20 p.m. CP 29 (FF6, 7); RP 25, 27. The warrant was issued that day and he executed it later that afternoon. CP 29 (FF7); RP 25-26.

When the car was searched, the briefcase was opened and several ounces of marijuana and about an ounce of cocaine² were found inside. CP 29 (FF9); RP 26. Some cell phones were found in the open center console. CP 29 (FF8); RP 26, 41. A medical marijuana authorization form was found inside the briefcase as well. CP 29 (FF9); RP 45. A scale found inside the car had both white residue on it and bits of marijuana. CP 29 (FF9); RP 49. A separate search warrant was obtained to search the cell phones. CP 30 (FF10); RP 27. Messages on the cell phone appeared to show drug deals being set up. RP 46.

While Ferguson invoked his rights after having been read his Miranda rights, he did tell Lipson that he had a medical marijuana authorization form, but told Lipson he didn't have it with him. CP 28

² The substance was initially listed as meth/amphetamine in the police reports, but when it was tested at the laboratory, the results showed that it was cocaine. RP 45-46.

(FF4); RP 32, 35-36. He could have accessed the form from the briefcase that night, but he did not. RP 48.

D. ARGUMENT

On appeal Ferguson alleges that the seizure of his car was unlawful because it did not comply with the impound statute under RCW 46.55.113. By its own terms, the impound statute does not provide the only lawful means for law enforcement to seize and tow a car. The trial court did not err in finding that the officer lawfully seized and had the car towed based on probable cause to believe that it contained evidence of a crime.

Ferguson also asserts that the officer's waiting from late Sunday night to his next shift that Monday afternoon to obtain a search warrant was unreasonable. Under the circumstances where there was no urgent need to obtain a warrant at the time the car was seized, the 15 hour delay did not unconstitutionally impinge on Ferguson's possessory rights in the car.

Ferguson next asserts that his conviction should be reversed because of the State's untimely motion to amend the information to correct the statutory citation. While the State's motion did come after the State had rested, Ferguson did not make any showing of prejudice from

the late amendment and was required to where the amendment did not change the offense charged, but merely corrected the statutory citation.

Ferguson also asserts that his conviction should be reversed because a small portion of the tape recording of the hearing for the search warrant for the cell phones was unintelligible. The entire record of the basis for the probable cause determination can be heard on the tape and that record is sufficient for appellate review of the probable cause determination. The only part that is somewhat unintelligible is when the court announced its decision about issuing the warrant. However, it's clear from the court's signing of the warrant that he did find probable cause for the warrant. Where the record is adequate for review of the probable cause determination, suppression of the warrant is not an appropriate remedy.

Last, Ferguson asserts he was sentenced for a crime he didn't commit because the judgment and sentence contains the same scrivener's error regarding the statutory citation that the amended information did, and therefore his conviction should be reversed. Upon the record, Ferguson was clearly sentenced for the crime the court found him guilty of, possession of cocaine with intent to deliver. The appropriate remedy is to correct the scrivener's error on the judgment and sentence.

- 1. The car was lawfully seized based on probable cause to believe it contained evidence of a crime and the fifteen hour delay in obtaining the warrant was reasonable.**

Ferguson asserts that the trial court erred in determining that the impound statute under RCW 46.55.113 did not apply to the officer's seizure of the car and in concluding that the 15 hour delay from the seizure of the car to the execution of the search warrant was not unreasonable. Ferguson does *not* contest the probable cause to support the seizure or search of the car. The officer seized the car here based on probable cause to believe that it contained evidence of a drug offense and had it towed to the University's secure lot. The car was not "impounded," therefore the court did not err in concluding the impound statutes inapplicable to the seizure of the car. In addition the 15 hour delay in obtaining the search warrant was not unreasonable because it was after eleven o'clock on a Sunday night when the WWU officer decided to seize the car, the officer was due to go off shift within a couple hours, and the officer arrived at work early the next day in order begin the process to obtain a search warrant for the car. Given that there were no extraordinary circumstances, it was reasonable for the officer to delay applying for a search warrant until the next business day.

a. *the seizure of the car was lawful pursuant to common, constitutional law*

RCW 46.55.113 does not purport to provide the exclusive reasons to seize or even impound vehicles. By its own provision, nothing in the statute derogates from the power of police officers under the common law. RCW 46.55.113(4). In addition, for example, impounds under RCW 64.44.050 are not considered “impounds” subject to the provisions of the chapter. RCW 46.55.117. Impoundment is a concept separate and distinct from a seizure for the purposes of search and seizure law. State v. Davis, 29 Wn. App. 691, 697, 630 P.2d 938, *rev. den.*, 96 Wn.2d 1013 (1981). “The term “impoundment” refers to the taking of an object (usually a vehicle) into custody for some valid reason *wholly apart from* any purpose to search that object for incriminating matter.” *Id.* (emphasis added). The purpose of an impound search is not to search for evidence of a crime, but to protect the owner’s property and to protect the police from dangerous items contained therein and from claims of lost or stolen property. *Id.*

... [W]hen the police have probable cause to believe a vehicle, which is not itself evidence of a crime, contains contraband or incriminating evidence and “exigent circumstances” exist³, the vehicle may be searched, ..., *or seized and searched*. ... In this

³ Post State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012), the mere mobility of a car will not constitute “exigent circumstances” and unless “true” exigent circumstances exist, the police must obtain a search warrant in order to search a car.

type of search, of course, the avowed purpose is to unearth and seize any incriminating matter.

Id. at 697-98 (internal citations omitted).

Ferguson makes a similar argument to the one made in State v. Huff, 64 Wn. App 641, 826 P.2d 698, *rev. den.* 119 Wn.2d 1007 (1992): he asserts that the impound statute provides the exclusive basis for law enforcement to seize and impound a car. The defendant in Huff asserted that the trial court's holding was contrary to prior caselaw as to when a vehicle may be lawfully impounded, and argued that the bases cited therein were exclusive.⁴ The Huff court rejected this contention, finding that the cases relied upon had not involved a situation in which there was probable cause to search the vehicle, and therefore the Supreme Court did not consider "whether probable cause would justify the warrantless seizure of a car for the time reasonably needed to obtain a warrant." Id. at 652. In

⁴ In State v. Williams, 102 Wn.2d 733, 742-43, 689 P.2d 1065 (1984) had held:

A motor vehicle may be lawfully impounded in certain specific circumstances: (1) as evidence of a crime, if the ... officer has probable cause to believe that it was stolen or used in the commission of a felony; (2) as part of the "community caretaking function," if the removal of the vehicle is necessary (in that it poses a threat to public safety and convenience, or is itself threatened by vandalism or theft of its contents), *and* neither the defendant nor his spouse or friends are available to move the vehicle; and (3) as part of the police function of enforcing traffic regulations, if the driver has committed one of the traffic offenses for which the Legislature has specifically authorized impoundment.

Huff, the court held: "... when an officer has probable cause to believe that a car contains contraband or evidence of a crime, he or she may seize and hold the car for the time reasonably needed to obtain a search warrant and conduct the subsequent search." Id. at 653.

The impound statute relied upon by Ferguson does not purport to recite the exclusive bases for law enforcement to seize a vehicle and have it towed when it is being seized based upon probable cause to search the vehicle. The statute itself makes this clear in stating that nothing in the statute derogates from law enforcement's authority under the common law. As noted in Huff, as long as there is probable cause for a search of a vehicle, the vehicle may be seized for the time reasonably necessary to obtain a warrant.

The Huff court relied in part on Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), in making this conclusion. In reaching its conclusion that law enforcement may search a vehicle without a warrant when the vehicle was removed to a police station if there is probable cause to search, the Chambers court noted:

Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. *For constitutional purposes, we see no difference between on the*

one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Chambers, 399 U.S. at 51-52 (emphasis added). As long as there is probable cause to believe that an automobile contains contraband or evidence of a crime, an officer may seize it pending obtaining a warrant to search it.⁵ Cardwell v. Lewis, 417 U.S. 583, 593-95, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991); *see also*, Vinston v. State, 625 S.W.2d 533, 274 Ark. 452 (1981), *cert. den.*, 459 U.S. 833 (1982) (seizure of car involved in robbery was reasonable where robbery had occurred the evening before, police had good reason to believe this was their only chance to seize the car before someone would remove evidence from the car, and there was good information that the car had been involved in the robbery and could contain evidence of the crime). Officers may also seize a vehicle on public property when there is probable cause to believe it is forfeitable contraband. Florida v. White, 526 U.S. 559, 119 S.Ct. 1555, 143 L.Ed.2d 748 (1999).

⁵ Under federal law an automobile may also be searched based solely on probable cause to believe the car contains evidence of a crime or contraband under the "automobile exception." Arkansas v. Sanders, 442 U.S. 753, 760, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979)

The trial court rejected Ferguson's argument that the WWU officer was required to comply with Washington's impound statute when he seized the car and that the officer did not have justification under the statute to seize the car. RP 54. The judge found that the impound statute largely addressed traffic safety concerns and didn't provide an exclusive list of reasons for seizing a car. RP 59-60. The court found the seizure lawful under Huff. RP 60.

By its own provisions, the impound statute does not purport to be an exhaustive list of the bases upon which law enforcement may seize a car. Under common, constitutional law, law enforcement can seize a car when they have probable cause to believe that the car contains evidence of a crime. They can seize such property for a reasonable period of time to obtain a search warrant.

b. unreasonable delay

Ferguson asserts that the 15 hour delay in obtaining the search warrant was unreasonable. The delay here, from late on a weekend night to the next business day, was reasonable, particularly where there were no apparent extraordinary circumstances at the time of the seizure.

The only interest implicated by the seizure of Ferguson's car is his *possessory* interest in the car, not his *privacy*. "A seizure affects only the person's possessory interests; a search affects a person's privacy

interests.” United States v. Burgard, 675 F.3d 1029, 1033 (7th Cir. 2012) (quoting Segura v. United States, 468 U.S. 796, 806, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984)). In Huff, the court noted that

... it is constitutionally reasonable to allow a slightly longer infringement on *possessory rights* in order to encourage the heightened protection of privacy rights that result from obtaining a warrant before a search is conducted.

Id. at 651 (emphasis added); *see also*, State v. Platt, 574 A.2d 789, 794, 154 Vt. 179 (1990) (seizure of car intruded upon defendant’s possessory rights in car, but did not violate his privacy rights therein because a warrant was obtained before the car was searched).

Huff held that property may be seized and held for a “time reasonably necessary to obtain a warrant,” assuming probable cause. Huff, 64 Wn. App. at 649. From the facts in Huff it isn’t clear how long the delay was. The court found that the time period from the officer’s seizure of the car and tow to the police station to the preparation of the search warrant documents and issuance of the search warrant was not unreasonable because the car was seized only for the time reasonably needed to obtain a warrant. *Id.* at 653. While there are very few cases⁶ in

⁶ The only other published case the State found discussing this issue was State v. Flores-Moreno, 72 Wn. App. 733, 741, 866 P.2d 648, *rev. den.*, 124 Wn.2d 1009 (1994), which held that a 50 minute delay from the time the car was detained to the application for a search warrant was reasonable..

Washington that discuss the reasonableness of a delay in obtaining a search warrant for seized vehicles, there is case law from other jurisdictions addressing such delays and delays in searching a car under the federal “automobile exception.”

Under the Fourth Amendment, “if the police have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct either an immediate or a delayed search of the vehicle.” California v. Acevedo, 500 U.S. 565, 570, 111 S. Ct. 1982, 1986, 114 L. Ed. 2d 619 (1991). A warrantless search of a vehicle does not need to occur simultaneously with its seizure. United States v. Johns, 469 U.S. 478, 484, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985). The delay must be reasonable considering the circumstances⁷. Johns, 469 U.S. at 487. Under the Fourth Amendment, the reasonableness of the delay is determined by “weighing ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’” Burgard, 675 F.3d at 1033 (quoting U.S. v. Place, 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)).

⁷ In Johns, the circumstances noted by the Court were the absence of any asserted adverse affect on a privacy or possessory interest. *Id.* at 487.

In U.S. v. Howard, 991 F.2d 195 (5th Cir. 1993), *cert. den.*, 510 U.S. 949 (1993) the court concluded that a two day delay in effecting the search of a car was not unreasonable under the Fourth Amendment. In that case, the police seized the defendant's car, which the police had reason to believe had been involved in the delivery of drugs, from its location on a public street, but did not search the vehicle until two days later, after the police had obtained a search warrant. *Id.* at 197, 202.⁸ The court held that where the police had probable cause to search the vehicle at the scene, and could have searched the automobile at the scene under the automobile exception, the police should not be penalized for exercising caution and choosing to obtain a search warrant. *Id.* at 202. It concluded that a two day delay in the search conducted pursuant to a warrant was not unreasonable even where the defendant asserted a possessory interest in the car. *Id.*; *see also*, Johns, 469 U.S. at 487 (delay of three days in execution of a warrantless search of seized property is not unreasonable under the Fourth Amendment).

In a case out of Vermont, applying a reasonableness standard under Vermont's constitution, the court found that a delay from a Saturday

⁸ It isn't exactly clear from the case whether the search warrant wasn't issued until two delays later and the search conducted on that same day, or whether the warrant was obtained sometime prior to the search that was conducted two days after the seizure.

to the next business day on a Monday was not an unreasonable delay. State v. Guzman, 965 A.2d 544, 184 Vt. 518 (2008). In that case, the officer detected the distinct odor of marijuana coming from the vehicle when he contacted the defendant, whom he had pulled over for a speeding violation. *Id.* at 546. A canine unit called in to check the car for drugs alerted on the car. *Id.* at 546-47. The officers seized and impounded the car sometime after 1:00 a.m. on an early Saturday morning and applied for a search warrant the morning of the next business day, Monday. *Id.* The warrant was granted and executed that afternoon. *Id.* at 547. The defendant asserted that the search of his car violated Vermont's state constitution⁹ because the police had waited an unreasonable amount of time before applying for a search warrant. *Id.* Vermont's constitution, like Washington's, "permits the warrantless seizure of an unoccupied vehicle for a reasonable amount of time before a warrant can be obtained where there is probable cause that the car contains evidence of a crime." *Id.* at 551. Applying that standard, the court found that it was not unreasonable for the police to wait until Monday morning to apply for the search warrant even assuming the police could have contacted a judge over the

⁹ The Vermont state constitution provides greater protections to individual rights than the Fourth Amendment. State v. Bryant, 950 A.2d 467, 473 n.2, 183 Vt. 355 (2008).

weekend. *Id.* at 551-52. The court also concluded that there was no requirement that police obtain search warrants immediately for vehicles, only that the warrant be obtained within a reasonable period of time. *Id.* at 552.

In a case from Mississippi, the Mississippi Supreme Court came to a similar conclusion that a one day delay in obtaining a search warrant after seizure was not unreasonable. *Edlin v. State*, 523 So.2d 42, 48 (Mississippi 1988). In that case the police noticed damage to the defendant's car located at his house and greenish blue paint on it. The police directed that the defendant's car, which had been moved, be impounded due to its probable connection to a crime in which a car had been run off the road by another car. *Id.* at 46. After impounding the car, the police sought and obtained a search warrant for it the next day. *Id.* Finding there was probable cause to impound the car, the court concluded that the seizure did not impermissibly interfere with the defendant's possessory interest in the car and that a one day delay from impoundment to issuance of the search warrant was not unreasonable. *Id.* at 48.

In *Burgard*, the court found a six day delay between seizure of a cell phone and the issuance of the search warrant reasonable given the circumstances. *Burgard*, 675 F.3d at 1034. There the court weighed the defendant's possessory interest in his cell phone, which he had asserted

during its seizure, against law enforcement's strong interest in determining whether there was in fact child pornography on the phone. *Id.* The delay was attributable in part due to conflicting shifts of the officers involved in obtaining the search warrant, as well as an intervening robbery investigation that required the affiant's attention. *Id.* at 1031. A day of delay was also attributable to the officer's communications with the U.S. attorney's office regarding drafting of the warrant application. *Id.* In response to defense argument that the officer could have been more diligent and expeditious in obtaining the warrant, the court stated:

But police imperfection is not enough to warrant reversal. With the benefit of hindsight, courts "can almost always imagine some alternative means by which the objectives of the police might have been accomplished," but that does not necessarily mean that the police conduct was unreasonable. *United States v. Sharpe*, 470 U.S. 675, 686–87, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). Krug may theoretically have been able to work more quickly, but his delay was not the result of complete abdication of his work or failure to "see any urgency" as in *Mitchell*, 565 F.3d at 1351. He wanted to be sure that he had all the information he needed from the seizing officer and he wanted to consult with the AUSA, all the while attending to his other law enforcement duties. We do not want to discourage this sort of careful, attentive police work, even if it appears to us that it could or should have moved more quickly. Encouraging slapdash work could lead to a variety of other problems. See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (warrant failed to meet Fourth Amendment's particularity requirement, because of failure in copying paragraph from warrant application to warrant).

Burgard, 675 F.3d at 1034. Finding the six delay reasonable, the court summarized that compliance with the Fourth Amendment “will entail diligent work to present a warrant application to the judicial officer at the earliest reasonable time.” Id. at 1036.

The Washington court rules do not dictate a time period within which a search warrant must be sought for seized property, but the probable cause determination regarding a person’s warrantless arrest must be made within 48 hours. CrR 2.3 does not state a time period within which to obtain a search warrant, but requires that the warrant be executed within 10 days. CrR 2.3(c). A judicial decision regarding probable cause to arrest someone must be made within 48 hours under the rules. CrR 3.2.1(a); JuCrR 7.3(a); CrRLJ 3.2.1; Westerman v. Cary, 125 Wn.2d 277, 288-89, 291, 892 P.2d 1067 (1994). The Washington Supreme Court adopted the 48 hour time period from the standard set forth by the U.S. Supreme Court in County of Riverside v. McLaughlin. State v. K.K.H., 75 Wn. App. 529, 533-34, 878 P.2d 1255 (1994), *rev. den.*, 126 Wn.2d 1015 (1995). In County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) the U.S. Supreme Court decided that a reasonable time period within which a person’s initial warrantless detention based on probable cause and the judicial probable cause determination had to be made generally was 48 hours. Riverside, 500 U.S.

at 56. In coming up with this time limit, the Court struck a balance between the “rights of individuals and the realities of law enforcement.”
Id. at 53.

Here, the WWU officer stopped the car for a traffic violation, with no reason to suspect at the time of the stop that the car might contain drugs. He seized the car in order to secure it until he could obtain a search warrant. He did not apply for a telephonic search warrant that night because it was late on a Sunday night, and there was no urgent need to. His shift ended a couple hours later. He was diligent in processing the search warrant application the next day, even coming in two hours early on his shift in order to start it. He obtained the search warrant and executed it the next day. The 15 hour delay in obtaining a search warrant was reasonable. There were no extraordinary circumstances compelling the officer to obtain the search warrant that night. The better course therefore was to wait until the next business day to apply for one. Balancing Ferguson’s right to possession of his car and the need to detain it pending obtaining a search warrant, the short, overnight delay was reasonable.

Ferguson essentially asserts that the officer was obligated to obtain a search warrant that night as soon as he had developed probable cause to search the car. The law does not require that an officer obtain a search

warrant for seized property immediately upon its detention, but within a reasonable time. Other jurisdictions hold that a two day delay is reasonable where there are no extraordinary circumstances, particularly where the delay occurs over a weekend. It is not unreasonable for a police officer to delay obtaining a search warrant to the next business day and to exercise due care to ensure that the judge has all the relevant information before him or her when determining whether to issue a search warrant. Certainly if 48 hours is a reasonable time period within which to make a judicial determination regarding a person's liberty, then such a time period should be reasonable with respect to delays in order to obtain warrants to search seized vehicles, absent extraordinary circumstances.

2. The record before the appellate court is sufficient to permit review of the search warrant application regarding the cell phones.

Ferguson asserts that his conviction should be reversed because the search warrant application hearing for the cell phones was not properly recorded. The only portion of the hearing that is perhaps unintelligible is the portion where the judge states he found probable cause and was signing the warrant. The entire portion of the tape recording regarding the basis for probable cause is intelligible, and Ferguson does not contend otherwise. As the record is sufficient to review the judge's probable cause determination and it's clear from the judge's signing of the warrant that he

did in fact make that determination, there is no legal or factual basis for Ferguson's requested remedy.

CrR 2.3 requires some form of recording of the search warrant hearing so that there is a record of the probable cause determination. State v. Garcia, 140 Wn. App. 609, 620, 166 P.3d 848 (2007). If the recording is faulty or missing, a reconstruction of the telephonic hearing is permissible as long as it does not "impair the reviewing court's ability to determine what was considered by the magistrate in issuing the warrant." *Id.* A complete record is not necessary as long as there is a sufficient basis for the court to review the probable cause determination. *Id.* at 622. In order for a reconstructed record to be sufficient, there must be corroboration from a disinterested party of the reconstructed evidence considered by the magistrate. *Id.* at 621. If the record is insufficient to permit review of the magistrate's probable cause determination, then the remedy is suppression of the evidence seized pursuant to the warrant. *Id.* at 620.

Here, the tape recording is sufficient in and of itself to permit review of the judge's probable cause determination. While defense counsel asserted there was a problem with the tape recording, it was limited to the fact that the judge's voice was unintelligible at the time when the judge decided to issue the warrant. RP 4-5, 7. It was not

contested that the judge did in fact sign the warrant. Ex. 2. The judge personally reviewed the tape, and then determined that there were seven syllables that were unintelligible given the static on his recorder:

... On my cassette player there was too much background static to determine, I think I uttered seven syllables and there was a pause, um as I was looking for something on the face of the warrant, I assume and then I said, "oh yeah", suggesting I found whatever I was looking for. It may have been the serial numbers that were referred to.

RP 8. The trial judge found that the basis for probable cause was clearly set forth on the recording. RP 10. The judge ruled that based on his review of the recording it was clear that he didn't have any questions about the basis for the warrant and that in signing the warrant, he had made the legal and factual determination that there was probable cause for the warrant. RP 12.

Ferguson asserts that simply because the State failed to preserve a "proper record" of the search warrant application, that suppression of the warrant and evidence obtained thereby is the remedy. Ferguson provides no authority for this remedy, and it's clear from the case law that the purpose of the requirement of a record is to permit review of the probable cause determination. Here, there is a sufficient record for that review.

Moreover, the State believes that with a better tape recorder, most of the missing seven syllables are intelligible. The State believes the recording states:

DPA Bracke: Any questions?
Judge Uhrig: No, I don't.
...
Judge Uhrig: Is there any identifying numbers of the phones on the?
DPA Bracke: There are. There are serial numbers on both.
Judge Uhrig: Okay. As long as it has that, it's sufficient.
(pause) Oh yes. Okay. Anything else?
DPA: No. (unintelligible) Okay.
Judge Uhrig: (unintelligible) sufficient legal and (unintelligible¹⁰) basis for the warrant and I have signed it.

Ex. 1.

It is clear from the tape and the signed warrant that the judge did find probable cause and did issue the warrant. The record is sufficient for the probable cause determination to be reviewed. The trial court did not err in finding that there was no basis to suppress the warrant due to the difficulty in understanding seven syllables on the recording.

¹⁰ The State believes this word is "factual" but it is not as clear as the rest of the recording.

3. The Court did not abuse its discretion in allowing the amendment of the information to correct a scrivener's error regarding the statutory citation after the State had rested where defense counsel failed to demonstrate any prejudice from the late amendment.

Ferguson asserts that the trial court erred in granting the State's motion to amend the information to change the statutory citation regarding count II, Unlawful Possession of Cocaine with Intent to Deliver, to read "RCW 69.50.401(2)(a)" instead of "RCW 69.50.401(2)(b)." Ferguson asserts that he wasn't required to show prejudice under State v. Pelkey¹¹ because the State's motion was made after it had rested its case. The Pelkey rule prohibiting amendments to the offense charged after the State rests does not apply to technical amendments of the information. If the amendment relates to a statutory citation error, a defendant must show prejudice to preclude amendment of the information even after the State has rested. The trial court found no prejudice here, found the statutory citation error was a scrivener's error, and thus did not abuse its discretion in granting the amendment.

A trial court's decision regarding amendment of an information is reviewed for abuse of discretion. State v. Collins, 45 Wn. App. 541, 551,

¹¹ State v. Pelkey, 109 Wn. 2d 484, 487, 745 P.2d 854, 855 (1987).

726 P.2d 491 (1986), *rev. den.*, 107 Wn.2d 1028 (1987). The court rules permit an information to be amended before verdict as long as the defendant's rights aren't prejudiced. CrR 2.1(e) states:

The court may permit an information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

However, due to state constitutional limitations a court may not permit the State to amend the criminal charge, unless it is to a lesser degree or included offense, after the State has rested even if the defendant has not established prejudice. State v. Pelkey, 109 Wn. 2d 484, 487, 745 P.2d 854, 855 (1987). Failure to seek a continuance in light of an amended information demonstrates lack of prejudice. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

The Pelkey rule of no amendments after the State has rested does not apply, however, to all amendments. For example, it does not apply to those related to form and not substance. State v. Debolt, 61 Wn. App. 58, 61-62, 808 P.2d 794 (1991); *accord*, State v. Downing, 122 Wn. App. 185, 93 P.3d 900 (2004) (amendment to date of offense alleged in information after State had rested related to matter of form and not substance and therefore was permissible where there was no showing of prejudice to defendant). Amendments to cure statutory citation errors are not reversible unless the amendment prejudiced the defendant. State v.

Vangerpen, 125 Wn.2d 782, 787-88, 888 P.2d 1177 (1995). CrR 2.1(a)(1)

provides in relevant part:

... Error in the citation or its omission shall not be ground for dismissal of the indictment of information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

CrR 2.1(a)(1). The constitutional concerns that underlie the Pelkey rule are not implicated by technical amendments. *See, Vangerpen*, 125 Wn.2d at 790 ("Convictions based on charging documents which contain only technical defects ... usually need not be reversed.").

On August 15th, 2011 the State filed the First Amended Information, along with the First Amended Affidavit of Probable Cause, to change count II to allege that the controlled substance was cocaine because the laboratory results showed that the controlled substance was cocaine and not methamphetamine. CP 34, 69-75; RP 45-46, 76. Ferguson was arraigned on the amended information ten days later, and two months before trial. Supp CP ___, Sub Nom. 30; 8/25/11 RP 2. Defense counsel was well aware that the controlled substance at issue was cocaine and not methamphetamine because on cross-examination he asked the officer about the "cocaine" found in the briefcase, and asked about the fact that it initially had been listed as methamphetamine in the police

reports but was determined to be cocaine based on the laboratory results.

RP 45-46, 72.

Defense counsel was careful to wait to raise his argument until he was sure that all the evidence was in and the State had formally rested. RP 72. He argued that although the information was amended to allege cocaine, the citation had not been changed and still referenced the methamphetamine subsection. RP 75-76. After the State moved to amend the information, defense counsel never argued that Ferguson would be prejudiced by the amendment, just that he objected to it because it was not timely. RP 77-78. The trial court found that the State's motion to amend related to a scrivener's error and, finding no prejudice, permitted the amendment. CP 34; RP 78.

Pelkey, cited by Ferguson, is distinguishable. That case stands for the proposition that: "An amendment during trial stating a new count charging a different crime violates [Art.1 Section 22]." Pelkey, 109 Wn. 2d at 487. In that case the defendant was charged with bribery. After the State had presented its case, the defense moved to dismiss because of lack of evidence to support an element of the offense, that the person was acting in their official capacity. The State then moved to amend the information to charge the offense of trading in special influence, which did not require proof that the result affected a public servant's official duties.

Id. at 486. In Pelkey, the amendment clearly related to the substance of the offense, an element of the crime. The amendment here does not.

Ferguson also contends that Unlawful Possession of Cocaine with Intent to Deliver is a class C felony. He is incorrect. Like methamphetamine, possession of cocaine with intent to deliver is a class B felony. RCW 69.50.401(2)(a) provides in part that if the violation relates to a Schedule I or II drug that is a narcotic drug, the offense is a class B felony. RCW 69.50.401(2)(a) (2010). Cocaine is a Schedule II drug and is a narcotic. RCW 69.50.206(b)(4), State v. Harris, 44 Wn. App. 401, 408, 722 P.2d 867 (1986); RCW 69.50.101(r)(5) (2010); State v. Stitt, 24 Wn. App. 260, 261-62, 600 P.2d 671 (1979), *rev. den.*, 93 Wn.2d 1006 (1980).

Here, the State did not change the charge when it moved to amend the information. It had already amended the information to allege that the controlled substance was cocaine and not methamphetamine. Defense counsel was aware of that, and the only amendment after the State had rested was to correct a scrivener's error. There was no missing fact or element that required proof of which Ferguson wasn't aware, or of which evidence hadn't been presented. It's clear from defense counsel's cross examination that he was aware that Ferguson was charged with possession of cocaine and not methamphetamine. Moreover, on appeal Ferguson has not pointed to any prejudice that he suffered from the amendment of the

statutory citation. The trial court did not abuse its discretion in granting the State's motion to amend the statutory citation error after it had rested its case.

4. **The judgment and sentence correctly lists the offense as a class B felony but should be corrected to list the statutory violation as "RCW 69.50.401(2)(a)".**

Ferguson contends that he was sentenced for a crime he didn't commit because the judgment and sentence references the offense with the same statutory citation error that was contained in the First Amended Information and because he asserts that the violation was a class C felony. As noted above, Unlawful Possession of Cocaine with Intent to Deliver is a class B felony. The judgment and sentence, however, does contain the same scrivener's error regarding the statutory citation and that should be corrected. This Court should remand this matter for the limited purpose of correcting the citation error in the judgment and sentence.

The trial court did not sentence Ferguson for an offense he didn't commit. It was clear to all that the court had found Ferguson guilty of Unlawful Possession of Cocaine with Intent to Deliver and was being sentenced for that offense. CP 35; RP 83-85. The judgment and sentence states that the offense is "Unlawful Possession of a Controlled Substance with Intent to Deliver, To-Wit: Cocaine." CP 17. While no Second

Amended Information was filed correcting the statutory citation, the amendment was memorialized in the court's findings and conclusions. CP 34-35.

Ferguson requests that his conviction be reversed based on the statutory citation error in the judgment and sentence. Ferguson cites no authority for this remedy of a typographical citation error. Typographical errors that are easily corrected do not render a judgment invalid. In re Coats, 173 Wn.2d 123, 135, 267 P.3d 324 (2011). The remedy for such errors is remand to correct the error in the judgment and sentence, pursuant to CrR 7.8(a). *Id.* at 144. The appropriate remedy for the statutory citation error in the judgment and sentence here is to correct the citation reference upon remand.

E. CONCLUSION

Based on the foregoing, the State respectfully requests that Ferguson's conviction for Unlawful Possession of a Controlled Substance with Intent to Deliver, to-wit: Cocaine, be affirmed and the scrivener's error in the judgment and sentence be corrected.

Respectfully submitted this 10th day of August, 2012.


HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Andrew Subin, addressed as follows:

ANDREW SUBIN
Attorney at Law
1000 McKenzie Avenue #24
Bellingham, WA 98225

 08/10/2012
Legal Assistant Date

APPENDIX A

FILED IN OPEN COURT
11/29/2011
WHATCOM COUNTY CLERK
By 

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,)	
)	No.: 11-1-00051-9
Plaintiff.)	
)	
vs.)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW RE:
TIMOTHY LI-GEMENI FERGUSON,)	SUPPRESSION
)	
Defendant.)	

This matter having come regularly before the court upon the motion of defendant to suppress evidence and the court having heard the testimony of Officer Lipson of the WWU Police Department and heard the argument of counsel makes the following:

I. FINDINGS OF FACT

1. Officer Lipson was on regular patrol duty on the evening of November 28, 2010 in Bellingham, Whatcom County. Around 10:30 pm he was stopped with his window down at the corner of East Chestnut Street and Ellis Street. He observed a white Mitsubishi southbound on Ellis. He heard that the exhaust on the vehicle was loud and could see that the muffler had been altered. He observed that the front license plate on the vehicle had been placed behind a portion of the exterior of the Mitsubishi and was not readable.

FINDINGS OF FACT AND COCLUSIONS FO LAW RE;SUPPRESSION
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Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
(360) 676-6784
(360) 738-2532 Fax

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1 2. He followed the vehicle southbound on Ellis past where it turns into Samish Way. He
3 contacted dispatch as he followed to identify the registered owner of the vehicle. He did not
5 recognize the vehicle nor did he know or suspect of it being involved in criminal activity. The
7 owner was identified by dispatch as defendant. The officer had no suspicions that defendant was
9 involved in criminal activity unrelated to the equipment violations concerning his vehicle.

11 3. Defendant pulled his vehicle over and parked on Consolidation Street east of Samish
13 Way. Defendant was alone in his vehicle. Officer Lipson walked up to the driver's door and
15 defendant lowered the window. Officer Lipson immediately detected the strong odor of unburnt
17 marijuana emanating from the vehicle. Office Lipson is familiar with odor of unburnt marijuana
19 from his law enforcement training in California. He has also been involved with dozens of
21 investigations concerning marijuana over the course of his eight year law enforcement career and
23 readily recognizes its odor.

25 4. Defendant denied that there was any marijuana in his vehicle. He also stated he had not
27 smoked any marijuana. He advised that he had a prescription to possess marijuana, but stated
29 that he did not have the prescription with him. Officer Lipson asked defendant to step from his
31 vehicle and arrested him for possessing marijuana. He was placed in handcuffs, advised of his
33 rights and put in the back of the officer's patrol car.

35 5. A drug detecting dog was requested to respond to the scene. Within ten minutes,
37 Officer Woodward of the Bellingham Police Department arrived with his narcotics dog Justice.
39 Justice alerted on the drivers door and jumped against the vehicle. Justice also alerted on the
41 passenger side near the front seat.

43 6. Officer Lipson decided to seize the Mitsubishi and have it towed to the campus
45 security office. This was accomplished a little after 11:00 pm on November 28, 2010. The

1 vehicle was towed to that location and the doors and windows secured with evidence tape.
3 Officer Lipson photographed the front license plate which was placed behind a portion of the
5 fender or grill. (Exhibit), Officer Lipson reported two hours early to work the following day at
7 2:00 pm.

9 7. At 3:20 pm he was on the telephone with Commissioner Parise obtaining a search
11 warrant to search the Mitsubishi. The qualifications of Justice as a drug detecting dog were not
13 related to the commissioner. Officer Lipson did set forth his training and experience in
15 recognizing the odor of unburnt marijuana. Commissioner Parise found probable cause for the
17 issuance of the warrant for the car. The warrant was executed at 4:00 pm that same day.

19 8. The search of the automobile resulted in the discovery of \$1435 in a wallet in the
21 center console. The wallet also contained defendant's student identification from the community
23 college. There were also two cell phones in the console. A black briefcase was located behind
25 the front passenger seat.

27 9. The brief case was opened and three large bags of substance identified as marijuana
29 were located inside. In the main compartment of the briefcase, officers found a notebook with
31 writings consistent with records of past drug sales. Digital scales displaying small bits of
33 marijuana and a white powdery residue on its surface was also in the briefcase. A baggie of
35 white powder weighing about one ounce was also in the briefcase. This substance was
37 chemically analyzed and determined to be cocaine. More notes portraying past drug sales were
39 discovered, as well as, paperwork designating Mr. Ferguson as the marijuana provider for
41 another individual were found. A prescription that was current in date and in proper form
43 permitting Mr. Ferguson to use marijuana was located in the briefcase.

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47 FINDINGS OF FACT AND COCLUSIONS FO LAW RE;SUPPRESSION

1 4. The transcript of the proceedings in which the search warrant for the cellular
3 telephones is sufficiently clear for the court to confirm the probable cause
5 justifying its issuance. Defendant has orally moved to suppress the fruits of
7 the search warrant because a portion of the recording of the warrant
9 proceedings is unintelligible. The unintelligible portion of the recording is
11 very brief and, after listening to the recording, the court is satisfied that it
13 asked a question. If the question involved probable cause for the warrant or
15 some other particular regarding its issuance, the court is satisfied that the
17 answer adequately responded to the court's concerns or it would not have
19 signed and authorized the warrant. This Motion to Suppress will be denied.

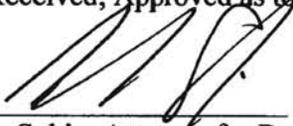
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23 11/29/11

25 Judge Ira Umrig

27 Presented by:

29
31 
33 CRAIG D. CHAMBERS, WSBA #11771
35 Deputy Prosecuting Attorney

37 Copy Received; Approved as to Form:

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41 Andrew Subin, Attorney for Defendant
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