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NOV 18 2010

King County Prosecutor
Appellate Unit

NO. 65727-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

F. M.,

Appellant.

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

The Honorable Christopher Washington, Judge

OPENING BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress under CrR 3.6.¹

2. The trial court erred when it entered that portion of finding of fact 7 that indicates appellant was "loud, disruptive, and belligerent" to the extent it implies that appellant did anything more than direct a profane statement toward an officer before being seized.

3. The trial court erred when it entered that portion of conclusion of law 5 that indicates "[t]he initial contact with the respondent by Deputy Eshom was a social contact and did not constitute an impermissible stop or seizure" to the extent this refers to Deputy Eshom's command that appellant stop and speak with him.

4. The trial court erred in conclusion of law 7 when it found that officers had probable cause to arrest appellant for obstructing a law enforcement officer to the extent this conclusion refers to appellant's conduct prior to being seized.

5. The court also erred when it found that police lawfully

¹ The court's findings and conclusions are attached to this brief as an appendix.

arrested appellant and that all evidence obtained incident to arrest was admissible [conclusions of law 8-12].

Issues Pertaining to Assignments of Error

1. While complying with an order to leave the area in which he was standing, appellant directed profanity at one of the officers involved. Mistakenly believing this to be a crime, that officer commanded appellant to stop, which he did. Was this an unlawful seizure unsupported by reasonable suspicion of criminal activity?

2. In light of this unlawful seizure, did the trial court err when it upheld appellant's subsequent arrest and ruled all evidence obtained as a result of that arrest admissible?

3. Did the court err when it entered several findings of fact and conclusions of law in support of its decision denying the defense motion to suppress?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Fabian Manion with Unlawful Possession of a Firearm in the Second Degree and Obstructing a Law Enforcement Officer. CP 26-27. Manion moved to suppress all evidence against him, arguing it was the fruit of an

unlawful seizure unsupported by reasonable suspicion of criminal activity. CP 14-21. The motion was denied. RP 89-91; CP 36-40.

The parties proceeded by way of stipulated trial. RP 92-93; CP 29. The Honorable Christopher Washington found Manion guilty of Unlawful Possession of a Firearm but not guilty of Obstructing a Law Enforcement Officer. RP 93-96; CP 28, 41-44. Judge Washington imposed local sanctions, and Manion timely filed his notice of appeal. CP 30-35, 45.

2. Facts Pertaining to Motion to Suppress

In November 2009, King County Sheriff's Deputy Joseph Eshom served as a Metro Transit officer in Seattle. RP 14. At 12:50 a.m. on the morning of November 14, Deputy Eshom responded to the downtown Seattle Transit tunnel in the area of Third and Pine regarding a complaint that a group of a dozen individuals was causing a disturbance and being confrontational with security officers. RP 14-15, 24. When Eshom arrived, he saw the individuals exiting the tunnel with security following them. Deputy Eshom told the group, which consisted of teenaged males and females, to leave the Transit property and not return for the rest of the night. RP 15-16.

Eshom got into his patrol car and watched as the group crossed Third Avenue and stopped on the other side of the street, which is still within a Metro zone that covers the entire block. Eshom decided to contact them again and move them completely out of the zone. RP 16-17. Eshom, who was in full uniform and driving a marked patrol car, parked his car on the street near the group, and turned on the car's blue and red lights. RP 24-28. A second uniformed deputy – Deputy Matthew Paul – parked his patrol car immediately behind Eshom's. RP 25-26, 41-44. The two deputies then approached the group and ordered them to leave the area. RP 18, 28-29, 38, 44-45.

The group began to leave. While doing so, one individual in the group, Fabian Manion, told Deputy Eshom to "fuck off." RP 18, 29. Believing that profanity in a metro zone was a crime, Eshom commanded Manion to stop and Manion complied. RP 18, 29. When Deputy Eshom engaged Manion, he could smell alcohol on his breath and believed Manion's demeanor was confrontational. RP 18-19, 33. Eshom walked Manion to a wall, intending to identify him and pat him down, and ordered Manion to place his hands on the wall. RP 19, 30-31. Manion reached for his right pants pocket, however, and Eshom grabbed his hand. Manion tried to run away,

but Eshom grabbed his jacket. Deputy Paul sprayed Manion with pepper spray, but Manion fled, running through traffic on Third Avenue. RP 19-20, 39.

Deputies were able to catch Manion, using a Taser to bring the chase to an end. RP 20, 40. Manion was cuffed and frisked. Deputy Eshom felt a hard object in his right pants pocket that resembled a gun. Eshom asked Manion what it was and Manion confirmed it was a firearm. RP 21. Deputy Eshom removed a loaded .380 caliber handgun from Manion's pocket. RP 22, 40-41.

Manion testified at the CrR 3.6 hearing, denying he was with the group in the bus tunnel, denying that he ever told Deputy Eshom to "fuck off," and denying he had been drinking alcohol. RP 53-56, 66-67. According to Manion, he was already at the bus stop on Third Avenue when the group from the tunnel joined him. RP 54-55, 72. The deputies ordered everyone to leave, and as he began to walk away, the deputies ordered him to stop, grabbed his arm, and took him to the wall. RP 56-58. Manion felt the officers had no right to pat him down, so he ran away. RP 59. He was tased and officers found the gun in his pocket. RP 59-61. Defense counsel argued that Manion was first seized when Deputy Eshom commanded him to stop as he walked away with the group on Third Avenue. RP 76-77;

CP 15-16. Counsel argued that Eshom did not have reasonable suspicion of criminal activity at that point, noting that cursing at a police officer is not a crime. RP 79-81; CP 16-18.

Judge Washington found Manion's testimony not credible. CP 39 (conclusion 1). He found that Manion did indeed tell Deputy Eshom to "fuck off" and, in response, Eshom commanded Manion to stop, which he did. CP 37-38 (findings 6, 21); RP 90. Deputy Eshom then smelled alcohol, which – when combined with Manion's behavior – suggested Manion had been drinking. Eshom then led Manion to the wall to investigate the crime of minor in possession of alcohol, a crime for which Judge Washington found he had probable cause. CP 37 (findings 6-8), 39 (conclusion 7); RP 90-91. Judge Washington also found that Eshom had probable cause to arrest Manion for obstructing a law enforcement officer and that the gun was properly seized in a lawful search incident to arrest. CP 39 (conclusions 7-10); RP 91.

Manion now appeals.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED MANION'S MOTION TO SUPPRESS.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution, warrantless searches and seizures are per se unreasonable unless the State demonstrates they fall within one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)).

One of these narrow exceptions is the "Terry investigatory stop," discussed in detail in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). During a Terry stop, an "officer may briefly detain and question a person reasonably suspected of criminal activity." State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995) (quoting State v. Rice, 59 Wn. App. 23, 26, 795 P.2d 739 (1990)). To justify an intrusion, however, an officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065

(1984) (quoting Terry, 392 U.S. at 21). Specific and articulable facts means that the circumstances must show "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). When police have reasonable suspicion of criminal activity, they may stop the person, ask for identification, and ask the individual to explain his or her activities. State v. Alcantara, 79 Wn. App. 362, 365, 901 P.2d 1087 (1995).

A person is seized "when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal quotations and citations omitted). Whether a seizure has occurred is a mixed question of law and fact. What occurred involves questions of fact. But the legal consequences flowing from those facts are questions of law, reviewed de novo. State v. Bailey, 154 Wn. App. 295, 299, 224 P.3d 852, review denied, 169 Wn.2d 1004 (2010).

Notably, statements such as “halt,” “stop, I want to talk to you,” “wait right here,” and the like qualify as seizures. See State v. Whitaker, 58 Wn. App. 851, 854, 795 P.2d 182 (1990), review denied, 116 Wn.2d 1028 (1991); State v. Ellwood, 52 Wn. App. 70, 73-74, 757 P.2d 547 (1988); State v. Sweet, 44 Wn. App. 226, 230, 721 P.2d 560, review denied, 107 Wn.2d 1001 (1986); State v. Friederick, 34 Wn. App. 537, 541, 663 P.2d 122 (1983).

Judge Washington’s findings from the CrR 3.6 hearing do not expressly identify at what point he believed Manion was seized. The closest the findings come is conclusion of law 6, which states:

There was no pretextual stop of the respondent by Deputy Eshom or any of the other police officers. The respondent drew attention to himself when he told the deputies to “Fuck Off”. It was a bad decision for the respondent to say “Fuck Off” to a deputy after he had been drinking and warned to stay off of Metro Zone property.

CP 39. Judge Washington’s focus on the events immediately following Manion’s profane comment was proper. As soon as Deputy Eshom commanded Manion to stop, there was a warrantless seizure because no reasonable person would feel free to ignore that order. The only remaining question is whether there was reasonable suspicion of criminal activity authorizing this seizure.

In upholding Manion's subsequent detention, search, and arrest, Judge Washington found that once Manion stopped as commanded, and Deputy Eshom spoke to him, Eshom could smell alcohol. At that point, reasoned Judge Washington, Eshom had probable cause to arrest Manion for the crime of minor in possession of liquor. CP 38 (finding 22), 39 (conclusion of law 7); RP 90-91. But this analysis overlooks the pertinent question: whether there was reasonable suspicion to seize Manion in the first place by ordering him to stop. There was not.

As defense counsel pointed out below, the First Amendment protects speech directed at law enforcement officers. This is true even where the speech is provoking and obscene. City of Houston v. Hill, 482 U.S. 451, 461-462, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987); see also Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (striking down ordinance making it a crime "for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.").

Deputy Eshom was apparently unaware that Manion's comment was protected speech. He erroneously believed that using profanity in a metro zone was a crime and, based on that belief,

commanded Manion to stop. RP 18, 29. It was at this point that Manion was illegally seized.

Any evidence or statements derived directly or indirectly from an illegal seizure must be suppressed unless sufficiently attenuated from the initial illegality to be purged of the original taint. Wong Sun v. United States, 371 U.S. 471, 484-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995); State v. Chapin, 75 Wn. App. 460, 463, 879 P.2d 300 (1994), review denied, 125 Wn.2d 1024 (1995). The courts apply a "but-for analysis." State v. Aranguren, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985). But for the unlawful seizure, there would have been no evidence that Manion smelled of alcohol, no attempt to place him against the wall, no attempt to flee, no probable cause to arrest Manion, and no discovery of the gun in his pocket. In short, contrary to conclusions of law 8-12, all evidence obtained following the illegal seizure had to be suppressed.

Finally, a few of the trial court's other written findings and conclusions warrant additional discussion. When reviewing the denial of a suppression motion, this Court must determine whether substantial evidence supports the findings of fact and then determine whether the findings support the conclusions of law. State v. Hill,

123 Wn.2d 641, 644, 870 P.2d 313 (1994); State v. Hagen, 55 Wn. App. 494, 498, 781 P.2d 892 (1989). "A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal." Hill, 123 Wn.2d at 647 (citing Nord v. Eastside Ass'n Ltd., 34 Wn. App. 796, 798, 664 P.2d 4 (1983)).

In finding of fact 7, Judge Washington found that "the respondent's loud, disruptive and belligerent behavior combined with the odor of alcohol suggested that he had been drinking alcohol." CP 37. To the extent this constitutes a finding that Manion was in any manner loud, disruptive or belligerent to Deputy Eshom (beyond the one profane remark) prior to the seizure, it is not supported by any evidence in the record and is erroneous.

In conclusion of law 5, the court indicated, "The initial contact with the respondent by Deputy Eshom was a social contact and did not constitute an impermissible stop or seizure" CP 39. To the extent this refers to Deputy Eshom's command to Manion that he stop, it is erroneous. A "social contact" is contact falling short of an investigative detention; *i.e.*, an interaction in which an individual *would* feel free to walk away. See State v. Harrington, 167 Wn.2d 656, 663-665, 222 P.3d 92 (2009); see also State v. Nettles, 70 Wn. App. 706, 710, 855 P.2d 699 (1993) (seizure does not occur "when a

police officer merely asks an individual whether he or she will answer questions or when the officer makes some further request that falls short of immobilizing the individual.”), review denied, 123 Wn.2d 1010 (1994). That is not what occurred in this case, where a uniformed officer, accompanied by a second officer, ordered Manion to stop so that he could confront him.

Lastly, in conclusion of law 7, the court found that officers had probable cause to arrest Manion for obstructing a law enforcement officer. CP 39. “A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.” RCW 9A.76.020(1). Conclusion 7 does not indicate at what point officers had probable cause for this offense. But Manion *complied* with Deputy Eshom’s command that he leave the bus stop area with the rest of the group and his subsequent command, following the profanity, that Manion stop. This conclusion must, therefore, refer to circumstances following Manion’s efforts to avoid a pat down search and unsuccessful attempt to flee. In that context, the conclusion is correct, but it is irrelevant to whether the seizure was proper at the outset.

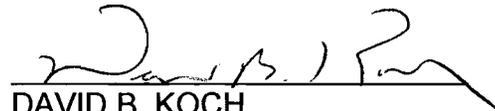
D. CONCLUSION

Manion was seized without reasonable suspicion of criminal activity. All evidence discovered following the illegal seizure must be suppressed. Manion's conviction should be reversed and the case dismissed.

DATED this 18th day of November, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

APPENDIX

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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| FABIAN MANION, |) | CONCLUSIONS OF LAW |
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A hearing on the admissibility of physical and/or oral evidence was held on June 24, 2010, before Judge Chris Washington, in the above-entitled court. Judge Washington advised the respondent of his rights regarding his option of whether or not to testify and the consequences of that decision pursuant to CrR 3.6 and confirmed that the respondent understood his rights.

After considering the evidence submitted by the parties, including the testimony of Deputy Joseph Eshom, Deputy Matthew Paul and Deputy Chris Caven of the King County Sheriff's Office, and of the respondent himself, and hearing argument, the Court enters the following findings of fact and conclusions of law as required by CrR 3.6:

I. FINDINGS OF FACT.

1. On November 14, 2009, around 12:30 a.m., Deputies Joseph Eshom, Chris Caven and Matthew Paul of the King County Sheriff's Office were dispatched to Westlake Station in Seattle, Washington in response to a large group of juveniles causing a verbal disturbance with security on site. Seattle, Washington is in King County, Washington. Each of the deputies was at the time assigned to Metro Transit Police and their duties included responding to disturbances and incidents relating to Metro Transit and its property. Each deputy was in full uniform, clearly marked as Transit Police, as well as a visible police badge, name badge, patch, radio, and a utility belt with a gun, taser, baton and flash light. Each

1 deputy drove a fully-marked patrol vehicle. Each patrol vehicle had a light bar
2 and was clearly marked as a King County Sheriff Transit Police vehicle.

- 3 2. Deputy Eshom arrived at Westlake Station and observed approximately 12 people
4 inside walking towards the exit on Pine Street with security following them.
- 5 3. Security pointed to the crowd and signaled that they were the people that the call
6 was about. Deputy Eshom followed the group onto Pine Street and ordered them
7 to stay off of Metro property for the rest of the night and watched as they walked
8 off.
- 9 4. Deputies Eshom and Paul noticed that the group verbally trespassed from Metro
10 property for the night appeared to be teenagers based on their appearance,
11 behavior and the way they were dressed.
- 12 5. Deputy Eshom got into his patrol car and began to leave and noticed the same
13 group of people loitering in a Metro zone near Third Avenue and Pine Street.
14 Deputy Eshom and Deputy Paul parked their patrol vehicles near the Metro zone.
15 Each deputy left the wig-wag lights on. Neither deputy used the siren on their
16 patrol vehicle. Deputy Eshom and Deputy Paul again contacted the group and
17 together ordered the group to leave the Metro zone. Both Deputies ordered the
18 group to leave. The respondent, Fabian Manion, was in this group.
- 19 6. The respondent told Deputy Eshom to "fuck off." Deputy Eshom commanded
20 that the respondent stop. The respondent stopped and turned to speak with
21 Deputy Eshom. Deputy Eshom approached the respondent to talk to him and
22 smelled the odor of alcohol emanating from the respondent's breath and body.
23 Deputy Eshom expected the respondent to stop and talk with him.
7. Based on the officer's training and experience, the respondent's loud, disruptive
and belligerent behavior combined with the odor of alcohol suggested that he had
been drinking alcohol.
8. Deputy Eshom grabbed the respondent's arm and led him to the wall to separate
him from the group, pat him down and investigate a potential minor in possession
of liquor.
9. Deputy Eshom told the respondent to put his hands on the wall. The respondent
started to lower his hand towards his pants. Deputy Eshom grabbed Manion's
hand. The respondent pulled away from Deputy Eshom in an attempt to flee.
10. The officer had safety concerns when the respondent reached toward his pants.
11. Deputy Eshom grabbed onto the respondent's jacket and told him to stop and that
he was under arrest. The respondent continued to attempt to flee. Deputy Paul
arrived and deployed pepper spray at the respondent as he tried to run.

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12. Deputy Eshom got the respondent onto the ground, but Manion jumped up and started to run southbound on Third Avenue into the lanes of travel. The respondent zigzagged in the road and eventually started to run westbound on Pine Street.
 13. Deputy Eshom gave the respondent several commands to stop running, but he refused to comply.
 14. Deputy Caven pulled ahead of the respondent in his patrol car and the respondent turned around and started running eastbound on Pine Street. Deputy Caven saw the respondent running in traffic and holding his baggy pants up with his hand.
 15. Deputy Eshom deployed his department issued taser into the respondent. The respondent again attempted to flee. The respondent was eventually able to be put into handcuffs by Deputies Eshom and Paul.
 16. Deputy Eshom noticed the respondent moving on the ground in an apparent attempt to reach his pocket.
 17. Deputy Eshom patted down the outside of the respondent's clothing and felt a hard object in Manion's pocket. Deputy Eshom asked the respondent what the object was and the respondent said "it's a gun."
 18. In the respondent's right pocket of his shorts, Deputy Eshom found a black semi-automatic Lorgin .380 handgun, #181457, with a magazine of four rounds inserted into it and one round loaded into the chamber.
 19. Deputy Eshom read the respondent his Miranda rights. The respondent invoked his Miranda rights and refused to answer any further questions.
 20. The respondent had reason to know that he was told to stay out of and off of Metro Zone property on the night of November 14, 2009.
 21. Deputy Eshom approached the respondent at the Metro bus stop at Third and Pine Street because he had told the group of people to stay out of the Metro zone and the respondent told him to "fuck off." When Deputy Eshom approached the respondent, he smelled alcohol on the respondent's breath.
 22. Deputy Eshom then led the respondent to the wall and had probable cause to arrest the respondent for minor in possession of liquor, a gross misdemeanor.

After having made those Findings of Fact, the Court also now enters the following:

II. CONCLUSIONS OF LAW

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1. The respondent's testimony was not credible. This was an unfortunate chain of events that the respondent brought upon himself.
2. Deputy Eshom's, Deputy Paul's and Deputy Caven's testimony was credible.
3. The respondent has the burden of proof on a CrR 3.6 motion to suppress.
4. The respondent had reason to know that he was told to stay out of and off of Metro Zone property on the night of November 14, 2009.
5. The initial contact with the respondent by Deputy Eshom was a social contact and did not constitute an impermissible stop or seizure. The deputies had no reason to single-out the respondent, unless the respondent was doing something wrong.
6. There was no pretextual stop of the respondent by Deputy Eshom or any of the other police officers. The respondent drew attention to himself when he told the deputies to "Fuck Off". It was a bad decision for the respondent to say "Fuck Off" to a deputy after he had been drinking and warned to stay off of Metro Zone property.
7. Deputy Eshom observed an odor of alcohol and believed that the respondent had been drinking. Deputy Eshom had individualized probable cause to detain and arrest the respondent for minor in possession of liquor and obstructing a law enforcement officer.
8. The search of the respondent was part of a lawful search incident to arrest.
9. All physical evidence obtained from the pat down and search of the respondent incident to arrest, is admissible.
10. Deputy Eshom was authorized to search the respondent's pocket incident to the respondent's arrest.
11. The firearm, to wit: a .380 handgun found in the respondent's pocket is ruled admissible.
12. The respondent's motion to exclude evidence is denied.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 11th day of July, 2010.

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Honorable Chris Washington

Presented by:

Whitney I. Furman
Whitney I. Furman, WSBA #35790
Deputy Prosecuting Attorney



Amy Bowles Bowles
Amy Bowles, WSBA ##33541
Attorney for Respondent

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

| | | |
|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 65727-5-I |
| |) | |
| F.M., |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF NOVEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] F.M.,
1301 E. MADISON STREET
APARTMENT 4
SEATTLE, WA 98122

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF NOVEMBER, 2010.

x *Patrick Mayovsky*