72221-2

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COA NO. 72221-2-I

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LAVELE MITCHELL, Appellant,

BRIEF OF APPELLANT

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III. STATEMENT OF THE CASE

A. FACTS RELATING TO MR. MITCHELL'S DETENTION & ARREST

1. PRE-DETENTION FACTS

On March 2, 2012, Mr. Mitchell boarded a Metro Bus in Tukwila, Washington. The bus was travelling north on Pacific Highway South.[1] At the suppression hearing, Mr. Mitchell testified that he entered the bus through the front door, paid for his fare with cash, and the bus driver gave him a transfer ticket as he entered. Just before he exited the bus, Mr. Mitchell gave his transfer to another passenger. Mr. Mitchell then exited the bus.[2]

Meanwhile, two Fare Enforcement Officers (FEOs), Charles Smith and Christopher Johnson, were on duty and waiting to board the Mr. Mitchell bus at Mr. Mitchell's intended exit. FEO's are private security officers whose sole duty, as FEO John would later testify, is "to ***board*** [Metro] buses, ***contact passengers*** [and ask] for proof of payment" on certain routes.[3]

2. THE INITIAL DETENTION

Most of the facts that follow are not disputed. When the bus's doors opened, several passengers, including Mr. Mitchell, exited. Waiting outside the bus was FEO Johnson, who was waiting to board the bus after the passengers exited. After the passengers exited the bus, FEO Johnson approached each passenger and briefly detained each of them. One at a time, FEO Johnson stopped

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[1] The type of route Mr. Mitchell was on, called "RapidRides," is apparently one such route. On those routes, passengers have two different ways to pay: (a) using a pre-paid "ORCA" card that works like a debit card, or (b) cash. At every rapid fare bus stop, signs are posted that tell each passenger that he must retain "proof of payment" when *he is riding the bus*. *See* FEO Johnson's testimony at RP 96.

[2] RP 119-122.

[3] RP 22.

each of the passengers once they had exited the bus, and demanded that they show him "proof of payment," i.e. by either showing him their ORCA card, or a transfer ticket.[4] Before stopping any of these former passengers, including Mr. Mitchell, FEO Johnson had no objective reason to believe that any of them had not paid.[5]

After stopping Mr. Mitchell and demanding proof of payment, Mr. Mitchell could not present his proof of payment. He then tried to explain to FEO Johnson that, thinking he no longer needed it, he gave the transfer to another passenger just before exiting the bus. FEO Johnson ignored Mr. Mitchell's explanation and continued to detain him, now demanding that Mr. Mitchell produce his identification. Mr. Mitchell gave his full name and date of birth, but did not have his identification on him. FEO Johnson then requested King County Sherriff's Deputy Drazich, who was near the scene, to assist him in verifying Mr. Mitchell's identity.[6]

After Deputy Drazich ran Mr. Mitchell's name and date of birth, the warrants check "returned with a valid warrant out of SeaTac PD . . . [for] DWLS Third."[7] Deputy Drazich testified that "[he] knew at that moment that [he] had grounds for a physical arrest.[8] He proceeded to place Mr. Mitchell under arrest, "for that warrant." During a search incident to arrest, Deputy Drazich found two revolvers: a .22 caliber in Mr., Mitchell's front right pocket and a.32 caliber in his front left pocket.[9]

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[4] RP 97.
[5] RP 96-99. ("Before talking to him, I would not know that he'd committed any . . . infraction.")
[6] RP 40; RP 95-101.
[7] RP 41
[8] RP 41
[9] RP 20-35.

Mr. Mitchell was eventually transported and booked at the precinct and was further interviewed by KCSO Detectives Morris and Barfield before being transported to King County Jail. Six months after his arrest, Mr. Mitchell received a citation in the mail for "failure to display proof of payment. And that's cited under Title 81."[10]

B. MR. MITCHELL'S DEFENSES & RELEVANT JURY INSTRUCTIONS

Through the trial, defense counsel burned through many different defenses. Initially, defense counsel argued a necessity defense, which the Court corrected rejected, as there was no eminent threat to Mr. Mitchell. Ultimately, Mr. Mitchell's counsel argued a lack of notice defense, pursuant to the judicially created affirmative defense in *Brietung*.

Operability of the Firearm. At trial, the State believed that it needed to prove that Mr. Mitchell possessed an "operable" firearm. It argued this theory in closing, and it requested a jury instruction to support of this theory. Adopting the State's proposed instruction,[11] the court instructed the jury as follows:

Definition of "Firearm" Instruction

> A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder. A temporarily inoperable firearm that can be rendered operational with reasonable effort and within a reasonable time period is a 'firearm.' A disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a 'firearm.'[12]

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[10] RP 185
[11] CP 59 (modifying the WPIC based upon *State v. Releford.* 148 wn. App. 478. 490-91, 200 P.3d 729 (2009).
[12] CP 188 (Jury Instruction No. 10)

Lack of Notice. By the end of trial, Mr. Mitchell's sole defense was that he was never given notice of his right to possess a firearm as required by statute and as stated in the Supreme Court's decision in *Brietung*. On that defense, the Court instructed the jury as follows:

Lack of Notice

> It is an affirmative defense to the crime of Unlawful Possession of a Firearm in the First Degree that the defendant had a lack of notice.
>
> This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.
>
> Actual notice can be met where the evidence demonstrates oral and written notification, or by other evidence.[13]

In addition, the court gave the jury a standard WPIC instruction on knowledge, which reads as follows:

Knowledge Instruction

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact. [14]

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[13] CP 187 (Jury Instruction No. 7)
[14] CP 188 (Jury Instruction No. 8)

C. VERDICT & SENTENCING

The jury found Mr. Mitchell guilty of one count of unlawful possession of a firearm as charged.[15] The court sentenced Mr. Mitchell to a standard range sentence.[16]

IV. ARGUMENTS

A. THE TRIAL COURT ERRED WHEN IT DENIED MR. MITCHELL'S MOTION TO SUPPRESS.

1. STANDARD OF REVIEW

Factual findings are reviewed for abuse of discretion. A finding that lacks sufficient factual support—one that is not supported by "substantial evidence"—is an abuse of discretion.[17] Evidence is substantial if the facts before the court would be enough to convince a rational, fair-minded person that the finding was in fact true.[18] Those findings, if supported by substantial evidence, must also support the trial court's conclusions of law. Whether the findings support the court's legal conclusions is reviewed de novo.[19]

CrR 3.6 requires, after a hearing on a motion to suppress, that the court enter written findings of fact and conclusions of law (FFCL).[20] Filing timely FFCLs are essential to ensure efficient and accurate appellate review.[21] Submitting late FFCL's is "disfavored," because it may prejudice the defendant

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[15] CP 172
[16] CP 226-33.
[17] *State v. Gibson*, 152 Wn. App. 945, 951, 219 P.3d 964 (2009).
[18] *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).
[19] *State v. Hinton*, 179 Wn.2d 862, 867, 319 P.3d 9 (2014).
[20] CrR 3.6(b).
[21] *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996).

on appeal.[22] The duty to submit proposed FFCL's falls on the prevailing party.[23] In Mr. Mitchell's case, that duty fell on the State. Yet, at the time Mr. Mitchell has filed his opening brief, no proposed FFCL's have been offered to the court, and no FFCLs have been filed.

This Court should prohibit the State from supplementing the record at this late juncture. Allowing the court to file late FFCL would certainly prejudice Mr. Mitchell, both by delaying a timely review of his appeal, and potentially, by allowing the Court, or the State as the submitting party, to tailor those findings to avoid reversal. In fact, the only feasible reason for submitting FFCL's at this late juncture would be to save the Trial Court's erroneous ruling by tailoring the FFCL in light of the arguments advanced here in this brief. As such, this Court should treat the Trial Court's brief oral ruling as if it were is written FFCL on appeal.

2. A LAWFUL DETENTION REQUIRES THE "AUTHORITY OF LAW"

The Fourth Amendment protects us from warrantless searches and seizures by requiring them to be supported by probable cause.[24] Washington's Constitution goes further than that.[25] Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, *without authority of law*." Thus, in Washington, probable cause alone is not enough to

[22] *Id.* at 329-30.
[23] *State v. Head*, 136 Wn.2d 619, 625-26, 964 P.2d 1187, 1190-91 (1998).
[24] *Staats v. Brown*, 139 Wn.2d 757, 771 (2000).
[25] *State v. Walker*, 157 Wn.2d 307, 313, 138 P.3d 113 (2006).

authorize a warrantless seizure.[26] The State bears the burden to show that such authority exists.[27]

The "authority of law" to seize someone must be granted by the constitution or by statute.[28] For example, the Legislature has granted police officers the authority to make warrantless felony and misdemeanor arrests to the specific situations described in RCW 10.31.100. For misdemeanors, that statute allows police to make a warrantless misdemeanor arrest if the suspect commits the offense "in the presence" of the arresting officer.[29]

Washington's legislature used this same "in the presence" language in RCW 7.80.050-060, and the Supreme Court has applied it to infractions.[30] Referencing this requirement, the Trial Court held that FEO Johnson was allowed to detain Mr. Mitchell because Mr. Mitchell failed to produce his proof of payment to FEO Johnson when asked. In other words, the Court held that FEO Johnson was "justified *to stop* [Mr. Mitchell] and ask for proof of payment,"[31] because it later turned out, after the initial detention, that Mr. Mitchell did not have his proof of payment.

3. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT FEO JOHNSON HAD THE AUTHORITY "TO STOP" MR. MICHELL AND "ASK FOR PROOF OF PAYMENT" BECAUSE HE COULD NOT PRODUCE PROOF OF PAYMENT PURSUANT TO RCW 7.80.060.

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[26] *State v. Barker*, 143 Wn.2d 915 (2001) (Oregon cop did not have constitutional or statutory authority at time to effect DWI stop of motorist crossing into Washington).
[27] *State v. Ducan*, 146 Wn.2d 166, 43 P.3d 513 (2002).
[28] *See id.*
[29] RCW 10.31.100; *State v. Ortega,* 177 Wn. 2d 116, 122, 297 P.3d 57, 60 (2013). Police may also arrest someone for specifically defined misdemeanors, such as domestic violence offenses, no contact order violations, anti-harassment orders, DWI, DWLS, Hit and Run Unattended, criminal trespass, MIP, and others. *See generally State v. Bonds*, 98 Wn.2d 1, 9-10, 653 P.2d 1024 (1982).
[30] *See, e.g., Ducan*, 146 Wn.2d at 166.
[31] RP 185.

Before denying Mr. Mitchell's motion to suppress, the trial court outlined the facts, the applicable law and the issue before it as follows:

> The Court has reviewed each of the Exhibits that were offered and admitted in this case in support of its analysis in this case. *The question is whether the officer's stop was justified. And by officer, I'm referring to the fare enforcement officer.* And it must meet the requirements of a warrantless search and seizure under the Fourth Amendment as well as the Washington State Constitution.
>
> From the Court's reading in *State v. Duncan*, found at 146 Wn.2d 166 (2002), the Court specifically refers to RCW 7.80, which governs civil infractions. *And here the question becomes whether the fare enforcement officer was justified to stop and ask for proof of payment.* In the absence, as are found under these facts, of a proof of payment, the officer may take identification information for citation at a later time. *And that's what the officer did in this case, based upon an infraction committed in his presence. Here the infraction, as found on the citation, is a failure to display proof of payment.* And that's cited under Title 81.
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> . . . . .
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> The facts in this case are undisputed with respect to the Defendant *exiting* the RapidRide transit on March 2, 2012. He was asked by the Fare Enforcement Officer Johnson for proof of payment, together with other persons exiting the RapidRide, and he was unable to show proof of payment. He indicated that he had given his proof of payment to someone else. From that, the fare enforcement officer took personal information, which the Defendant gave voluntarily. *From these facts, the Court reaches the conclusion that the fare enforcement officer did have a right under the civil infraction statutes to stop and inquire about proof of payment* . . . [32]

At the outset, the Court cited *Duncan*, which outlines some of the applicable law, as discussed below and it framed the issue before correctly as this: "whether [FEO Johnson] was justified *to stop*" Mr. Mitchell and "ask for his proof of payment."[33] But then, the court goes on to say that FEO Johnson was

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[32] RP 185-87.
[33] RP 185.

justified to detrain Mr. Mitchell, to ask for proof of payment "based upon an infraction [failure to display proof of payment] in [FEO Johnson's] presence."[34] In other words, FEO Johnson's initial detention, "to ask for proof of payment," was, under the Court's reasoning, justified because he later learned *after he detained Mr. Mitchell*, that Mr. Mitchell committed an infraction in his presence.

This reasoning is fatally flawed for several reasons. At the outset, the State failed to meet its burden to show that Mr. Mitchell committed any infraction at all. Mr. Mitchell testified that he did not give his transfer ticket away until moments before he stepped off the bus. This testimony was uncontroverted. FEO Johnson testified that all passengers are notified that they must keep their transfer tickets as proof of purchase *while they are on the bus*. Even if Mr. Mitchell was given fair notice of this requirement, it is the high of formality to expect him to know that he must retain that proof of purchase, even when he knows that seconds later, he will be exited the bus and will no longer need it.

In addition, even if Mr. Mitchell did commit an infraction, the Court's reasoning is still fatally flawed because FEO Johnson had no idea that an infraction had been committed until *after* he detained Mr. Mitchell. The Court's reasoning, therefore, flatly ignores the long-standing constitutional rule that no officer, regardless of the source of his authority, may ever justify a seizure with facts that he learns after he seizes that person.[35]

And even if the Legislature could empower FEO's to retroactively justify an otherwise unlawful detention, it did not do so here. RCW 7.80.050-060 only

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[34] RP 185-87.
[35] *See e.e.g, State v. Mendez*, 137 Wn.2d 208, 225-26, 970 P.2d 722 (1999).

allows FEO Johnson to detain Mr. Mitchell if he commits an infraction in FEO Johnson's "presence." The Trial Court recognized that this was the rule, but it clearly failed to understand what that phrase meant. Recently, our Supreme Court has clarified exactly what that phrase means. In *Ortega*, the Court clearly said that an infraction does not occur "in an officer's presence," *until* "the officer directly perceives facts permitting a reasonable inference that a misdemeanor is being committed."[36]

But here, FEO Johnson was not aware of any such facts until *after* he had already detained Mr. Mitchell. It was not until he detained Mr. Mitchell to "ask for proof of payment" when FEO Johnson learned that Mr. Mitchell did not have it. Thus, at the time he detained Mr. Mitchell, FEO Johnson did not, and in fact could not have known, whether Mr. Mitchell committed any infraction whatsoever. The Trial Court concluded so much when it framed the issue before the Court as "whether [FEO Johnson] was justified *to stop*" Mr. Mitchell and "ask for his proof of payment."[37]

Duncan, which the Court relied upon, actually contravenes its own conclusion. In that case, police observed Duncan and two other men at a bus stop standing near an open bottle concealed in a brown bag. Suspecting that the bottle contained alcohol, the officer's stopped Duncan for potentially committing a civil infraction (possessing an open container of alcohol in public). But the Trial Court correctly suppressed the evidence, reasoning that the offense did not occur "in the officer's presence. The Supreme Court affirmed, reasoning that, because the

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[36] *Ortega*, 177 Wn.2d at 122
[37] RP 185.

officers did not actually *see* "Duncan drinking the alcohol, or holding the bottle, or reacting to their approach, the violation did not occur in their presence.[38]

Here, there is even less of a basis for stopping Mr. Mitchell than there was in *Duncan*. In *Duncan*, before detaining the suspect, the officers at least had a reasonable suspicion to believe that Duncan violated the open container law: they saw a bottle concealed in a brown bag, which is commonly used to conceal alcohol, the bottle was "cold" to touch, and Duncan was one of only three men standing near it. But here, there are absolutely no facts from which FEO Johnson could have concluded that Mr. Mitchell did not pay for his fare, or that he did not have his proof of payment. In fact, FEO Johnson even admitted that "Before talking to" Mr. Mitchell, FEO Johnson "would not know that he'd committed any . . . infraction" whatsoever.[39]

4. RCW 81.112.210(2)(B) DOES NOT APPLY BECAUSE THAT STATUTE APPLIES TO TRAINS & LIGHT RAILS, NOT BUSES.

The State may argue that RCW 81.112.210(2)(b) authorized FEO Johnson to detain Mr. Mitchell under these facts. This argument should be rejected because that argument is not at all supported by the plain text of that statute.

First, under Title 81, Section 112, as defense counsel argued at trial, does not apply to buses. It applies solely to trains and light rails. When interpreting a statute, this Court's primary duty is to give effect to the legislature's intent.[40] Words in a statute should be given their ordinary meaning; if the plain meaning of

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[38] *Duncan*, 146 Wn. 2d at 182.
[39] RP 96-99.
[40] *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

the statute is clear, no further interpretation is necessary.[41] When it enacted that titled, in 1999, the Legislature made its intent very clear:

> The purpose of this act is to ***facilitate ease of boarding of commuter trains and light rail trains*** operated by regional transit authorities by allowing for barrier free entry ways. [42]

To accomplish this goal, the Legislature gave "regional transit authorities," such as Sound Transit, the power to employ FEOs.[43] Those FEO's, as the Legislature envisioned, were empowered to monitor the payment of fares specifically on "commuter trains and light rails." Nowhere in the applicable sections that grant FEOs their limited authority did the Legislature say that intended for FEO's to be able to board buses and monitor the payment of bus fares. And in 1999, there was certainly no vision of such a thing. Because the Legislature specifically limited Title 81, Section 112, to commuter and light rail trains, it could not have intended to grant FEO Johnson the authority he acted upon here to detain Mr. Mitchell after he exited a bus.

Common knowledge about the differences between trains, light rails and buses support this conclusion. Trains and light rails, for example, need people to monitor the payment of fares because it is impossible for the drivers of such vehicles to do so. But for buses, that is not traditionally so. In fact, when the relevant statutes were enacted, there is no evidence that the Legislature envisioned such an expansion of Title 81, Section 112.

And these differences between buses and trains, as it turns out, are significant in this case. Mr. Mitchell told FEO Johnson that he paid in cash, but he

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[41] *Id.*
[42] RP 161
[43] Title 81.112 (Purpose)

gave his transfer away as he exited the bus, at a time when he was no longer legally required to carry it. Had FEO Johnson had real doubts about whether he paid, he could have asked the bus driver, who could have verified Mr. Mitchell's proof of payment.

Second, even if the Court allows the Legislature's intent to be stretched all the way from trains to buses, the plain language of the applicable statutes does not give FEO's any authority to "detain" someone, especially after they have already exited the bus, as clearly happened here. True, "in addition to the specific powers granted to enforcement officers under RCW 7.80.050 and 7.80.060," RCW 81.112.210(2)(b) gives an FEO the "authority" to (1) "*Request* proof of payment from passengers," (2) "*Request* personal identification from the passenger," (3) and (3) "*Ask* the passenger to leave the authority facility." But, nowhere in that statute did the Legislature grant FEO's the additional authority "to detain" anyone, for any reason.

Had the Legislature intended to grant FEO's the "detain" someone, without reasonable cause, it would have said so, as it did in RCW 7.80.060. By not doing so, the Legislature made a conscious choice to limit an enforcement officer's authority to detain to situations where he has already developed reasonable cause to believe that the person detained, had actually committed an infraction. But here, FEO Johnson himself admitted that when he detained Mr. Mitchell, no such reasonable cause existed.

Further, the Legislature's constant use of the word "passengers" is also significant here because it envisions that FEO's authority to even *ask* for proof of

payment must cease once that person is no longer a "passenger." The act, however, does not define the word "passengers." So, we must look to the common definition of the word. Webster's dictionary defines a passenger as "a person *who is traveling from one place to another in a car, bus, train, ship, airplane,* etc., and who is not driving or working on it."[44] But, the undisputed facts clearly establish that Mr. Mitchell, and all the other passengers before him, were stopped *after* they had already exited the bus, and therefore were no longer passengers at all.

In *K.L.B.*, a passenger was convicted of making a false statement to a public servant in violation of RCW 9A.76.175 after he gave a false name to a Sound Transit FEO on Seattle's Link light rail system[45]. After interpreting the plain language of several relevant statutes, the Court held that the Legislature did not intend for FEOs, such as FEO Johnson, to have the equivalent powers of a "public servant" so that lying to one of them would amount to a crime.

This decision is significant in this case for two reasons. First, the Court held that FEO's authority must be strictly limited to what is granted by statute. As the Court observed, these "statutory powers" only allow them to "monitor compliance with fare collection."[46] They "do not transform Sound Transit FEOs (who in reality are Securitas employees) into public servants" and give them the same authority to act as a police officer. In other words, FEOs are no more than "private security officers," with very limited powers, granted by statute. If the Legislature did not grant them a specific power, then an FEO would have no

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[44] Merriam-Webster's Dictionary Online accessed at http://www.merriam-webster.com/dictionary/passenger (accessed on March 3, 2015).
[45] *State v. K.L.B.*, 180 Wn. 2d 735, 741, 328 P.3d 886, 889 (2014).
[46] *Id.*

power to act. Instead, if a FEO feels that some other action is warranted, the FEO "must summons the police."[47]

Second, *K.L.B.* is also significant on its facts. In that case, K.L.B. did not complain, as Mr. Mitchell does here, that the FEO was not authorized to temporarily detain him after could not produce proof of payment. But, that was because the FEO did not detain K.L.B. to ask him for proof of payment because K.L.B. was still on the train when FEO asked to see his proof of payment. Simply demanding payment, when someone is still a passenger, is not a detention at all. Further, FEOs are specifically granted the statutory authority to "ask for proof of payment" from "*passengers.*" Nowhere in either of the governing statutes, however, did the Legislature grant FEOs the authority "to detain" someone, who has already exited the train, to check for their proof of payment, which is exactly what happened here.

Though we do not have derailed FFCLs, the Trial Court's oral ruling shows that it denied Mr. Mitchell's motion to suppress on an erroneous view of the law. It therefore abused its discretion when it denied Mr. Mitchell's motion to suppress. This Court should reverse the trial court's ruling, with orders to grant the motion to suppress. Further, the search incident to Mr. Mitchell's arrest produced the only evidence that he possessed a firearm, and that is now fruit of the poisonous tree. Accordingly, Mr. Mitchell's conviction should be dismissed with prejudice.

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[47] *Id.* The court also said that the mere fact that "passengers can lie to [FEOs] without repercussions," does not act as a substitute for a clear Legislative grant of power.

B. UNDER THE INSTRUCTIONS GIVEN, NO REASONABLE JUROR COULD HAVE REJECTED MR. MITCHELL'S LACK OF NOTICE DEFENSE BECAUSE THERE WAS NO EVIDENCE OF ORAL NOTICE, NOR WAS THERE ANY "OTHER EVIDENCE" OF ACTUAL NOTICE, AS REQUIRED BY THE COURT'S INSTRUCTION.

1. STANDARD OF REVIEW

Unchallenged jury instructions become the "law of the case" on appeal.[48] The purpose of this doctrine is twofold: (1) it encourages prosecutors to offer instructions that accurately convey their burden of proof;[49] and (2) it promotes finality and efficiency in each case tried to a jury.[50] In most cases, the law of the case doctrine is applied as a test of the State's burden of proof, i.e., to argue that the State failed to prove an element erroneously added to the to-convict instructions at trial.[51]

In those cases, the court must dismiss the defendant's conviction if the State failed to prove the added element in the to-convict instructions.[52] For an affirmative defense, the standard is similar: if, after considering the evidence in the light most favorable to the State, no rational jury could have rejected the defense, the court must dismiss the conviction.[53] Here under the instructions given, no reasonable juror could have rejected Mr. Mitchell's lack of notice defense.

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[48] *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998).
[49] *Id.* (motivates prosecutors to "review all jury instructions to ensure their propriety before the instructions are given to the jury.")
[50] *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) ("the doctrine seeks to promote finality and efficiency in the judicial process.").
[51] *See, e.g., State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998); *State v. Hobbs*, 71 Wn. App. 419, 423, 859 P.2d 73 (1993) (adding location of crime); *State v. Ong*, 88 Wn. App. 572 (1997) (adding knowledge that drug was morphine); *State v. Potts*, 93 Wn. App. 82 (1998) (adding "methamphetamine").
[52] *See Hickman*, 135 Wn.2d at 101-06 (applying the law of the case as described and dismissing conviction).
[53] *State v. Lively,* 130 Wn.2d 1, 17, 921 P.2d 1035 (1996).

In this case, the trial court's instruction to the jury, which is likely a misstatement of the rule announced in *Breitung*, read as follows:

Lack of Notice Instruction

> It is an affirmative defense to the crime of Unlawful Possession of a Firearm in the First Degree that the defendant had a lack of notice.
>
> This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.
>
> Actual notice can be met where the evidence demonstrates oral and written notification, or by other evidence.[54]

Under these instructions, to be acquitted, the jury had to find that it was more likely than not that Mr. Mitchell had a "lack of notice" that he was not allowed to possess a firearm. Put conversely, the instruction defined "actual notice" as being proved through "oral and written notification, or by other evidence."[55]

This means, under the most logical interpretation, that the jury could find actual notice in only two situations: (a) if it found that Mr. Mitchell received either "oral and written notice," or (b) "*other* evidence," i.e. not evidence of oral or written notice, in the record indicated that he received actual notice that he was not able to possess a firearm at the time of possession.

But here, there is simply no evidence in the record, apart from Mr. Mitchell's written statement of plea on guilty and the disposition papers that

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[54] CP 187 (Jury Instruction No. 7).
[55] *Id.*

proves that he had actual knowledge that he was not allowed to possess a firearm. Mr. Mitchell testified that he did not receive oral notice at his hearing, and the State did nothing to rebut that claim, even though it easily could have obtained an audio recording from his juvenile sentencing hearing to do so.[56] But more importantly, because the State failed to establish oral notice, and there was indication on the record, the Court and the jury must assume that "no such notice was given."[57]

Thus, without both oral *and* written notice, the jury could only find a lack of notice if it found, through "other evidence," that Mr. Mitchell did not receive such notice. But no such other evidence exists in the record. Accordingly, under these instructions, no reasonable juror could have rejected Mr. Mitchell's lack of notice defense. Accordingly, under the law of the case, the evidence is insufficient to prove that Mr. Mitchell committed the crime of unlawful possession of a firearm, and his conviction must be dismissed.

C. Defense Counsel Rendered Ineffective Assistance of Counsel By Failing to Obtain an Copy of the Audio Recording From Mr. Mitchell's Juvenile Sentencing Hearing and to Use it at Trial.

1. Standard of Review

Washington courts follow the rule announced in the United States Supreme Court's seminal decision in *Strickland v. Washington.*[58] Under *Strickland*, the defendant must prove (1) that counsel's actions or decisions (or the absence of them) was deficient, and (2) that the deficiencies prejudiced the result

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[56] Of course, now, we know that would not have benefited the State, but had it done so, the State would have been obligated to provide that information to defense counsel, who surely would have used it in his client's defense.
[57] *State v. Minor,* 162 Wash.2d 796, 800, 174 P.3d 1162 (2008).
[58] *Strickland v. Washington*, 446 U.S. 668, 104 S. Ct. 2052 (1984).

of the case.[59]

2. DEFENSE COUNSEL HAS A DUTY TO INVESTIGATE ALL REASONABLE LINES OF DEFENSE SO HE CAN COME TO AN INFORMED DECISION ABOUT HOW TO BEST REPRESENT HIS CLIENT.

Counsel's performance is deficient if it was "objectively unreasonable," in light of all the circumstances. Reasonableness is measured by "prevailing professional norms, i.e. what a competent criminal defense attorney would do under similar facts."[60] Courts begin with the assumption that counsel performed competently, but that presumption can be rebutted in a number of ways.[61]

Effective assistance requires counsel to, at a minimum, reasonably investigate the case so he can make "make an informed decision" about how to "best represent [his] client."[62] A reasonable investigation includes investigating *all* reasonable lines of defense, "especially the defendant's most important defense."[63] Counsel's decision to investigate (or not investigate) must be reasonable in light of the relevant facts and law.[64] A trial attorney who fails to consider alternate defenses constitutes deficient performance when the attorney "neither conducts a reasonable investigation nor makes a showing of strategic reasons for failing to do so."[65]

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[59] *Id.*
[60] *Id.*
[61] *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 721, 720-33, 101 P.3d 1 (2004).
[62] *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).
[63] *Davis*, 152 Wn.2d at 720-33.
[64] *Id.*
[65] *Id.*

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND DISCOVER READILY AVAILABLE EXCULPATORY EVIDENCE: NAMELY, THE TRANSCRIPTS FROM MR. MITCHELL'S JUVENILE SENTENCING HEARING.

In *Hart v. Gomez*, counsel did not investigate "readily available" exculpatory evidence that would have corroborated the defense's theory – extensive records of a witness that refuted the alleged victim's testimony that her father molested her in the absence of another adult – and no plausible tactical reason could excuse that failure.[66] The defense witness informed counsel of the records that proved that she was present with the defendant on the dates of the alleged molestation, but counsel allowed the witness to testify without any evidentiary corroboration.[67] After finding no possible strategic reason for counsel to completely ignore the witness's pleas to investigate and introduce the supporting documents, the Ninth Circuit held that defense counsel's decision was deficient under *Strickland*.[68]

Mr. Mitchell's trial attorney, just like defense counsel in *Hart*, knew that Mr. Mitchell might not have been given the required oral notice at his juvenile sentencing hearing, yet, he completely failed to investigate that line of defense. And in fact, as Mr. Mitchell's new counsel pointed out to the court before Mr. Mitchell was sentenced, no such oral notice was given. Mr. Mitchell was required to testify without any evidentiary corroboration that was central to his defense.

A reasonable effort would have led to the discovery of the transcripts from Mr. Mitchell's juvenile sentencing hearing, but instead, counsel decided to have

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[66] *Hart v. Gomez,* 174 F.3d 1067, 1069 (9th Cir.1999).
[67] *Id.* at 1070.
[68] *Id.* at 1071.

the jury come to its own conclusions regarding the truthfulness of Mr. Mitchell's testimony. There is no conceivable tactical reason why counsel neglected to perform such a perfunctory inquiry that would have led to crucial, exculpatory evidence. Counsel's performance was unreasonable and likewise, deficient under *Strickland.*

4. COUNSEL'S FAILURE TO DISCOVER & USE THE EXCULPATORY EVIDENCE PREJUDICED MR. MITCHELL.

Deficient performance is prejudicial if there "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[69] Or, phrased differently, a reasonable probability simply requires a sufficient basis to "undermine confidence in the outcome" of the case.[70] As *Strickland* implied, the standard falls somewhere in between prejudice that is merely "conceivable" and prejudice that is still less than a preponderance ("more likely than not.").[71]

In *Hart*, the Court held that had the defense witness's records been admitted, the jury, in all likelihood, would have been convinced that she was not a biased witness or one who did not have knowledge of all the relevant facts, and likewise could not have "voted to convict on those charges."[72] Although the Ninth Circuit noted its previous holding that "ineffective assistance claims ... must be considered in light of the strength of the government's case," it was not persuaded by the State's argument that evidence against the defendant was overwhelming.[73]

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[69] *Strickland*, 466 U.S. at 69.
[70] *Id.* at 694.
[71] *Id.*
[72] *Id.* at 1068, 1073.
[73] *Id.* at 1072.

Although the State provided substantial evidence that the defendant molested his daughter *prior* to the one-year period charged in the information, there was little to no evidence of molestation during the charged period.[74] This combined with the defense witness's records convinced the Court that no jury could have found the defendant guilty beyond a reasonable doubt, or at the very least undermined confidence in the verdict.[75]

The State's evidence against Mr. Mitchell with regard to Mr. Mitchell's lack of notice defense cannot, by any stretch of the imagination, be said to be overwhelming. It came down to a credibility determination, but only because defense counsel did not obtain the very best proof to show that Mr. Mitchell did not in fact receive the oral notice required by statute.

Without that evidence, Mr. Mitchell was forced to hope that the jury would simply believe him on his word that he did not recall receiving such notice. But, even then, his testimony was only that he could not *recall* receiving oral notice. He did not testify that he remembered not being given such notice. Counsel failed to retrieve the one piece of objectively irrefutable proof that he did not receive oral notice. Had counsel obtained such evidence, much of the State's argument in favor of actual notice would have absurd, and easily rejected by the jury.[76]

The prejudice was only worsened by the Court's willingness to embrace the State's argument to the jury that they should simply assume that Mr. Mitchell

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[74] *Id.* at 1073.
[75] *Id.*
[76] RP 524.

received oral notice.[77] Had the transcript been admitted, the jury would have been compelled to believe Mr. Mitchell's testimony, despite their doubts about his truthfulness. The validity of Mr. Mitchell's conviction is undermined, his counsel's performance was defective and resulted in substantial prejudice to him, and therefore, must be reversed.

VI. CONCLUSION

Appellant, Mr. Mitchell, respectfully asks that this court grant the relief as requested above.

Dated March 3, 2015,

Mitch Harrison, ESQ.,
WSBA#43040
Attorney for Appellant

[77] RP 530.

CERTIFICATE OF SERVICE

I, Christopher Wieting, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

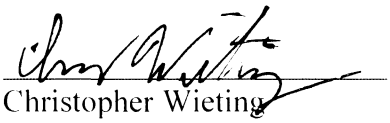
1. I am employed by the law firm of Harrison Law.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

3. On the date set forth below, I served in the manner noted a true and correct copy of this **Brief of Appellant** on the following persons in the manner indicated below:

Washington State Court of Appeals, Div I One Union Square 600 University St Seattle, WA 98101-1176	☐U.S. Mail ☐Email: ☐Fax: ☒In Person
King County Prosecuting Attorney's Office King County Courthouse, Rm W554 516 Third Avenue Seattle, WA 98104-2362	☐U.S. Mail ☐Email: ☐Fax:
Lavele Mitchell, DOC #375920 Washington Corrections Center 2321 West Dayton Airport Road PO Box 900 Shelton, WA 98584	☒U.S. Mail ☐Email: ☐Fax:

DATED this 2nd day of March, 2015 at Seattle, Washington.



Christopher Wieting