

No. 71427-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS GOGEL,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Douglas Gogel was charged and convicted of prescription forgery under the Legend Drugs Act for attempting to obtain oxycodone using a forged prescription. Attempting to obtain oxycodone through prescription forgery is also an offense under the Uniform Controlled Substances Act. Under statute, any offense that is a violation of the Uniform Controlled Substances Act “shall” not be charged under the Legend Drugs Act. Because Gogel was incorrectly charged and convicted under the Legend Drugs Act, this Court should reverse and order the charge dismissed. Additionally, this Court should reverse because the information omitted an essential element of the offense, and the trial court erred in denying Gogel’s motion to suppress evidence obtained from an unlawful search.

B. ASSIGNMENTS OF ERROR

1. The State erred in charging Gogel with prescription forgery under RCW 69.41.020(1), part of the Legend Drugs Act, instead of prescription forgery under RCW 69.50.403(1), part of the Controlled Substances Act.

2. The information was deficient by failing to allege that Gogel knew the prescription was forged, an essential element of the crime of prescription forgery.

3. After conducting a suppression hearing, the trial court erred by not entering written findings of fact and conclusions of law.

4. The court erred in denying Gogel's motion to suppress under CrR 3.6.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In general, the State "shall" not charge any offense that is a violation of the Uniform Controlled Substances Act under the Legend Drugs Act. Attempting to obtain oxycodone through prescription forgery is an offense under both acts. Did the State err in charging Gogel with prescription forgery for attempting to obtain oxycodone under the Legend Drugs Act rather than under the Uniform Controlled Substances Act?

2. A charging document must contain all the essential elements of the offense. The charging document alleged that Gogel attempted to obtain Oxycodone "by means of a false and forged prescription." The information did not allege that Gogel knew the prescription was forged, an essential element. Was Gogel provided sufficient notice of the elements of the charge?

3. After conducting a suppression hearing under CrR 3.6, the court must enter findings of fact and conclusions of law. The court held a suppression hearing, but did not enter written findings or conclusions. Should this Court remand for entry of written findings and conclusions?

4. Police searched the pickup truck that Gogel had been a passenger in. An officer testified that Gogel gave written consent for the search. Gogel denied that he had consented. The written consent form that Gogel purportedly signed did not contain Gogel's signature, rather it contained an "X" on the "consenter" line. The officer admitted that the "X" was not a signature, but testified that Gogel had made the mark. The officer admitted that Gogel was handcuffed with hands behind his back when he purportedly made the mark. Did the State meet its burden of proving by clear and convincing evidence that Gogel consented?

5. The language on the consent form stated that Gogel consented to the search of the truck and any locked containers within. During the search, the officer found a closed laptop computer. Despite not being part of the truck and not being a "container," the officer opened the laptop. Did the State exceed the scope of consent in opening the laptop?

D. STATEMENT OF THE CASE

Pharmacy technician Lauren Wolfer was working the evening shift at a Bartell's pharmacy in Bellevue on May 21, 2012. 1/2/14RP 6-8. Around 8:15 p.m., a man representing himself as Thomas Blake presented a prescription for oxycodone for himself. 1/2/14RP 76, 81, 88. Suspicious, Wolfer called the doctor listed on the prescription. 1/2/14RP 76, 78. After speaking with the doctor, Wolfer called the police. 1/2/14RP

80. Shortly thereafter, a woman arrived to pick up the prescription.

1/2/14RP 82. Wolfer called the police again. 1/2/14RP 82.

Officer Laurino Perrerrira arrived. 12/31/13RP 49. He spoke with the woman who was there to pick up the prescription. 12/31/13RP 50. After speaking with her, the officer made a call for other officers to stop a black truck that was leaving the parking lot. 1/2/14RP 108. Officer Benjamin Buck stopped a black truck. 12/31/13 6-7. Another officer in a separate patrol car joined Buck. 12/31/13 RP 7, 40-41. The officers removed Douglas Gogel and two other men from the truck and handcuffed them. 12/31/13RP 7-9; 1/2/14RP 123-24. Gogel had been in the front passenger seat. 1/2/14RP 26, 123.

Gogel agreed to speak with Buck. 1/2/14RP 27. Buck obtained incriminating statements from Gogel. 12/31/13 RP 11-14. Purportedly based on Gogel's consent, Buck searched the truck and obtained incriminating evidence. 12/31/13 16-20. Shortly thereafter, Officer Perrerrira drove Wolfer to where police had detained Gogel. 12/31/13RP 53; 1/2/14RP 12. Wolfer identified Gogel as the same person who had presented the prescription to her. 1/2/14RP 12.

The State charged Gogel with prescription forgery under RCW 69.41.020(1) for trying to obtain oxycodone by means of a forged prescription. CP 1. Gogel moved to suppress the evidence obtained from

the search of the truck. See 1/2/14RP 43-44. Gogel also moved to suppress Wolfer's identification of him. 1/2/14RP 51-54. The court denied the motions. 1/2/14RP 50-51; 55-56. After a jury trial, Gogel was convicted as charged. 1/6/14RP 34. Gogel appeals.

E. ARGUMENT

1. The State improperly charged Gogel with prescription forgery under the Legend Drugs Act rather than under the Controlled Substances Act, requiring reversal of the conviction.

a. In general, offenses that violate the Controlled Substances Act must not be charged under the Legend Drugs Act.

In general, offenses that violate the Controlled Substances Act, chapter 69.50 RCW, must not be charged under the Legend Drugs Act, chapter 69.41 RCW.¹ Under the Legend Drugs Act, "Any offense which is a violation of chapter 69.50 RCW other than RCW 69.50.4012 shall not be charged under this chapter." RCW 69.41.072.²

¹ "Legend drugs" means any drugs which are required by state law or regulation of the pharmacy quality assurance commission to be dispensed on prescription only or are restricted to use by practitioners only." RCW 69.41.010(12).

² The exception listed in RCW 69.41.072 allows for prosecution for an offense that would violate RCW 69.50.4012. Under RCW 69.50.4012, it is unlawful to substitute another material in lieu of a controlled substances in a drug transaction. As Gogel was not prosecuted for this offense, the exception does not apply.

This Court touched upon RCW 69.41.072 in State v. Rapozo, 114 Wn. App. 321, 58 P.3d 290 (2002).³ There, a juvenile was charged under the Legend Drugs Act with unlawful possession of a legend drug, lorazepam. Rapozo, 114 Wn. App. at 322. When trial started, however, the State argued it would instead prove that the juvenile had violated a provision under the Controlled Substances Act. Id. at 322-23. The juvenile moved to dismiss. Id. at 323. The court granted the motion, reasoning that the State had to charge the juvenile under the Controlled Substances Act. Id. The court denied the State's motion to amend the information. Id. On appeal, the State conceded that lorazepam is a controlled substance and that it should have charged the juvenile under the Controlled Substances Act. Id. The State argued, however, that the trial court abused its discretion in not allowing the State to amend the information. Id. at 324. This court rejected the argument. Id.

b. Gogel was improperly charged and convicted of prescription forgery under the Legend Drugs Act rather than the Controlled Substances Act.

Police arrested Gogel for allegedly committing prescription forgery under RCW 69.41.020. CP 3, 6. The information alleged that

³ At that time, RCW 69.41.072 was codified at RCW 69.41.070.

Gogel attempted to obtain a legend drug, Oxycodone, by means of a forged prescription in violation of RCW 69.41.020(1):

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse DOUGLAS BURCE-JOHN GOGEL and BREANNA JOANN BYRD, and each of them, of the crime of Violation of the Uniform Controlled Substances Act, committed as follows:

That the defendants DOUGLAS BRUCE-JOHN GOGEL and BREANNA JOANN BYRD, and each of them, in King County, Washington, on or about May 21, 2012, then and there knowingly and intentionally did attempt to obtain a legend drug, to-wit: Oxycodone, a controlled substance, by means of a false and forged prescription;

Contrary to RCW 69.41.020(1), and against the peace and dignity of the State of Washington.

CP 1-2 (emphasis added).⁴ This information was not amended and Gogel was convicted, as charged, for violating RCW 69.41.020. CP 21, 41.

While the information refers to the Controlled Substances Act, RCW 69.41.020 is actually part of the Legend Drugs Act. See chapter 69.41 RCW; State v. Jordan, 91 Wn.2d 386, 387, 588 P.2d 1155 (1979). Under this statute, it is unlawful to try to obtain a legend drug through the forgery of a prescription:

⁴ Byrd was the woman who allegedly tried to pick up the prescription. CP 4. She was not tried with Gogel.

Legend drugs shall not be sold, delivered, dispensed or administered except in accordance with this chapter.

(1) No person shall obtain or attempt to obtain a legend drug, or procure or attempt to procure the administration of a legend drug:

(a) By fraud, deceit, misrepresentation, or subterfuge; or

(b) By the forgery or alteration of a prescription or of any written order; or

(c) By the concealment of a material fact; or

(d) By the use of a false name or the giving of a false address.

RCW 69.41.020(1). A nearly identical statute is contained within the

Controlled Substances Act, chapter 69.50 RCW:

(1) It is unlawful for any person knowingly or intentionally:

...

(c) To obtain or attempt to obtain a controlled substance, or procure or attempt to procure the administration of a controlled substance, (i) by fraud, deceit, misrepresentation, or subterfuge; or (ii) by forgery or alteration of a prescription or any written order; or (iii) by the concealment of material fact; or (iv) by the use of a false name or the giving of a false address;

RCW 69.50.403(1)(c).

Attempting to obtain oxycodone, by forgery of a prescription is a violation of RCW 69.50.403(1)(c) because oxycodone is a controlled substance. RCW 69.50.101(d) (“‘Controlled substance’ means a drug,

substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or commission rules.”); RCW 69.50.206 (listing oxycodone as a schedule II controlled substance). Thus, because attempting to obtain oxycodone through prescription forgery is an offense under the Controlled Substances Act, Gogel should not have been charged with prescription forgery under RCW 69.41.020(1), which is part of the Legend Drugs Act.⁵ RCW 69.41.072.

c. Gogel’s conviction should be reversed and the charge dismissed.

By charging Gogel with prescription forgery under the Legend Drugs Act, the State violated RCW 69.41.072. While there do not appear to be any Washington cases on point, the remedy should be reversal and dismissal. This is consistent with the remedy provided in cases where there are two concurrent criminal statutes, but the State erroneously charged the general statute rather than the special statute. State v. Walls, 81 Wn.2d 618, 623, 503 P.2d 1068 (1972) (reversing and dismissing case where the defendant was erroneously charged and convicted under

⁵ A conviction under RCW 69.41.020(1) is treated more harshly than a conviction under RCW 69.50.403(1)(c). A person who violates RCW 69.50.403 is guilty of a class C felony and may only be imprisoned for not more than two years. RCW 69.50.403(3). In contrast, a person who violates RCW 69.41.020 is guilty of a class B felony which is punishable by imprisonment of up to ten years. RCW 69.41.020(8); RCW 9A.20.021. Class B felonies take ten years to wash out while Class C felonies take five years. RCW 9.94A.525.

inapplicable larceny statutes). Thus, this Court should reverse the conviction and order the case dismissed.

2. The information failed to allege that Gogel knew the prescription was forged, an essential element of prescription forgery.

The information alleged that Gogel “knowingly and intentionally did attempt to obtain a legend drug, to-wit: Oxycodone, a controlled substance, by means of a false and forged prescription” in violation of RCW 69.41.020(1). CP 1-2 (emphasis added). Irrespective of whether Gogel was properly charged with violating RCW 69.41.020(1), the charge was defective for failing to allege that Gogel knew the prescription was false or forged.

a. All essential elements must be included in the charging document.

To afford notice to a defendant of the nature and cause of the accusation, the State must include all the essential elements of the crime in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art 1, § 22; Const. amend. VI. This includes non-statutory elements. Kjorsvik, 117 Wn.2d at 102-103.

b. Knowledge that the prescription is forged is an essential element of prescription forgery under RCW 69.41.020(1).

RCW 69.41.020(1) may be violated in multiple ways:

Legend drugs shall not be sold, delivered, dispensed or administered except in accordance with this chapter.

(1) No person shall obtain or attempt to obtain a legend drug, or procure or attempt to procure the administration of a legend drug:

(a) By fraud, deceit, misrepresentation, or subterfuge; or

(b) By the forgery or alteration of a prescription or of any written order; or

(c) By the concealment of a material fact; or

(d) By the use of a false name or the giving of a false address.

RCW 69.41.020(1) (emphasis added). Though the State did not charge a particular subsection, the language used in the information indicates the allegation was that Gogel violated subsection (b).

Judicial interpretation of RCW 69.41.020(1)(b) is sparse.

Questions of statutory interpretation are reviewed de novo. State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). The purpose in interpreting a statute is to determine and carry out the intent of the legislature. Id. Statutes must be interpreted consistent with their underlying purposes while avoiding constitutional deficiencies. Id. In construing a statute, this Court presumes the legislature did not intend absurd results. Id.

The language, “attempt to obtain a legend drug . . . [b]y the forgery or alteration of a prescription,” implies that the person who

attempts to obtain the drug knows the prescription is forged or altered.

The language “by the forgery or alternation” means that the person who tried to obtain the drugs had committed the act of “forgery or alteration.”

A person who forges a prescription knows that the prescription is forged.

This interpretation harmonizes the statute with its analog statute in the Controlled Substances Act. Unlike RCW 69.41.020(1)(b), it states that person must act “knowingly or intentionally” to be guilty. RCW 69.50.403(1)(c) (“[i]t is unlawful for any person knowingly or intentionally . . . [t]o obtain or attempt to obtain a controlled substance, or procure or attempt to procure the administration of a controlled substance . . . by forgery or alteration of a prescription or any written order.”).

Requiring knowledge that the prescription is forged is consistent with the general rule that every crime must contain a mens rea element. Eaton, 168 Wn.2d at 481. While the legislature may create strict liability crimes, they are disfavored. State v. Anderson, 141 Wn.2d 357, 363, 5 P.3d 1247 (2000). A mens rea element requires the prosecution to prove that the defendant had the requisite state of mind when committing the crime. Eaton, 168 Wn.2d at 481. Absent a requirement that a person knows the prescription is forged, a person would be guilty even if the person lacked knowledge of forgery. It would subject those who pick up a prescription for another person to a crime if the prescription was forged.

The history of the offense of prescription forgery supports this interpretation. In 1938, our Supreme Court interpreted a predecessor statute, Rem. Rev. Stat. § 2509-3, which outlawed prescription forgery for “narcotic” drugs. State v. Harkness, 196 Wash. 234, 236-37, 82 P.2d 541 (1938). The court stated that the statute made “it an offense for any person knowing a physician’s prescription to have been falsely made to present it to a druggist with intent to procure a narcotic drug.” Id. at 237 (emphasis added).

While there does not appear to be a Washington case holding that the precise language at issue requires knowledge, cases from other jurisdictions with substantially similar statutes require knowledge that the prescription is forged. Thus, for example, in interpreting the language, “No person shall make or utter any false or forged prescription or written order for any narcotic drug,” the Supreme Court of Florida held that the information must allege that the “defendant knew the instrument was false and forged.” Beasley v. State, 158 Fla. 824, 826, 30 So.2d 379 (1947). Similarly, the Supreme Court of Louisiana reversed a conviction for obtaining a controlled substance by means of a forged prescription because the State failed to prove the essential element that the defendant knew the prescription was forged. State v. Scott, 456 So.2d 1383, 1385 (La. 1984).

While not controlling, it is significant that the jury instructions in this case required a finding that “the defendant knew that the prescription had been falsely made, completed, or altered.” CP 31, 32 (emphasis added). These instructions were proposed by the State. See 1/6/2014 RP 3-4. Thus, the State, though it failed to include the element in the information, recognized that an essential element of the offense is knowledge that the prescription has been forged.⁶

This Court should hold that knowledge that the instrument has been forged is an essential element of RCW 69.41.020(1)(b).

c. Under either a strict or liberal construction, the essential element of knowledge that the prescription was forged is missing, requiring reversal

“The information must be written in such a manner as to enable persons of common understanding to know what is intended.” State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992). When the defendant challenges the information before the verdict, the reviewing court strictly construes the information. State v. Johnson, 119 Wn.2d 143, 150, 829 P.2d 1078 (1992); State v. Ralph, 85 Wn. App. 82, 85, 930 P.2d 1235 (1997). When the defendant challenges the sufficiency of the information for the first time on appeal, the court liberally construes the document, and

⁶ Proper jury instructions cannot cure a defective information. State v. Vangerpen, 125 Wn.2d 782, 788, 888 P.2d 1177 (1995).

analyzes whether “the necessary facts appear in any form, or by fair construction can they be found, in the charging document?” Kjorsvik, 117 Wn.2d at 105. If the court does not find the missing element, prejudice is presumed and reversal is required. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000). If the element is found, the court analyzes whether the defendant was actually prejudiced by the inartful language. Kjorsvik, 117 Wn.2d at 106; McCarty, 140 Wn.2d at 425.

While discussing the jury instructions, Gogel raised a general objection to any defects in the information. 1/6/2014RP 5-6 (“I would object to any defects in the information that might raise an issue on appeal and I want to make sure I note that.”). The State did not respond to Gogel’s objection and the parties proceeded to closing arguments after the instructions were finalized. See 1/6/2014RP 6. While Gogel did not move to dismiss, his objection was sufficient to apprise the State and the court that the information was defective. Because Gogel objected to the information before the case was submitted to the jury, the strict standard applies.

Under a strict standard, reversal is required because the language—“knowingly and intentionally did attempt to obtain a legend drug, to-wit: Oxycodone, a controlled substance, by means of a false and forged prescription”—did not convey that that Gogel had to know the prescription

was forged. See Johnson, 119 Wn.2d at 150 (under strict standard, information alleging unlawful delivery of a controlled substance failed to contain language clearly conveying the requisite criminal intent); Beasley, 158 Fla. at 826 (charge for crime of uttering a forged prescription requires allegation that defendant knew prescription was forged).

Even under the liberal interpretation, reversal is required because the missing element cannot be fairly implied from the language (“knowingly and intentionally did attempt to obtain a legend drug, to-wit: Oxycodone, a controlled substance, by means of a false and forged prescription.”). Viewed liberally, the terms “knowingly” and “intentionally” only modify the words “did attempt to obtain a legend drug.” They cannot be fairly read to leap to the end of the clause. Such a construction does not make grammatical sense. As constructed, the sentence should have ended with language such as “knowing the prescription to be false and forged” in order to enable Gogel to understand all the elements of the offense.

Had the information used the statutory language, a different result might be warranted. Instead of using the statutory language, “[b]y the forgery or alteration of a prescription or of any written order,” the information used the language “by means of a false and forged prescription.” Unlike the statutory language, this language does not fairly

imply that Gogel knew the prescription was “false and forged.” It only alleges that Gogel used a prescription that was forged. A hypothetical is illustrative. If a baseball league alleged that a player had hit a homerun “by means of a corked bat,” the allegation fails to allege that the player knew the bat was corked. The same is true here.

This preceding analysis is in accord with other cases that analyze whether a knowledge element can fairly be implied. For example, in State v. Simon, our Supreme Court reversed a conviction for first degree promotion of prostitution because the information failed to allege that the defendant knew the victim was less than 18 years old, an essential element. Simon, 120 Wn.2d at 198-99. The language there alleged that the defendant “did knowingly advance and profit by compelling [the victim] by threat and force to engage in prostitution; and did advance and profit from the prostitution of [the victim], a person who was less than 18 years old.” Id. at 197-98. The court reasoned that, “No one of common understanding reading the information would know that knowledge of age is an element of the charge of promoting prostitution of a person under 18.” Id. at 199. Other cases are similar. See e.g., State v. Moavenzadeh, 135 Wn.2d 359, 361-64, 956 P.2d 1097 (1998) (information alleging possession of stolen property deficient where it did not fairly allege that the defendant knowingly possessed stolen property); State v. Brown, 169

Wn.2d 195, 197, 234 P.3d 212 (2010) (information alleging crime of escape deficient where it failed to allege that the defendant acted knowingly).

Under the foregoing cases, the essential element that the Gogel knew the prescription was forged cannot be fairly implied from the information. Accordingly, this Court presumes prejudice and should reverse. McCarty, 140 Wn.2d at 425-26. The charge should be dismissed without prejudice. Id. at 428.

3. The court erred in denying Gogel's motion to suppress evidence from the search of the truck.

a. The court erroneously found that Gogel voluntarily consented to the search.

Gogel moved to suppress evidence obtained from the search of the truck. 12/31/13RP 2. The State argued that evidence was admissible because Gogel voluntarily consented to the search. CP 14-15.

Officer Buck pulled over the truck, in which Gogel was a passenger, around 9:00 p.m. 12/31/2013RP 6. It was dark. 1/2/2014RP 37. Other officers arrived. 12/31/13 RP 7, 40-41, 46. Guns drawn, police ordered Gogel and the two other men out of the truck; the men complied and were handcuffed with their arms behind their back. 12/31/13RP 7-9, 25; 1/2/14RP 123-24.

Officer Buck testified he sought Gogel's consent to search the truck. 12/31/13RP 19. Buck recounted that he told Gogel he could refuse consent and read Gogel "Ferrier"⁷ warnings from a card issued by the police department. 12/31/13RP 16. Buck claimed to have obtained Gogel's written consent. 12/31/13RP 18-19. The form, however, does not contain Gogel's signature. Ex. 3; 12/31/13RP 27. Rather it has an "X" on the "Consenter" line. Ex. 3. Despite acknowledging that Gogel was handcuffed with hands behind his back at the time, Buck represented that Gogel made the "X." 12/31/13RP 25, 27-28.

Gogel recalled events differently. He testified that while he had given permission for police to retrieve a small dog that was in the truck, he had not consented to the search. 1/2/2014RP 28-30. He testified that no one had read him warnings that he had a right to refuse consent. 1/2/2014RP 29, 38. He denied making the "X" on the form. 1/2/2014RP 29.

The court, while "troubled by the issue of how difficult it would be for somebody to make an X on a piece of paper behind their back," nevertheless concluded that Gogel had validly consented:

I'll deny the defense motion. I am troubled by the issue of how difficult it would be for somebody to make an X on a paper behind their back, but on the whole, I find that

⁷ State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

Officer Buck's testimony has greater weight and more credibility than Mr. Gogel's testimony, not that I necessarily think that Mr. Gogel is not being truthful as to what he remembers, but I think that he was so distracted by his concern for the dog that he just wasn't paying attention to what was going on with the rest of these things, and because of his concern with the dog, I think he probably just simply doesn't recollect that the officer did in fact explain the Ferrier warnings to him and did get his consent to search the truck. And I think that Mr. Gogel ostensibly had authority to grant permission to search the truck because he appeared to be possession of the truck, appeared to have lawful possession of it, and therefore was in a position to grant permission to search it.

1/2/2014RP 50. This was the entirety of the court's oral ruling. The court did not enter written findings of fact and conclusions of law.

b. The court failed to enter findings of fact and conclusions of law.

After conducting a CrR 3.6 hearing, the court must enter written findings of fact and conclusions of law. CrR 3.6(b) ("If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law"). This requirement ensures that there is an adequate record for the review. See State v. Head, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998).

The court failed to enter written findings as to the CrR 3.6 hearing. The court also failed to enter related findings on the admissibility Gogel's statements (CrR 3.5) and whether Wolfer's identification of Gogel was

admissible. Accordingly, this Court should remand for entry of the findings and conclusions. See Head, 136 Wn.2d 624-25.

If this Court is satisfied that the court's oral opinion provides sufficient information to enable review, this Court may review the issue without remanding. State v. Radka, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004). If this Court declines to remand, this Court should reverse because the State failed to prove that Gogel consented to the search of the truck. Alternatively, this Court should reverse because the police exceeded the scope of consent by opening up a laptop computer in the truck.

c. Gogel did not voluntarily consent to the search.

Article 1, section 7 of the Washington Constitution provides that, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" Const. Amend. IV.

In general, warrantless searches are unreasonable. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). One of the exceptions to the warrant requirement is consent. Id. The State has the burden of establishing that the consent was voluntary by clear and

convincing evidence and that the search did not exceed the scope of the consent. Id.; State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990). In analyzing whether consent was voluntary, the court typically considers several factors, including (1) whether Miranda⁸ warnings were given prior to obtaining consent; (2) the degree of education and intelligence of the defendant; and (3) whether the defendant was advised of his right not to consent. State v. Shoemaker, 85 Wn.2d 207, 212, 533 P.2d 123 (1975). No one factor is dispositive. Id.

While police gave Gogel his Miranda warnings and claimed to have told him he could refuse the search, the record shows that the State did not meet its burden to prove by clear and convincing evidence that Gogel consented to the search.

Officer Buck claimed to have obtained Gogel's consent to search the truck. The evidence shows he did not. Buck admitted that the consent form does not contain Gogel's signature. 12/31/13RP 27; Ex. 3. There is no evidence that Gogel signs with an "X." Documents in the record show that he does not. CP 7, 45. Our Supreme Court has approved of the general use of consent to search forms because they carry the "advantage of creating evidence that avoid ambiguity over whether consent was

⁸ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

actually given.” State v. Ferrier, 136 Wn.2d 103, 119 n.10, 960 P.2d 927 (1998). The lack of Gogel’s signature on the form is unambiguous evidence that Gogel did not consent. While credibility determinations are for the trial court, this court is in same position as the trial court in reviewing documentary evidence. See Smith v. Skagit County, 75 Wn.2d 715, 718, 453 P.2d 832 (1969). This Court should hold that an “X” on a consent form is not sufficient evidence of consent.

Even assuming an “X” is sufficient, the State did meet its burden of proving that Gogel made the mark. Officer Buck admitted that Gogel was handcuffed with his hands behind the back. Nevertheless, he claimed that Gogel was able to sign the form, which was allegedly placed on top of the hood of a police car. 12/31/13RP 28. The State did not demonstrate that a person would be physically capable of doing so.

Assuming that Gogel did make the X and that this is legally sufficient to establish consent, the evidence does not show that his consent was voluntary. Officer Buck did not affirmatively testify that Gogel said he understood the warnings. See 12/31/13RP 19. Rather, he testified that Gogel did not appear confused and that he did not indicate that he lacked understanding. 12/31/13RP 19.

This Court should hold that the State failed to meet its burden of proving by clear and convincing evidence that Gogel voluntarily

consented to the search. The denial of Gogel's CrR 3.6 motion should be reversed.

d. Assuming valid consent, police exceeded the scope of the consent by opening up a laptop in the truck.

Alternatively, this Court should reverse because the State exceeded the scope of consent.

The consent to search form states that Gogel authorized police to "search the property described as: 1 PICKUP TRUCK AND ANY LOCKED CONTAINERS WITHIN WA B2761616R. 2004 CHEVEY SILVERADO." Ex. 3. When searching the truck, however, the officer opened up a laptop computer, found that it was on, and saw "a program running with a prescription block format laid out on the size of paper that was consistent with the prescription that had been passed at the pharmacy." 1/2/14RP 131; see 12/31/13 RP 21.

The plain language in the consent form did not authorize this action. The laptop was not part of the truck itself. Neither was it a "container" within the truck.

While computers may be analogized to containers because they store digital data, they are not true containers because they do not store physical objects. In the context of analyzing whether cell phones (which for all purposes are pocket sized computers) are "containers" that may be

searched incident to arrest, the United States Supreme Court has rejected the analogy:

Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter. See New York v. Belton, 453 U.S. 454, 460 n. 4, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (describing a “container” as “any object capable of holding another object”). But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen.

Riley v. California, 573 U.S. ___, 134 S. Ct. 2473, 2014 WL 2864483, at *16 (2014). In addition to noting a cell phone’s capability to access remote data, the Court also reasoned that cell phones, like computers, are distinct because they have immense storage capacity, which distinguish them from other containers or objects a person might carry. Id. at *14. Similarly, the Kansas Supreme Court has reasoned that, “a computer is not truly analogous to a simple closed container or conventional file cabinet, even a locked one. Rather, it is the digital equivalent of its owner’s home, capable of holding a universe of private information. State v. Rupnick, 280 Kan. 720, 735, 125 P.3d 541 (2005).

Given a laptop computer’s immense storage capacity and capability to access data elsewhere, this Court should hold that the laptop in Gogel’s truck was not a “container.” Accordingly, the search of it exceeded the scope of consent.

e. The errors were prejudicial.

If evidence was seized without authority of law, the evidence is not admissible in court. State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). Its admission is constitutional error. State v. Thompson, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Id.

The evidence from the laptop alone requires reversal. It directly linked Gogel to the prescription presented to Wolfer. Besides the incriminating information obtained from opening the laptop, the police obtained other incriminating evidence, including a piece of prescription paper, a printer/scanner, and a bright green construction shirt. 1/2/2014RP 20; 1/6/2014RP 130. Wolfer testified that the man who presented her with a prescription was wearing a lime green vest. 1/2/2014 RP 10; 1/6/2014 77. The State cannot meet its burden to prove the unlawful search harmless beyond a reasonable doubt.

F. CONCLUSION

The State violated the law by charging Gogel with prescription forgery under the Legend Drugs Act rather than under the Controlled Substances Act. The conviction should be reversed and the charge dismissed. Alternatively, the charge should be dismissed because the information failed to include all the essential elements. If not dismissed, this Court should reverse because of the unlawful search.

DATED this 21st day of July, 2014.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 71427-9-I
)	
DOUGLAS GOGEL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DOUGLAS GOGEL (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	() () (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JULY, 2014.

X _____ 

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