SUPREME COURT NO. 101848-7

NO. 56600-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD PURVES,

Petitioner.

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

The Honorable Keith Harper, Judge

PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Richard Purves seeks review of the Court of Appeals' unpublished decision in State v. Purves (Op.), which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Washington's former statute criminalizing drug possession is void under State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). Because the statute is void, a warrant authorizing a search based on that statute lacks authority of law to justify an invasion of privacy under article I, section 7. Should this Court grant review and reverse the Court of Appeals decision?

2. A partially invalid warrant renders a search wholly invalid when any valid portion is relatively insignificant compared to the valid portion. Then, the valid portion is not severable, and suppression is required. Here, the portions of the warrant relating to drug paraphernalia were incidental to the overarching goal of searching for evidence of a controlled

substance. Should this Court also grant review and determine the warrant was not severable?

C. STATEMENT OF THE CASE

1. **Initial contact, affidavit, warrant, and charges**

On November 14, 2020, a Jefferson County deputy, Coronado, stopped Purves for speeding. Purves acknowledged he had a suspended license. Deputy Coronado ordered Purves out of the car and arrested him for driving with a suspended license. CP 20 ("Search Warrant Affidavit").

Meanwhile, another deputy, Schreier, arrived and arrested the passenger, whom Schreier saw with a tooter. Schreier also told Coronado the passenger had what Schreier believed to be heroin. CP 20; see CP 27 (police report attached to defense motion to suppress). Coronado looked in the car and saw a hollowed out pen near the driver's seat, a substance that appeared to be heroin in a baggie, and a small case Coronado believed was a "drug kit[]." CP 20-21, 27.

Coronado filed an affidavit for search warrant asking to search the car for:

> (X) Evidence of the crime of VUCSA RCW 69.50.4013[1], Drug Paraphernalia RCW 69.50.412(1)[2][;]
>
> (X) Contraband, the fruits of the crime, or things otherwise criminally possessed[.]

CP 19. Specifically, Coronado asked permission to seize items related to dominion and control, "all drug paraphernalia including but not limited to pipes, lighters, syringes, foil, baggies, straws, and spoons," and "all controlled substances including but not limited to methamphetamine, prescription pills, and heroin." CP 21.

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[1] Under former RCW 69.50.4013(1) (2015), with certain exceptions, "[i]t is unlawful . . . to possess a controlled substance[.]" That crime, now void, was a felony. Former RCW 69.50.4013(2).

[2] Under former RCW 69.50.412(1) (2019), "[i]t is unlawful for any person to use drug paraphernalia [to] inject, ingest, inhale, or otherwise introduce into the human body a controlled substance[.]" The offense is a misdemeanor. Id.

The warrant itself indicated there was probable cause to believe those two crimes were being or had been committed, and that evidence of those crimes (or contraband) would be found in the car. CP 23. The warrant authorized seizure of the items as listed in the affidavit. CP 21, 23.

Based on items discovered in the search, the State charged Purves with two counts of possession of a controlled substance with intent to deliver. CP 1-2 (Count 1, heroin; Count 2, fentanyl); RCW 69.50.401(1), (2)(a).[3]

2. **Denial of motion to suppress**

Purves moved to suppress the evidence, arguing the search warrant was not supported by authority of law because unlawful possession of a controlled substance was void under Blake, 197 Wn.2d 170. CP 12-14, 31-38. As for the paraphernalia offense, there was insufficient nexus between the paraphernalia crime and the place to be searched, the car. CP 14-16. Alternatively, the

[3] The information incorrectly cites RCW 69.50.401(2)(b). CP 1-2.

warrant was overbroad (partially not supported by probable cause); and the invalid portion of the warrant, relating to unlawful possession of a controlled substance, was not severable. CP 38-39.

The State acknowledged during its presentation that police officers were looking for evidence of drugs to pursue a felony conviction. Drug paraphernalia would supply evidence of the crime of unlawful possession of a controlled substance; and possession of a controlled substance would supply evidence supporting a violation of the paraphernalia statute. Thus, the State acknowledged, there was no way to separate the two crimes. RP 20, 28.

The court denied the motion to suppress and entered written findings and conclusions. CP 86-94. The factual findings are consistent with the deputies' recitation in the warrant affidavit and reports attached to the motion to suppress. See CP 86-88 (Findings of Fact 1-28). As indicated in the police reports, while searching the car, police officers discovered additional

suspected controlled substances. CP 88. They also discovered other items such as baggies, a digital scale, and cash.[4] CP 88.

The Court's conclusions of law begin by stating that on the date the warrant was issued, unlawful possession of a controlled substance and use of drug paraphernalia were both unlawful acts. CP 88 (Conclusion 1, challenged); see also CP 88 (Conclusions 2 and 3, quoting those statutes).

The court then recited various principles of law with citations. CP 88-91 (Conclusions 4-13). In contrast to cases in which an invalid court issued a warrant, a warrant based on a subsequently invalidated statute was valid. CP 91 (Conclusion of Law 14, challenged). A statute believed to be valid at the time could support a warrant unless the statute was flagrantly unconstitutional. CP 91 (Conclusion of Law 17, challenged). RCW 69.50.4013 was not flagrantly unconstitutional, and a magistrate need not conduct independent research into the

[4] The trial court later relied on this evidence in finding Purves guilty of "possession with intent." RP 57-58.

validity of statutes. CP 92 (Conclusions of Law 20 & 21). Former RCW 69.50.4013 was valid at the time the warrant was issued. CP 92 (Conclusion of Law 25, challenged).

The warrant was validly issued to search for drug paraphernalia because deputies saw drug paraphernalia on the passenger's person and in the car. CP 93 (Conclusion of Law 26, challenged). Relatedly, even if former RCW 69.50.4013 was invalid, the search warrant was still valid because "the existence of controlled substances within the vehicle was evidence that could be used to show [Purves] was using drug paraphernalia." CP 93 (Conclusion of Law 27, challenged).

The court believed it need not analyze whether the warrant was severable because "the warrant was not overly broad[,] and it described the area to be searched with sufficient particularity." CP 93 (Conclusion of Law 29, challenged). Further, the search did not involve a "good faith exception" because probable cause existed at the time the warrant was issued. CP 94 (Conclusion of Law 30, challenged).

3. **Convictions and appeal**

After the court denied the motion, Purves agreed to a bench trial on stipulated evidence. CP 81-82. The court found Purves guilty of both charged crimes. CP 83; RP 57-58.

Purves appealed, raising the issues identified above and a sentencing issue. CP 95.

Attempting to sidestep any Blake-related issue, the Court of Appeals issued a decision affirming Purves's convictions on the ground that the paraphernalia statute alone supported probable cause. Moreover, the severability doctrine was inapplicable. Op. at 2, 8-12.

Moses now asks that this Court grant review and reverse.

D. REASONS REVIEW SHOULD BE GRANTED

1. **This Court should grant review under RAP 13.4(b)(3).**

Review is appropriate under RAP 13.4(b)(3) because, even though the Court of Appeals sidestepped the issue, properly analyzed, the case presents an important state constitutional

issue, i.e., whether a void, nonexistent statute could supply authority of law to search. Further, this Court should grant review to clarify whether the severability doctrine must be applied under the circumstances. Cf. Op. at 10.

2. **Standards of review and legal framework**

This Court reviews de novo whether probable cause supports a warrant. State v. Martinez, 2 Wn. App. 2d 55, 66, 408 P.3d 721 (2018). No deference is owed to a magistrate's issuance of a search warrant "where the [supporting] affidavit does not provide a substantial basis for determining probable cause." State v. Lyons, 174 Wn.2d 354, 363, 275 P.3d 314 (2012). Evidence seized pursuant to a warrant must be suppressed if probable cause does not support the warrant. See State v. Betancourth, 190 Wn.2d 357, 364, 413 P.3d 566 (2018).

3. **Probable cause for possession of a controlled substance, a void crime, did not supply authority of law to search under the Washington constitution.**

A void former crime could not supply the authority of law for the search warrant in this case. This Court should grant

review and resolve the issue either as a logical extension of Afana or by revisiting the validity of the DeFilippo good faith carveout in Washington.

Where a petitioner raises a challenge under article I, section 7 of the state constitution, as distinct from the federal constitution, this Court need not apply the factors under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) to engage in an independent state law analysis. Rather, this Court determines whether the unique characteristics of the state constitutional provision and its prior interpretations lead to a specific result. State v. Sum, 199 Wn.2d 627, 639, 511 P.3d 92 (2022). This Court considers "the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing" the interest. State v. Mayfield, 192 Wn.2d 871, 881, 434 P.3d 58 (2019).

As for the text: Article I, section 7 provides: "No person shall be disturbed in [their] private affairs, or [their] home invaded, *without authority of law*." (Emphasis added.) It

provides greater protection to individual privacy rights than the Fourth Amendment. State v. Winterstein, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009). Whereas the Fourth Amendment prohibits "unreasonable searches and seizures," article I, section 7 prohibits any invasion of an individual's right to privacy without "authority of law." The provision "'recognizes an individual's right to privacy with no express limitations.'" Winterstein, 167 Wn.2d at 631-32 (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).

Considering next Washington courts' historical and recent treatment of the provision: Unlike its federal counterpart, Washington's exclusionary rule is "'nearly categorical.'" State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010) (quoting Winterstein, 167 Wn.2d at 636). The federal exclusionary rule focuses on *deterring* unlawful government action. Thus, the federal Supreme Court has held the rule should not be applied when police acted in "good faith." United States v. Leon, 468 U.S. 897, 918-20, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

"Good faith" is an officer's "'objectively reasonable reliance'" on authority or information that *appeared* to justify a search or seizure at the time. Herring v. United States, 555 U.S. 135, 142, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009) (quoting Leon, 468 U.S. at 922); see generally White, 97 Wn.2d at 108-10 (drawing contrasts between state and federal approaches).

In contrast, Washington has explicitly declined to adopt a good faith or reasonableness exception to exclusion where the government lacks authority of law. Afana, 169 Wn.2d at 184. Indeed, if the government has disturbed a person's private affairs, the question is not whether its agent behaved reasonably, but simply whether they had "authority of law." Id. at 180. Courts use a two-step analysis to determine whether the government violated article I, section 7. State v. Villela, 194 Wn.2d 451, 458, 450 P.3d 170 (2019). First, the court determines whether the action constitutes a disturbance of the private affairs. If so, the court considers whether authority of law

justified the intrusion. Id. If it did not, the intrusion was invalid. See Afana, 169 Wn.2d at 177.

A vehicle search "unquestionably" constitutes a disturbance of private affairs. Id. at 176. The next question is, therefore, whether authority of law authorized a search. Villela, 194 Wn.2d at 458. A valid search warrant would supply such authority. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). Yet a search warrant may issue only upon a determination of probable cause. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists if the affidavit supporting the warrant establishes "a reasonable inference that a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." State v. Figueroa Martines, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015). The items sought must be tied to a specific crime. See State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993).

Meanwhile, "[a] statute or ordinance which is void as being in conflict with . . . the constitution is of no force and

effect." City of Seattle v. Grundy, 86 Wn.2d 49, 50, 541 P.2d 994 (1975). In February of 2021, this Court held unlawful possession of a controlled substance under former RCW 69.50.4013 was void. Blake, 197 Wn.2d at 195. Where this Court declares a statute void, all pending litigation must be decided according to the principle the statute is void. See Grundy, 86 Wn.2d at 50.

As such, unlike in a situation where a warrant's factual support later founders,[5] the warrant in the present case lacked the requisite authority of law, and the ensuing search violated the state constitution. See Villela, 194 Wn.2d at 458, 463.

Nonetheless, the trial court determined the principle set forth in Michigan v. DeFillippo, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979) applied. E.g., Conclusion of Law 17. DeFillippo held an *arrest* based on an ordinance was valid under the Fourth Amendment even though the ordinance was later

[5] State v. Chenoweth, 160 Wn.2d 454, 476, 158 P.3d 595 (2007).

declared unconstitutional. In so holding, the DeFillippo court looked at whether a reasonable police officer could conclude probable cause existed at the time of the arrest. 443 U.S. at 37. Although DeFillippo discussed the Fourth Amendment, not article I, section 7, this Court applied the DeFillippo rule to arrests stemming from a partially invalidated statute in State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006) and State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006).[6]

In Afana, however, this Court clarified the DeFillippo rule was limited. Afana, 169 Wn.2d at 184. As the State argued in Afana, the only difference between DeFillippo, Potter, Brockob, on one hand, and Afana's case, on the other, was "the nature of the legal authority relied upon by the officer"—i.e., pre-Arizona v. Gant case law[7] instead of a statute or ordinance. Thus,

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[6] Cf. Conclusions of Law 8, 17, 19, and 20 (citing these cases for various related propositions, including proposition that police and issuing magistrate look at law then in effect).

[7] In Afana, a car's passenger was arrested on an outstanding warrant. A police officer searched the car incident to her arrest

according to the State, the DeFillippo rule should apply, as it had in Potter and Brockob. Afana, 169 Wn.2d at 181-82.

This Court rejected the State's argument. By citing cases merely analogous to the situation being considered, the State had not met its burden of demonstrating the search was supported by authority of law *or* that an exception to the exclusionary rule applied. Id. at 183-84. Potter and Brockob involved arrests based on misdemeanors, permitted by a misdemeanor arrest statute;[8] the arrests were lawful based on the existence of

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based on her presence in the car at the time of the traffic stop. Afana, 169 Wn.2d at 174. Before the case was final on appeal, the United States Supreme Court held in Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search[.]" Id. at 351. This Court held the search was not authorized because, although the warrant gave the officer a valid basis for *arrest*, the law no longer authorized a warrantless *search* of the car. Afana, 169 Wn.2d at 178.

[8] Under former RCW 10.31.100(3)(e) (2000), police officers could arrest a person without a warrant if they had probable cause to believe the person was driving with a suspended license.

probable cause even though the underlying misdemeanor statutes were later found unconstitutional. Brockob, 159 Wn.2d at 342; Potter, 156 Wn.2d at 840-43. See Afana, 169 Wn.2d at 184.

Returning to the final Mayfield consideration: Although this precise issue has not been decided by this Court, Afana supplies the appropriate decision-making framework. This case *also* does not involve probable cause to arrest. Someone's prior belief about authority to *search* does not fit under the diminutive DeFillippo / Potter / Brockob umbrella.

Admittedly, the tests for probable cause to arrest, and probable cause to search, overlap. But they are not identical. Probable cause for a warrant exists if the supporting affidavit establishes "a reasonable inference that a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." Figueroa Martines, 184 Wn.2d at 90. As stated, this must refer to a specific crime. E.g., Riley, 121 Wn.2d at 28. Probable cause to *arrest* exists when an officer is aware of facts or circumstances, based on reasonably

trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). At the time of arrest, the officer need not have evidence to prove each element of the crime. The officer is required only to have knowledge of facts such that a reasonable person would believe an offense had been committed. Id. The officer might even subjectively believe a different crime was committed than the one for which probable cause existed. State v. Huff, 64 Wn. App. 641, 646, 826 P.2d 698 (1992). Thus, although the tests are similar, more precision is required for warrants, considering that decisionmakers are judicial officers, not police officers in the field, and considering that warrants must be sufficiently specific.

As Afana made clear, DeFillippo, Potter, and Brockob looked at arrests (and what was known to the officer at the time of the arrest). But the question here is whether authority of law supported the *search*. See Afana, 169 Wn.2d at 184. If it did not, the evidence must be suppressed. Id. at 176-77.

The trial court believed the relevant question was whether everyone believed at the time that there was probable cause, with its built-in reasonableness consideration.[9] E.g., Conclusions of Law 14 & 17. But this case is more like Afana because it involves a search. And a search's validity is reviewed—de novo—for whether it was supported by authority of law. Afana, 169 Wn.2d at 176. It either was, or it was not. Because the relevant statute is void, it was not.[10] Based on a logical extension of existing Washington article I, section 7 jurisprudence, the trial court should have suppressed the evidence, giving effect to Blake.

But, even if this Court disagrees that Afana itself mandates reversal for the reasons stated, this Court should grant review and wholly reject the underlying DeFilippo rationale as inconsistent

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[9] Mayfield, 192 Wn.2d at 888 (quoting Afana, 192 Wn.2d at 183).

[10] As such, Conclusions of Law 30 ("good faith" doctrine not implicated in upholding search warrant) and 31 (appearing to apply balancing test related to privacy rights) were erroneous.

with article I, section 7 jurisprudence as it has developed independently. Purves acknowledges that this Court relied on the DeFillippo rule in Potter and Brockob (which, again, involved arrests). But the DeFillippo rule, like other federal authority, is rooted in evaluation of whether a government agent's actions are reasonable or done in good faith. See Herring, 555 U.S. at 142. As the law has developed under the state constitution, a court's evaluation of authority of law *must* include whether there was probable cause to believe a valid, non-void crime was implicated. Cf. White, 97 Wn.2d at 109 (looking askance at DeFillippo in context of article I, section 7 and indicating result is justifiable only if "one accepts the premise that the exclusionary rule is merely a remedial measure"). This Court should take this opportunity to so hold. See In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (this Court may reject its own prior holding if it is incorrect and harmful). In summary, this Court should grant review and reverse because a non-existent crime could not supply authority of law.

4. **The paraphernalia statute did not supply authority of law because the warrant was not severable.**

If this Court accepts the premise that the void drug possession statute did not supply authority of law, the next question is whether the warrant's reference to the paraphernalia statute nonetheless supplied authority of law. But, a search pursuant to an overbroad warrant will only be upheld if the warrant is severable. The Court of Appeals found the severability doctrine simply did not apply. Op. at 10.[11] The Court of Appeals' decision is incorrect.

The inclusion of illegally obtained *factual* information in a warrant affidavit does not render a warrant invalid, provided that the affidavit contains other facts sufficient to establish probable cause. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). The Court of Appeals seems to have relied on some version of this principle.

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[11] But see State v. Moses, 22 Wn. App. 2d 550, 563, 512 P.3d 600 (addressing severability under similar facts), review denied, 518 P.3d 205 (2022).

In contrast, the severability doctrine applies where portions of a warrant are *legally* infirm. A warrant is overbroad if it fails to describe with particularity items for which probable cause *does* exist. A warrant is also overbroad if—as here—it describes items, particularly or otherwise, for which probable cause *does not* exist. State v. Higgs, 177 Wn. App. 414, 426, 311 P.3d 1266 (2013); State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), aff'd, 152 Wn.2d 499, 98 P.3d 1199 (2004). A warrant is overbroad if some portions of a warrant are supported by probable cause, and some are not. Higgs, 177 Wn. App. at 426.

Under the severability doctrine, if a meaningful separation cannot be made between the valid and invalid portions, all evidence seized pursuant to the partially overbroad warrant must be suppressed. State v. Perrone, 119 Wn.2d 538, 556-59, 562, 834 P.2d 611 (1992); Higgs, 177 Wn. App. at 430.

"[S]everance is not available when the valid portion of the warrant is 'a relatively insignificant part' of an otherwise invalid

search." Perrone, 119 Wn.2d at 557 (quoting In re Grand Jury Subpoenas Dated December 10, 926 F.2d 847, 858 (9th Cir. 1991)). For the severability doctrine to apply, "there must be a meaningful separation to be made of the language in the warrant." Perrone, 119 Wn.2d at 560. "[T]here must be some logical and reasonable basis for the division of the warrant into parts which may be examined for severability." Id. In Perrone, this Court held the warrant was *not* severable. Id. at 556. Yet, because the question was not close, this Court declined to offer specific guidelines on severability. Id. at 557-62.

In Maddox, Division Two, fleshing out the standard, held the severability doctrine will save portions of an overbroad warrant only when five requirements are met: (1) The warrant must lawfully have authorized entry into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the portion of the warrant that includes particularly described items, supported by probable cause, must be *significant* compared to the warrant as a whole;

(4) the searching officer must have found and seized the disputed items while executing the valid part of the warrant, i.e., while searching for items supported by probable cause *and* described with particularity; and (5) the officer must not have conducted a general search in disregard of the warrant's scope. Maddox, 116 Wn. App. at 807-08; see also Higgs, 177 Wn. App. at 430-31. A trial court must conduct such an analysis before admitting evidence seized pursuant to an overbroad warrant. State v. Ring, 191 Wn. App. 787, 794, 364 P.3d 853 (2015).

In Higgs, a warrant authorized a search of items related to the possession of methamphetamine, including packaging, for which there was probable cause. But the warrant also authorized a search for items and records related to methamphetamine distribution, for which probable cause was lacking. Higgs, 177 Wn. App. at 421, 427. Based on a claim of ineffective assistance of counsel, the question became whether the portion of the warrant authorizing a search for methamphetamine was severable from the rest of the warrant. Id. at 430.

In dispute were the third and fourth requirements, whether the valid items—those described with particularity and for which there was probable cause—were "significant" in the context of the entire warrant, *and* whether items were seized while executing the valid portion of the warrant. As for the third requirement, Higgs noted that probable cause was lacking for most of the warrant's paragraphs. Yet despite this, "the primary purpose of this warrant . . . was to search for methamphetamine. And probable cause supported the portion of the warrant authorizing the search for methamphetamine." Higgs, 177 Wn. App. at 432 (citing Maddox, 116 Wn. App. at 800). Thus, the third criterion was satisfied.

Here, as in Higgs, the third Maddox criterion is at issue, but it leads to the opposite conclusion—that the warrant was not severable.

Deputy Coronado applied for a search warrant, asking for leave to search the car Purves was driving for "[e]vidence of the crime of VUCSA RCW 69.50.4013, Drug Paraphernalia RCW

69.50.412(1)," "[c]ontraband," and "the fruits of the crime, or things otherwise criminally possessed[.]" CP 19.[12]

Neither of the two listed crimes is considered a lesser offense of the other,[13] but they overlap. Under former RCW 69.50.4013(1), it was unlawful to possess a controlled substance. The crime, now void, was a felony. Former RCW 69.50.4013(2).

Under former RCW 69.50.412(1) (2019), "[i]t is unlawful for any person to use drug paraphernalia to . . . inject, ingest, inhale, or otherwise introduce into the human body a controlled substance[.]"[14] The offense is a misdemeanor. Id. Relatedly, "drug paraphernalia" means

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[12] A search for "contraband" would not independently supply probable cause for the search warrant. See United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986).

[13] State v. LaPlant, 157 Wn. App. 685, 688, 239 P.3d 366 (2010).

[14] Although such items are not included in the affidavit or warrant in this case, the prior version of the statute also prohibited use of items used in *production and processing* of controlled substances. Former RCW 69.50.412(1) (2019). The current version of the statute removes items related to drug *consumption*

> all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

RCW 69.50.102(a).

Specifically, Coronado asked permission to seize items related to dominion and control, "all drug paraphernalia including but not limited to pipes, lighters, syringes, foil, baggies, straws, and spoons," and "all controlled substances including but not limited to methamphetamine, prescription pills, and heroin." CP 21.

The warrant itself found probable cause to believe those two crimes were being or had been committed and that evidence of those crimes (or contraband) would be found in the car. CP

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and prohibits use of only the items used in production and processing. See Laws of 2022, ch. 16, § 91 (eff. June 9, 2022).

23. It authorized seizure of the items as listed in the affidavit. CP 21, 23.

The warrant did not satisfy the third severability criterion. It was not severable, because the search for drug paraphernalia was incidental to a search for evidence of the drugs themselves. All specifically sought items were items used to ingest possessed drugs, rather than items used in production and processing. The presence of any controlled substance *residue* on such an object is relevant to a determination of whether an object is drug paraphernalia. RCW 69.50.102(b)(5). But residue also supports a conviction for unlawful possession of a controlled substance. See State v. Rowell, 138 Wn. App. 780, 786, 158 P.3d 1248 (2007) (controlled substance "residue sufficient to support a conviction for simple possession"). As the State acknowledged in this case, the police officers sought the items named in the warrant with the primary goal of searching for controlled substances, relating to the more serious crime. RP 20, 28. Drug

paraphernalia, although prohibited under another statute, would supply such evidence.

Everyone appeared to recognize the type of drug paraphernalia sought—for drug consumption—was likely to support the greater crime of drug possession. E.g., RP 33-34. But the trial court (and the Court of Appeals) did not realize this fact's significance, that any search for drug paraphernalia, per se, was an insignificant part of an otherwise invalid search for evidence of possession of a controlled substance. The third Maddox criterion was not satisfied. Put another way, as in Higgs, even where the warrant authorized a search for a lengthier list of items, it was clear that the primary purpose of the warrant was a search for methamphetamine. Higgs, 177 Wn. App. at 432. This rationale also applies here, although, as stated, it produces a different outcome than in Higgs.

This Court should grant review on this issue, as well.

E. CONCLUSION

This Court should accept review under RAP 13.4(b)(3) and reverse.

I certify this document contains 4,939 words excluding those portions exempt under RAP 18.17.

DATED this 29th day of March, 2022.

Respectfully submitted,

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APPENDIX

Filed
Washington State
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Division Two

February 28, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD L. PURVES, Appellant.	No. 56600-1-II UNPUBLISHED OPINION

CRUSER, A.C.J. — In November 2020, Purves was driving with a suspended license when he was stopped for speeding, and officers found drug paraphernalia and heroin on his passenger's person. The officers looked into the window of the car and saw what they suspected to be drugs and drug paraphernalia. The officers sought and obtained a search warrant for the vehicle, and were granted that warrant, based on a finding of probable cause that Purves was in violation of statutes outlawing simple possession of a controlled substance and use of drug paraphernalia. When they executed the warrant, officers found drugs, paraphernalia, cash, and a logbook in Purves' car.

Purves was charged with two counts of possession with intent to manufacture or distribute heroin and fentanyl. He moved to suppress the fruits of the warrant, arguing that under *State v. Blake*[1], decided in February 2021, there was no legal basis to search his car for evidence of simple

[1] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) (holding that Washington's statute criminalizing simple drug possession was unconstitutional and void because it lacked a *mens rea* element).

drug possession, and that the paraphernalia portion of the warrant was not severable from the drug possession portion. Purves makes the same argument in this appeal.

We affirm the trial court's denial of the suppression motion. The warrant here was based on two criminal statutes, one of which remains valid—RCW 69.50.412(1), criminalizing use of drug paraphernalia. Officers had sufficient probable cause to believe that Purves had violated the drug paraphernalia statute, so it is immaterial that RCW 69.50.4013, criminalizing simple drug possession, was later invalidated under *Blake*.

Purves also argues, and the State concedes, that his sentence of 120 months confinement for each count plus 12 months community custody was in excess of the ten-year statutory maximum for his crimes. We remand with instructions to remove the 12-month community custody period from his sentence, leaving him with a sentence of 120 months confinement for each count.

FACTS

I. UNDERLYING INCIDENT

Purves was pulled over after Jefferson County Deputy Justin Coronado paced him as driving 75 MPH in a 60 MPH zone. Purves gave Coronado his passport and explained that his driver's license was suspended. Purves was then transferred to the back of the patrol car and another officer began speaking with his passenger, Nicole Prince. That officer found drug paraphernalia and heroin on Prince and arrested her for possession of a controlled substance and use of drug paraphernalia.

Looking into the car from the outside, officers saw "a clear plastic baggy under the emergency brake in the center console" containing "a brown powdery substance." Clerk's Papers

(CP) at 44. They also observed "balled up tinfoil on the passenger side floorboards [of the car] by Prince's feet" and "a hollowed out pen sitting next to the driver seat in between the door and the seat." *Id.* Finally, they saw "a small black case" similar to what they knew as drug kits. *Id.* The officers then seized the vehicle pending a search warrant for the interior.

II. SEARCH WARRANT

Deputy Coronado applied for a search warrant for the vehicle. Coronado's affidavit described why he believed evidence of the crimes codified at RCW 69.50.4013 (drug possession) and at RCW 69.50.412(1) (use of drug paraphernalia) was located in the car Purves was driving when he was pulled over. He explained that he saw the car driving erratically at a high speed, then stopped the vehicle and determined that Purves, the driver, had his license suspended. Another officer found heroin and a "tooter"[2] on a passenger's person and observed tinfoil on the floor beneath the passenger's feet. CP at 20, 26. Coronado could see another tooter and a clear plastic bag containing brown powder inside the car. The officers impounded the vehicle to await a warrant.

On November 14, 2020, a district court judge issued a warrant to search the car, finding probable cause that it contained evidence of the crimes codified at RCW 69.50.4013 and at RCW 69.50.412(1). The warrant authorized seizure of:

- Items showing dominion or control of the vehicle.
- Items showing dominion or control of items seized therein [sic] the vehicle.
- Photographs of the interior of the vehicle and items seized therein.
- All drug paraphernalia including but not limited to pipes, lighters, syringes, foil, baggies, straws, and spoons.
- All controlled substances including but not limited to methamphetamine, prescription pills, and heroin.

[2] According to Coronado, this is a term for a melted pen used to smoke drugs.

CP at 23.

Officer Coronado executed the warrant and found:

> a cellular device in the front area of the vehicle, a white crystalline substance he believed to be methamphetamine, weighing approximately 52 grams and was [sic] packaged separately into four separate baggies. A brown powdery substance believed to be heroin weighing approximately 40 grams that was packaged into three separate baggies, 219 blue M-Box pills packaged into two separate baggies, a digital scale and numerous small zip lock baggies. Further, a bundle of cash wrapped in a rubber band next to drug paraphernalia was located. The US currency totaled $4680. Additionally Purves was in possession of a small book. Inside the book contained several names with dollar amounts next to them.

CP at 53; *see also* CP at 63-80 (photos). The substances that were seized were later identified as heroin, fentanyl, and methamphetamine.

Shortly thereafter, Purves was charged under RCW 69.50.401(1) with two counts of possession with intent to manufacture or deliver a controlled substance (heroin and fentanyl).

III. MOTION TO SUPPRESS

Purves moved to suppress the fruits of the search, and the court heard arguments on the motion on August 20, 2021. Purves argued that after the *Blake* decision, a suspected violation of Washington's drug possession statute was not a legally valid basis for the search warrant. Accordingly, Purves asked the court to dismiss the charges against him.

The State argued in response that even if *Blake* made drug possession an invalid basis for the warrant, the police had independent probable cause for use of drug paraphernalia. It went on to argue that *Blake* did not change the validity of the warrant because at the time the warrant was issued, simple drug possession was a crime.

The court concluded that the warrant was lawfully issued based on probable cause for both crimes and denied Purves' motion to suppress. It entered the following conclusions of law that are challenged on this appeal:

> 1. On November 14, 2020, the date the warrant was issued, possession of a controlled substance and use of certain drug paraphernalia were unlawful.
>
> . . . .
>
> 14. A warrant issued by a magistrate based on a statute that was later invalidated is valid at its inception.
>
> . . . .
>
> 17. Like probable cause to arrest, probable cause to issue a warrant is based upon both the facts known at the time and the law in effect at the time the warrant was issued unless the law was grossly and flagrantly unconstitutional.
>
> . . . .
>
> 25. The warrant to search the vehicle for controlled substances was validly issued because RCW 69.50.4013 was valid at the time the warrant was issued and there was probable cause to believe the vehicle contained controlled substances based on Deputies seeing what they believed to be "gun powder heroin" sitting under the emergency brake.
>
> 26. The warrant was validly issued to search for drug paraphernalia based on the passenger possessing a "tooter" with burned residue in it, the lighter in her hand, the controlled substances in the vehicle, and the other paraphernalia in the vehicle that the deputies observed from outside the vehicle.
>
> 27. Assuming that RCW 69.50.4013(1) was invalid at the time the warrant was issued, it was still lawful to issue the search warrant for the controlled substances as the existence of the controlled substances within the vehicle was evidence that could be used to show the Defendant was using the drug paraphernalia.
>
> . . . .
>
> 29. Severance does not apply to the facts of this case as the warrant was not overly broad and it described the area to be searched with sufficient particularity.
>
> 30. This case does not involve a "good faith exception" because there is no question the magistrate had probable cause at the time the warrant was issued. The

> only issue is that the Supreme Court subsequently struck down one of the statutes listed in the warrant.
>
> 31. There is a substantive difference between vacating convictions which impact voting, traveling abroad, the right to bear arms, jury service, employment in certain fields, public social benefits and housing, and parental benefits, and upholding a warrant that leads to a temporary, and in this case minor, invasion of a person's privacy rights.

CP at 89, 91-94.

IV. Conviction and Sentencing

Purves waived his right to a jury trial and agreed to be tried on stipulated evidence consistent with the police reports from the incident. The court found him guilty of two counts of possession with intent to manufacture or deliver a controlled substance (heroin and fentanyl). Following the State's recommendation, the court sentenced Purves to 120 months confinement for each count (to run concurrently) and 12 months of community custody.

ANALYSIS

I. Statutory Background

A. Simple Drug Possession

Former RCW 69.50.4013 (2017) made it a felony "to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter." This was true regardless of whether the defendant "even knew they possessed the substance." *Blake*, 197 Wn.2d at 523.

In *State v. Blake*, decided in February 2021, the supreme court concluded that statute was unconstitutional. *Blake*, 197 Wn.2d at 524. It reasoned that the statute's strict liability scheme violated the due process clause by "taking innocent and passive conduct with no criminal intent at

all and punishing it as a serious crime." *Blake*, 197 Wn.2d at 524. After the *Blake* decision, the legislature amended RCW 69.50.4013(1) to outlaw drug possession only when it is done "knowingly." LAWS OF 2021, ch. 311, § 9.

B. Use of Drug Paraphernalia

Former RCW 69.50.412(1) (2019) made it a misdemeanor "to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana." RCW 69.50.102(a)[3] defines drug paraphernalia as

> all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

RCW 69.50.102(b) goes on to list fourteen non-exhaustive factors that inform the court's determination of whether a particular object is drug paraphernalia, including "[t]he proximity of the object to controlled substances" and "[t]he existence of any residue of controlled substances on the object."

[3] Although this statute was revised in 2022, the portions quoted here remain identical to Former RCW 69.50.102 (2012).

C. Drug Possession With Intent to Manufacture or Deliver

RCW 69.50.401(1) makes it a crime to "manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."[4] Pursuant to RCW 69.50.401(2)(a), a violation of this statute where the drug is a Schedule I or II narcotic is a class B felony with a maximum sentence of ten years confinement.

II. SEARCH WARRANT

Purves argues that the trial court erred when it denied his motion to suppress the fruits of the search warrant. He contends that the *Blake* decision, which invalidated the drug possession statute the warrant was partially based on, rendered the warrant invalid. The State responds that, at the time the warrant was issued, officers had authority to reasonably rely on the drug possession statute that was later invalidated in *Blake*.

However, these arguments are inapposite because the warrant here was adequately supported by probable cause that Purves violated the use of drug paraphernalia statute. We affirm on that ground and decline to reach the *Blake* issue.

A. Legal Principles

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in [their] private affairs, or [their] home invaded, without authority of law." This is a stronger protection than the Fourth Amendment of the United States Constitution, which guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects,

[4] The 2019 version and the 2022 version of the relevant portions of this statute are identical. *See* Former RCW 69.50.401(1), (2)(a) (2019).

against unreasonable searches and seizures." *See State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

"A search warrant may issue only upon a determination of probable cause." *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An affidavit establishes probable cause if it sets forth "facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity." *State v. Huft*, 106 Wn.2d 206, 209, 720 P.2d 838 (1986). The facts in such an affidavit "must be based on more than suspicion or mere personal belief that evidence of the crime will be found on the premises searched." *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002).

We generally review the issuance of a warrant for abuse of discretion and afford great deference to the issuing judge. *Vickers*, 148 Wn.2d at 108, *Huft*, 106 Wn.2d at 211. "However, at the suppression hearing the trial court acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the affidavit supporting probable cause." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Correspondingly, "the trial court's assessment of probable cause is a legal conclusion we review de novo." *Neth*, 165 Wn.2d at 182.

If a warrant is overbroad, then we must examine whether the valid portions may be severed from the invalid portions. *State v. Maddox*, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004)). The severability doctrine operates to suppress evidence seized pursuant to the flawed part of the warrant, but to save evidence seized pursuant to the valid portion of the warrant from suppression. *State v. Perrone*, 119 Wn.2d 538, 556, 834 P.2d 611 (1992). Five factors, set out in *State v. Maddox*, determine whether the valid portions of a warrant may be severed from the invalid portions:

> (1) [T]he warrant must lawfully have authorized entry into the premises; (2) the warrant must include one or more particularly described items for which there is

> probable cause; (3) the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole; (4) the searching officers must have found and seized the disputed items while executing the valid part of the warrant; and (5) the officers must not have conducted a general search, *i.e.*, one in which they "flagrantly disregarded" the warrant's scope.

State v. Temple, 170 Wn. App. 156, 163, 285 P.3d 149 (2012).

B. Application

Here, the search of Purves' car was based on probable cause that the car contained evidence of two crimes: use of drug paraphernalia and simple drug possession. We hold that regardless of *Blake*'s effect on the drug possession statute, the officers still had a sufficient basis to search the car for evidence of use of drug paraphernalia.

Although the parties center their arguments on the severability doctrine, we agree with the trial court that this is not the correct analysis because the warrant here was not overly broad and it described with particularity the area to be searched and the items to be seized.[5] The evidence sought under each crime was essentially identical, and was contained within the same location. This is because the illegal drugs observed in Purves' car were necessary not only to the State's ability to prove the crime of unlawful possession of a controlled substance under former RCW 69.50.4013 (2017), but also to prove the crime of use of drug paraphernalia under former RCW

[5] Even if the severability doctrine applied here, Purves' argument would not succeed. First, officers had probable cause to believe drug paraphernalia was contained in the car because they could see it from outside the car. Second, the warrant described with particularity that officers were to seize "[a]ll drug paraphernalia including but not limited to pipes, lighters, syringes, foil, baggies, straws, and spoons." CP at 23. Third, the paraphernalia portion of the warrant was significant in the context of the whole warrant, despite Purves' argument that simple possession, a felony, was "the more serious crime" and was "the primary goal" of searching officers. Br. of Appellant at 39. Fourth, officers found drugs, paraphernalia, cash, and a logbook within the scope of the valid search for paraphernalia. Finally, this was not a general search as there is no evidence the officers exceeded the warrant's scope.

69.50.412(1) (2019). *See State v. O'Meara*, 143 Wn. App. 638, 642-44, 180 P.3d 196 (2008) (reversing trial court's dismissal of paraphernalia charge because marijuana residue on pipe and tin found in defendant's backpack supported inference that defendant used items to store and ingest marijuana).

First, possession of a controlled substance required a showing that a defendant (1) "possess[ed]" (2) "a controlled substance" (3) without having "a valid prescription" or other authorization. Former RCW 69.50.4013 (2017). Second, use of drug paraphernalia required showing the defendant (1) "use[d]" (2) "drug paraphernalia" as defined in RCW 69.50.102 (a) "to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana." Former RCW 69.50.412(1) (2019). Under the second element, courts consider both "[t]he proximity of the object to controlled substances" and "[t]he existence of any residue of controlled substances on the object" "in addition to all other logically relevant factors" to determine whether a particular item is drug paraphernalia. RCW 69.50.102(b)(4), (5).

Here, officers looking into Purves' car could see a brown substance inside a plastic baggy—the baggy qualifies as paraphernalia only if the brown substance inside is an illegal drug. Thus, both the baggy and the substance are evidence that Purves violated the drug paraphernalia statute. The same can be said of the tooters, black case, and tin foil that officers observed from outside the car. Therefore, when the warrant authorized seizure of "[a]ll controlled substances including but not limited to methamphetamine, prescription pills, and heroin" as well as "[a]ll drug paraphernalia including but not limited to pipes, lighters, syringes, foil, baggies, straws, and

spoons" it authorized seizure of items supporting the drug paraphernalia offense. CP at 23. Without an overbroad warrant, we need not consider severability.

Nor must we reach the *Blake* issue in this case. The warrant here was supported by probable cause that Purves violated the use of drug paraphernalia statute, and we affirm the trial court on that basis.

III. EXCESSIVE SENTENCE UNDER RCW 9A.20.021

Purves argues that his sentence exceeds the statutory maximum sentence under RCW 9A.20.021. That statute provides,

> (1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:
>
> . . . .
>
> (b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine.

RCW 9A.20.021. Possession with intent to distribute Schedule I and II narcotics is identified as a class B felony in RCW 69.50.401(2)(a). *See also* RCW 69.50.101(gg) (defining "narcotic drug" to include opiates); *Drug Scheduling*, DRUG ENFORCEMENT AGENCY (Jul. 10, 2018), https://www.dea.gov/drug-information/drug-scheduling (listing heroin as Schedule I and fentanyl as Schedule II). Thus, the statutory maximum is ten years or 120 months confinement, but Purves was sentenced to 120 months confinement for each count (concurrent) plus 12 months of community custody. The State concedes that this exceeds the statutory maximum and that the case should be remanded to correct the sentence. Based on the State's concession, we remand the case with instructions to reduce Purves' term of community custody to zero, leaving him with the maximum sentence for his crimes.

CONCLUSION

We affirm the trial court's denial of Purves' motion to suppress evidence, and we remand the case with instructions for the trial court to remove the 12-month community custody period from Purves' sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Cruser, A.C.J.

We concur:

Price, J.

Che, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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