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Court of Appeals
Division I
State of Washington
NO. 72167-4-1

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

STATE OF WASHINGTON

Respondent

v.

JORDAN L. WILSON,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Was the trial court correct in ruling that the investigative detention of the defendant was lawfully based on a reasonable, articulable suspicion of criminal activity?

2. Did the officer exceed the permissible scope of the investigative detention by running the defendant's name for warrants?

II. STATEMENT OF THE CASE

On March 20, 2014, Detective Massingale, a 23 year law enforcement veteran who had spent the previous 8 years investigating between 800 and 900 property crimes, responded to the Extended Stay America motel in Everett. There had been a burglary in Everett earlier that day, and the suspect vehicle (a blue Buick) was spotted in the parking lot of the motel later that afternoon. Upon arrival at the motel detective Massingale noticed that the blue Buick was parked on the west side of the property, close to a side entrance which provided quicker access to rooms on that side of the motel. His investigation on March 20th resulted in the recovery of stolen firearms and other stolen property from both the blue Buick and motel room #203. The recovered property

belonged to victims of five separate burglaries in Snohomish County. RP (5/29/14) 4-5, 6, 7, 8, 15. 1 CP 59.

The blue Buick contained multiple bags full of property and some sterling silverware storage cases. RP (5/29/14) 8. Detective Massingale learned that the blue Buick was being used to transport stolen goods from one hotel to another. Id. at 9. Only one person was arrested on March 20th, but three additional suspects were not arrested. Id. at 14. Detective Massingale knew there were firearms, jewelry, and other property stolen from multiple burglaries which had not yet been recovered. Id. 7, 12.

Detective Massingale suspected that room #203 was not the only room at the motel involved in the trafficking of stolen property from these burglaries. He reviewed the officers' CAD logs from March 20th and learned the name of the occupant in room #123, then checked the recent pawn history for that person. In the 10 days from March 20th through March 31st, that person had a "very high level of pawning activity" involving jewelry, which was consistent in description with jewelry taken in the burglaries Detective Massingale was investigating. Id. 5, 6.

Eleven days later, on March 31st, 2014, the manager of the motel called Detective Massingale to inform him that the occupant

of room #123 was back at the motel. 1 CP 59. Detective Massingale drove to the motel and began looking for the blue Buick associated with both the occupant of room #123 and the prior burglaries. RP (5/29/14) 7. Upon arrival the detective observed a green Chevy Monte Carlo with three adult males standing nearby. The green Chevy was parked in the same general west-parking-lot location as the blue Buick's location on March 20th. The Detective continued around the motel in search of the blue Buick, but did not locate it. On his second pass around the motel he observed the green Chevy had its doors and trunk open. The vehicle was "completely loaded" and "overflowing" with bags, a fact that was consistent with similar crimes Detective Massingale had investigated. 1 CP 59; RP (5/29/14) 9-10. As Detective Massingale parked his unmarked police vehicle about two car lengths from the green Chevy, he noticed that the three males by the vehicle were engaged in light-hearted conversation. RP (5/29/14) 10. As soon as the Detective exited his vehicle and began to approach the men, the mood changed to a "nervous silence" and they started focusing on the Detective. Id. 1 CP 59. The defendant Jordan Wilson and another male were on the passenger side of the vehicle, so they were partially hidden by the

vehicle as the Detective approached from the driver's side. The third male was moving things around inside the vehicle as he stood at the open driver's side door. RP (5/29/14) 10.

Detective Massingale approached the men at a fast walk and identified himself as the police. Id. at 11. He explained that he was there to contact someone suspected of pawning stolen property and that he had recovered stolen property each of the last three times he responded to that motel. 1 CP 59. He said that he had just arrested a male from the parking lot of that motel for Possession of Stolen Property, and learned that the male had also been involved in the burglary of that property. Id.

As the Detective continued his fast approach he noticed the defendant move his right hand toward his waistband, which was obscured behind the green Chevy. Id. at 12. Mindful of the still-missing firearms from the burglaries he was investigating, Detective Massingale ordered all three men to put their hands on the vehicle where he could see them. The defendant "defiantly kept his right hand concealed." 1 CP 59. The Detective drew his firearm to the low-ready position and repeated his instructions. By this time the Detective was very close to the defendant and the green Chevy. RP (5/29/14) 22. He noticed that the defendant had an expensive

Nikon camera around his neck.¹ RP (5/29/14) 16; 1 CP 60. As the Detective got up to the vehicle, he could see that among the “bags, backpacks, shoulder-carry bags, gym bags” he could also see car parts, power tools, an air-soft or paint-ball gun, CDs and DVDs, five or six cellphones, and clothing throughout the car. RP (5/29/14) 26.

The defendant had to be told multiple times to make his hands visible to the Detective. Id. at 13. Detective Massingale called for a backup officer due to his safety concerns about the stolen firearms and the fact that he was outnumbered three to one.² Id. at 14. As he waited for backup to arrive Detective Massingale had to remind the defendant to keep his hands visible. 1 CP 60. He also told the three men that he was interested in speaking to the owner of the car. One of the men (not the defendant) answered that the owner of the green Chevy was an Asian male named Brian who was staying in room #203 or #204 at the same motel. Id. Room #203 is the same room that had contained stolen property when police investigated the burglaries on March 20th, 2014. 1 CP 59.

¹ The defendant later admitted that the camera came from the car. Id.

² The defendant does not allege, either at the trial court level or here, that Detective Massingale’s decision to call for a backup officer was unreasonable. As a result the record contains no evidence about how long it took for that officer to arrive.

Officer Loucks arrived as backup, allowing Detective Massingale to conduct a weapons frisk on each of the three men. The weapons frisks did not result in the discovery of any weapons or any other evidence. 1 CP 60. Officer Loucks proceeded to identify the defendant. He ran the defendant's name through dispatch and learned that the defendant had a no-bail felony warrant issued by the Department of Corrections for Failure to Register as a Sex Offender. Id. As soon as the warrant was confirmed the defendant was handcuffed, placed under arrest and searched incident to that arrest. RP (5/29/14) 15. The search of the defendant's left front pants pocket revealed one plastic baggie and two zip-loc bindles containing substances which later tested presumptive positive for heroin and methamphetamine. 1 CP 60-61.

III. PROCEDURAL HISTORY

On April 3rd, 2014 the Snohomish County Prosecutor's Office charged the defendant, Jordan L. Wilson, with Possession of a Controlled Substance related to events transpiring on March 31, 2014. 1 CP 69, 62. The defendant moved pursuant to CrR 3.6 to suppress the evidence obtained from the police searching his person incident to arrest, including the heroin and

methamphetamine that was found in the pocket of his pants. 1 CP 50. The defendant's motion to suppress evidence included factual declarations in the form of a Declaration of Counsel, as well as the sworn statement of the primary investigating Detective, Jim Massingale of the Everett Police Department. 1 CP 51-52, 59-61. The State provided a response brief and offered the in-court testimony of Detective Massingale. 1 CP 41-49. RP (5/29/14) 2-27. The court reviewed all of those materials and considered them in its ruling. RP (5/29/14) 2; 1 CP 38. The court also considered the State's Affidavit of Probable Cause. RP (5/29/14) 34 The court denied the defendant's motion, finding that the police held a reasonable and articulable suspicion that the defendant and two other men were involved in Trafficking Stolen Property.³ RP (5/29/14) 34.

On July 1, 2014 the court found the defendant guilty beyond a reasonable doubt after a stipulated bench trial on agreed documentary evidence. The defendant was sentenced to 9 months

³ Trafficking Stolen Property in the Second Degree is defined by RCW 9A.82.055 as follows: "(1) A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree. (2) Trafficking in stolen property in the second degree is a class C felony." RCW 9A.82.055. The term "traffic" is further defined as follows: "'Traffic' means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." RCW 9A.82.010(19).

of confinement, 12 months of community custody, and \$600 in costs and fees. 1 CP 28-37, 14-24. The defendant filed a timely appeal.

IV. ARGUMENT

A. STANDARD OF REVIEW.

The appellate court reviews a trial court's ruling on a motion to suppress evidence to determine whether substantial evidence supports the trial court's factual findings and whether the factual findings support the trial court's conclusions of law. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

1. Findings Of Fact.

Unchallenged findings of fact are verities on appeal. State v. Arreola, 176 Wn.2d 284, 288, 290 P.3d 983 (2012); State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). When an appellate court is asked to review findings of fact entered following a motion to suppress, it reviews only those facts to which error has been assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313, 316 (1994). Here the defendant assigns error to Findings of Fact #2

and #5. Brief of Appellant 2. This Court must determine whether substantial evidence supports the trial court's Findings of Fact #2 and #5.

2. Conclusions Of Law.

Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. Arreola, 176 Wn.2d at 291; Gaines, 154 Wn.2d at 716. A de novo standard of review also applies to the question of whether the initial detention was valid. State v. Bray, 143 Wn. App. 148, 152, 177 P.3d 153 (2008); State v. Byrd, 110 Wn. App. 259, 262 n.2, 39 P.3d 1010 (2002). In making its review, an appellate court may affirm on any grounds supported by the factual record, regardless whether such grounds were relied upon by the lower court. State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2007).

B. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S RULING THAT THE INVESTIGATIVE DETENTION OF THE DEFENDANT WAS LAWFUL.

1. Both Of The Challenged Findings Of Fact Were Supported By Substantial Evidence.

a. Finding of Fact #2

The defendant asserts that the court's findings of fact #2 and #5 were not supported by evidence from the record. With respect to

finding of fact #2,⁴ defendant argues only that the word “rooms” is inaccurate and should be replaced by the singular “room.” Brief of Appellant at 15. The defendant has not argued that the difference between the singular and plural version of the word “room” in this context would make a substantial difference in the validity of the legal conclusions drawn from any perceived error. However, assuming *arguendo* that such an error would render legal conclusions based on that error unjustified, the record before the trial court does contain substantial evidence supporting the plural over the singular.

The Detective referenced multiple rooms in his testimony. RP (5/29/14) 8. He even established which room numbers were involved and provided the nexus between each room and his reason to detain the defendant. He established that room #123 at the motel was associated with the owner of the blue Buick on March 20th. *Id.* at 7. That fact was significant because the blue Buick had been listed as a suspect vehicle in a burglary occurring earlier in the day on March 20th. *Id.* at 6. Officers searched the blue Buick on the 20th and found stolen property from that day’s

⁴ Finding of Fact #2 reads as follows: “Detective Massingale had been at that location previously on March 20, 2014, at which time he found a vehicle associated with rooms at the hotel where criminal activity was taking place.” 1 CP 39.

burglary. Id. at 8. The detective and his team also located property stolen from multiple recent burglaries in room #203 on March 20th. 1 CP 59. The record contains evidence that the blue Buick from the March 20th investigation had connections to rooms #123 and #203 at the motel. The court's Finding of Fact #2 was supported by substantial evidence.

b. Finding of Fact #5

The defendant also assigns error to Finding of Fact #5.⁵ While the State concedes that a bag, gym bag, or backpack viewed in isolation is not "associated with stolen property," the trial court's factual finding was justified in the context and totality of circumstances of the detective's investigation in this case. When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). Those circumstances include the officer's training and experience. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

The record does contain substantial evidence to support finding of fact number 5. The totality of the circumstances and the

⁵ Finding of Fact #5 reads as follows: "Detective Massingale observed property in the vehicle which was of a character associated with stolen property, such as bags, gym bags, and backpacks." 1 CP 39.

context of the developing investigation is critical to an understanding of how the detective's suspicions could be aroused by a vehicle that was "overflowing" with bags. The detective had learned on March 20th that property stolen in recent burglaries was being transported from one hotel to another in bags. RP (5/29/14) 8-9. He knew that the occupant of room #123, in the 11 days intervening between March 20th and March 31st, had continued to pawn property consistent with property stolen from the recent burglaries. Id. at 5-7. The Detective returned to the hotel on the 31st because the occupant of room #123 was still there and his pawning activity had continued. The detective reasoned that the defendant and the other two men had arrived with other stolen property to take it to room #123 to pawn. Id. at 13. In other words, the detective's ongoing investigation into a string of burglaries and the likely pawning of stolen property from those burglaries by the occupant of room #123, had established that the crime was facilitated by the use of an innocuous item (bags) to transport and conceal stolen property. Facts "which appear innocuous to the average person may appear incriminating to a police officer in light of past experience." State v. Samsel, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985). Police officers are not required to set aside

that experience. Id. The “overflowing” quantity of bags and property was also a factor in the detective’s basis to reasonably suspect criminal activity. RP (5/29/14) 10.

The trial court’s oral ruling on this particular finding of fact⁶ provides additional support for the written finding, yet is not inconsistent with it. An appellate court may use the trial court’s oral ruling to interpret written findings and conclusions. State v. Bynum, 76 Wn. App. 262, 266, 884 P.2d 10, 13 (1994). The court’s oral ruling was a more complete description of the detective’s observations, and it is supported by the detective’s testimony. RP (5/29/14) 26. Viewed in context and under a totality of the circumstances, taking into account the detective’s extensive training and experience and the specific facts of his current investigation, the court was justified in finding that the very large quantity of bags full of property allowed the detective to reasonably suspect the property was stolen.

⁶ The relevant portion of the trial court’s oral ruling reads as follows: “He observed, as he approached, property in the vehicle that was of a character *and in* bags, gym bags, backpacks, et cetera, associated with property that is stolen, that is transported from burglaries, and observed other things in the car, such as a large number of telephones and CDs in the front of the car. He also was aware that guns had been taken in the burglaries.” RP (5/29/14) 33-34 (*emphasis added*).

2. Conclusions Of Law: The Investigatory Detention Of The Defendant Was Legal And Supported By Specific, Articulated Facts.

Police may stop a person to investigate with less than probable cause to believe a crime has been committed or is about to be committed. State v. Bray, 143 Wn. App. 148, 152, 177 P.3d 154 (2008). To justify a warrantless investigatory detention police “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). The level of articulable suspicion necessary to support an investigatory detention is “a substantial possibility that that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Use of the word “possibility” suggests that the information known to the officer need not support a probability of criminal activity. The requisite level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

The defendant asks this court to consider the constitutionality of the investigatory detention under both the 4th

Amendment to the United States Constitution and article 1, section 7 of the Washington State Constitution. Brief of Appellant 6-7. With the exception of “pretext stops” (an area of the law not implicated by defendant’s argument), article I, section 7 jurisprudence is parallel to Fourth Amendment jurisprudence in the Terry stop context. State v. Marcum, 149 Wn. App. 894, 908, 205 P.3d 969, 976 (2009).

In this case it is important to take stock of how quickly the situation evolved in order to determine whether each successive step taken by Detective Massingale was reasonable and lawful. The duration of the investigative detention bears on the reasonableness of the intrusion and the totality of the circumstances, even though defendant’s arguments both at the trial court and here focus on the scope of detention rather than temporal duration. Although the record lacks specific testimony as to time intervals between events, there was testimony that the Detective’s initial approach was a “fast walk” covering the two car lengths between his unmarked patrol car and the green Chevy. RP (5/29/14) 10-11. A reasonable inference from those facts is that the Detective arrived at the green Chevy in less than 10 seconds. During this time the detective was simply explaining why he was

there and what he was looking for. Id. at 11-12. When police officers have a well-founded suspicion not amounting to probable cause to arrest, they may nonetheless stop a suspected person, identify themselves, and ask that person for identification and an explanation of his or her activities. State v. Gluck, 83 Wn.2d 424, 426, 518 P.2d 703 (1974).

As soon as the detective arrived at the green Chevy, the defendant dropped his hand to his waistband and out of the detective's view, creating a significant officer safety issue when combined with the fact that stolen firearms from the recent burglaries were still unaccounted for. Id. at 12. The detective's subsequent order for all three men to keep their hands visible and place them on the car was a justified expansion of an investigatory detention that had, up until this point, lasted mere seconds. An officer may lawfully enlarge or prolong the scope of a Terry stop as needed to investigate suspicions that arise or encompass events that occur during the stop. State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990). He may "maintain the status quo momentarily while obtaining more information," and may ask questions to determine whether a further short intrusion is necessary to dispel

his suspicions. State v. Williams, 102 Wn.2d 733, 737, 689 P.2d 1065 (1984).

Officers are permitted to conduct a frisk for weapons during an investigative Terry stop if a “reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” Terry v. Ohio, 392 U.S. at 27. Here, such a weapons frisk was completely justified but not yet feasible without the presence of a backup officer. The cursory weapons frisk was justified due to the combination of the defendant’s furtive movement and the fact that the ongoing burglary investigation involved stolen firearms.

The officer safety concern in this case is similar to the facts in State v. Belieu, 112 Wn.2d 587, 603-04, 773 P.2d 46, 54-55 (1989). In Belieu, the officers’ drew their weapons and implemented “felony stop” procedures on two burglary or attempted burglary suspects in an area where numerous burglaries had resulted in weapons being stolen. Id. The court found that the felony stop procedures were a justifiable intrusion because there was a reasonable inference that the suspects might have been armed. Id.

By the time Detective Massingale ordered the three men to make their hands visible, he was already close enough to the green Chevy to see more detail about its contents than simply overflowing bags. He noted additional property that only increased his suspicion that the men were trafficking stolen property, including an expensive camera around the defendant's neck and five or six cell phones in the vehicle. RP (5/29/14 16, 26). Before the backup officer arrived at the scene, Detective Massingale asked one of the three men for the identity of the owner of the green Chevy. The answer (Brian, an Asian male staying in room #203 or #204) provided an even greater nexus to the detective's ongoing investigation because he had previously recovered stolen property from room #203 on March 20th. 1 CP 59.

Under the totality of the circumstances test for investigatory stops, an officer may rely on a combination of otherwise innocent observations to briefly detain a suspect. United States v. Arvizu, 544 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). (overruled in part on other ground by Davis v. Washington, 547 U.S. 813, 126 S.Ct 2266, 165 L.Ed.2d 224 (2006)). The Arvizu court warned lower courts not to undertake a "divide and conquer analysis" by considering potentially innocuous facts in isolation, because that

approach “departs sharply” from the totality of the circumstances standard. United States v. Arvizu, 544 U.S. at 274. The defendant is encouraging this Court to engage in precisely the sort of “divide and conquer” approach that was rejected by the United States Supreme Court in Arvizu and by this Court in State v. Marcum, 149 Wn. App at 907.

A correct application of the “totality of the circumstances” analysis in this case leads only to one conclusion: that a very experienced detective was justifiably suspicious that the defendant was in the process of trafficking stolen property to room #123 in order to facilitate the pawning of that property. The Detective articulated sufficient facts to support his suspicion from the moment he stepped out of his vehicle, a suspicion which only grew stronger as he was able to get closer to the defendant and the green Chevy within seconds. The Court should uphold the trial court’s conclusion that this was a valid Terry stop from its inception.

C. THE OFFICER DID NOT EXCEED THE SCOPE OF THE TERRY DETENTION BY RUNNING THE DEFENDANT’S NAME FOR WARRANTS.

The defendant asserts that the act of running the defendant’s name for warrants exceeded the permissible scope of the investigative detention, citing State v. Williams, 102 Wn.2d 733,

689 P.2d 1065 (1984). Brief of Appellant at 16.⁷ However, the officers' actions which violated the Fourth Amendment in Williams did not involve checking the defendant's name for warrants. Instead, the officers in Williams detained the defendant to a degree associated with formal arrest by handcuffing him and placing him in the back of a patrol car before they even identified him. State v. Williams, 102 Wn.2d at 735, 741 fn.4. The Williams case presents much different facts from the present case, especially in light of this defendant's furtive movements and the legitimate concern that the defendant may have been armed with one of the stole firearms still outstanding from the earlier burglaries. A police officer may ask a person for identification when the officer has a reasonable suspicion that the person is involved in criminal activity. State v. Rowell, 144 Wn. App. 453, 458, 182 P.3d 1011, 1014 (2008). Warrant checks during an investigatory stop are accepted, routine

⁷ The defendant did not allege at the trial court, nor does he allege here, that the investigative detention exceeded the permissible *temporal* scope allowed under Terry and its progeny. The absence of such an argument at the trial court level explains the lack of evidence in the record as to time intervals between each successive stage of the detention. Only "*when an adequate record exists*, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal." State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915, 918 (1998)(*emphasis added*). However, "if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251, 1256 (1995), as amended (Sept. 13, 1995).

police procedures. State v. Madrigal, 65 Wn. App. 279, 283, 827 P.2d 1105 (1992); State v. Chelly, 94 Wn. App. 254, 261, 970 P.2d 376, review denied, 138 Wn.2d 1009 (1999); State v. Williams, 50 Wn. App. 696, 700, 750 P.2d 278 (1988). In this case the routine practice of checking the defendant's identity with dispatch served the legitimate investigative purpose of determining whether the information provided by the defendant was accurate, whether he had any criminal history similar to burglary or trafficking stolen property, or whether his criminal history warranted additional safety precautions based on the furtive movements he had already displayed. There is no evidence that the warrants check unduly extended the detention. The officers did not exceed the scope of a valid Terry stop by checking the defendant's identity for warrants.

V. CONCLUSION

The State respectfully requests that the Court affirm the conviction in this case.

Respectfully submitted on April 8, 2015.

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

THE STATE OF WASHINGTON,

Respondent,

v.

JORDAN LEE WILSON,

Appellant.

No. 72167-4-I

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 9th day of April, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Washington Appellate Project, elaine@washapp.org; wapofficemail@washapp.org; I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of April, 2015, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office