

No. 35761-5-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

TIMOTHY HOSHALL,

Appellant.

OTMRS-7 P11/2/05
STATE OF WASHINGTON
B. DEPUTY
COURT OF APPEALS
DIVISION II

PM 8-6-07

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Richard Strophy, Judge
Cause No. 06-1-01837-4

PATRICIA A. PETHICK, WSBA NO. 21324
THOMAS E. DOYLE, WSBA NO. 10634
Attorneys for Appellant

P.O. Box 7269
Tacoma, WA 98417
(253) 475-6369

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT	7
(1) HOSHALL’S CONVICTONS FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (COUNTS I AND II) SHOULD BE REVERSED AND DISMISSED FOR THE STATE’S FAILURE TO FILE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE BENCH TIAL	7
(2) THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE OBTAINED AGAINST HOSHALL DURING A WARRANTLESS SEARCH OF HIS PERSON WHERE THE STATE FAILED TO MEET ITS BURDEN IN ESTABLISHING HIS CONSENT TO THE SEARCH OF HIS PERSON WAS VALID	9
(3) HOSHALL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO PROPERLY ARGUE THE MOTION TO SUPPRESS EVIDENCE.....	16
(4) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING AS THE STATE FAILED TO PROPERLY ESTABLISH HOSHALL’S PRIOR CONVICTION FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.....	17
E. CONCLUSION	18

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u>City of Bremerton v. Fisk</u> , 4 Wn. App. 961, 486 P.2d 294 (1971), <i>disapproved on other grounds by State v. Souza</i> , 60 Wn. App, 534, 805 P.2d 237 (1991).....	8
<u>Mairs v. Department of Licensing</u> , 70 Wn. App. 541, 954 P.2d 665 (1993).....	8
<u>Munns v. Martin</u> , 131 Wn.2d 192, 930 P.2d 318 (1997).....	10
<u>State v. Boland</u> , 115 Wn.2d 571, 800 P.2d 1112 (1990)	10
<u>State v. Carter</u> , 127 Wn.2d 836, 904 P.2d 290 (1995).....	10
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993), <i>review denied</i> , 123 Wn.2d 1004 (1994)	16
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	16
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995)	16
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986)	10
<u>State v. Head</u> , 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)	8, 9
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	10, 11
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	8
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999)	14
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987), <i>aff'd</i> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	17
<u>State v. Mallory</u> , 69 Wn.2d 532, 419 P.2d 324 (1966).....	8

<u>State v. McGary</u> , 37 Wn. App. 856, 683 P.2d 1125 (1984).....	8
<u>State v. Mendoza</u> , Slip Opinion No. 34698-2-II, __ Wn. App. __, __ P.3d __ (July 17, 2007)	18
<u>State v. Olson</u> , 126 Wn.2d 315, 893 P.2d 629 (1995)	9
<u>State v. Parker</u> , 139 Wn.2d 486, 987 P.2d 73 (1999)	10, 11
<u>State v. Portomene</u> , 79 Wn. App. 863, 905 P.2d 1234 (1995).....	9
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004)	11
<u>State v. Reynolds</u> , 80 Wn. App. 851, 912 P.2d 494 (1996).....	9
<u>State Shoemaker</u> , 85 Wn.2d 207, 210, 533 P.2d 123 (1975).....	11
<u>State v. Soto-Garcia</u> , 68 Wn. App. 20, 841 P.2d 1271 (1992).....	14
<u>State v. Stock</u> , 44 Wn. App. 467, 477, 722 P.2d 1330 (1986).....	8
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	16
<u>State v. Walker</u> , 136 Wn.2d 678, 965 P.2d 1079 (1998)	11
<u>State v. White</u> , 135 Wn.2d 761, 958 P.2d 982 (1998).....	11
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972)	16
 <u>Federal Cases</u>	
<u>Wong Sun v. United States</u> , 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963).....	14
 <u>Constitution</u>	
Art. 1, sec. 7 of the Washington Constitution.....	9
Fourteenth Amendment to the United States Constitution	9

Fourth Amendment to the United States Constitution..... 9, 10

Court Rules

CrR 3.6..... 2, 8

CrR 6.1..... 8

JuCR 7.11..... 8

RAP 10.3..... 8

RAP 10.4..... 7

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to reverse and dismiss Hoshall's convictions due to the State's failure to enter required written findings of fact and conclusions of law following the bench trial.
2. The trial court erred in failing to suppress the evidence obtained from the warrantless search of Hoshall's person where the State failed to establish that his consent to the search of his person was valid.
3. The trial court erred in entering findings of fact and conclusions of law following the suppression hearing, Findings of Fact Nos. 7, 8, 9, 10; and Conclusions of Law Nos. 1, 2, 4, 5, 6. [Supp. CP 37-39].
4. The trial court erred in allowing Hoshall to be represented by counsel who provided ineffective assistance in failing to properly argue the motion to suppress.
5. The trial court erred in finding Hoshall's offender score was 1 based solely on a "prosecutor's statement of criminal history."

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to reverse and dismiss Hoshall's convictions due to the State's failure to enter required written findings of fact and conclusions of law following the bench trial? [Assignment of Error No. 1].
2. Whether the trial court erred in failing to suppress evidence obtained from the warrantless search of Hoshall's person where the State failed to establish that his consent to the search of his person was valid? [Assignments of Error Nos. 2-3].

3. Whether the trial court erred in allowing Hoshall to be represented by counsel who provided ineffective assistance in failing to properly argue the motion to suppress? [Assignment of Error No. 4].
4. Whether the trial court erred in finding Hoshall's offender score was 1 based solely on a "prosecutor's statement of criminal history?" [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

1. Procedure.

Timothy Hoshall (Hoshall) was charged by information filed in Thurston County Superior Court with one count of unlawful possession of a controlled substance—psilocyn/mushrooms (Count I) and one count of unlawful possession of a controlled substance—less than 40 grams of marijuana (Count II). [CP 2].

Prior to trial, Hoshall made a motion to suppress evidence pursuant to CrR 3.6 based on the State's inability to meet its burden of establishing that Hoshall's consent to search his person was valid. [CP 4-10; Supp. CP 37-39; 1-2-07 RP 4-35]. The court denied the motion entering the following written findings and conclusions:

FINDINGS OF FACT

1. On November 2, 2005 Thurston County Sheriff's Office Detectives Price and Rudloff responded to the residence of Timothy Hoshall to investigate a tip of illegal drug activity.

2. Hoshall was contacted by the detectives and the tip was explained to him. Also present during that conversation was Timothy Hoshall's mother, Violet Hoshall.
3. Both Violet and Timothy Hoshall denied illegal drug activity was occurring at the residence.
4. Timothy Hoshall was asked if he possessed an illegal drugs or paraphernalia. His response was "no."
5. Both Timothy and Violet Hoshall were asked if the police could clear the tip by searching the premises. After being advised of their *Ferrier* warnings by way of a consent to search form, both Timothy and Violet Hoshall agreed to a search of the home, but Timothy asked if he could prevent the searching of his parent's bedroom. Timothy exercised the right to limit the scope of the search, by refusing to allow his parent's bedroom to be searched.
6. During the search of the residence, a small amount of marijuana was located. Timothy admitted he had lied and the marijuana was his. The search continued and nothing else was found in the residence.
7. Timothy was then asked if would mind emptying his pockets to show that he had nothing illegal on his person.
8. Timothy emptied his pockets and inside a cigarette pack were some tan and brown mushrooms that were found to be psilocybin mushrooms.
9. Timothy was aware of his *Ferrier* warnings including the right to terminate and limit the scope of the search.
10. The police did not coerce the defendant in any way and were not giving an overt sign show of force.
11. The police were in plain clothes, not uniforms.

CONCLUSIONS OF LAW

1. The request of the defendant to empty his pockets was a request to extend the scope of the consent to search. The defendant did not object.
2. The defendant voluntarily consented to a search by his action of beginning to empty his pockets.
3. The defendant was not in custody during any period of the contact with the detectives.
4. The detectives had a right to be on the defendant's property and the authority to ask the defendant if he would consent to emptying his pockets.
5. The defendant was aware of his *Ferrier* warnings and chose to waive his rights.
6. The motion to suppress evidence is denied.

[CP 4-10; Supp. CP 37-39; 1-2-07 RP 4-35].

After losing the suppression motion and a lengthy colloquy with the court in which Hoshall affirmed that he was knowingly, voluntarily, and intelligently waiving his right to a jury trial although no written waiver of a jury trial was signed by Hoshall or filed, Hoshall stipulated to a reading of the record and was tried by the court at a bench trial, the Honorable Richard Strophy presiding. [CP 11-12; 1-2-07 RP 35-40]. The court found Hoshall guilty as charged of both counts, but failed (even as of this date) to file required written findings and conclusions after the bench trial. [1-2-07 RP 35-40].

The court sentenced Hoshall to a standard range sentence of 3-months on Count I (a felony) and 90-days with 89-days suspended on Count II (a gross misdemeanor) with both sentences running concurrently based on an offender score of one (a prior VUCSA/drug conviction from Pierce County) for Count I established by the prosecutor's statement of criminal history but not listed on the judgment and sentence. [CP 25-26, 27-35; 1-8-07 RP 3-7].

A timely notice of appeal was filed on January 8, 2007. [CP 13-22]. This appeal follows.

2. Facts Related to Suppression Motion.

On November 2, 2005, Thurston County Sheriff detective Tim Rudloff (Rudloff) and sergeant John Price (Price) went to 441 Ranger Drive SE regarding an anonymous tip of possible drug activity at the residence. [1-2-07 RP 6-7, 19]. As reported by the tip, there had been numerous vehicles coming and going from the residence and the smell of marijuana being smoked. [1-2-07 RP 6-7]. The officers were in plain clothes and driving an unmarked car. [1-2-07 RP 7-8].

Upon arriving at the residence the officers contacted Hoshall and his mother, Violet. [1-2-07 RP 8]. The residence was the home of Hoshall's parents, but he lived with them. [1-2-07 RP 8]. The officers explained to Hoshall and Violet why there were there with Hoshall and

Violet denying any drug activity at the residence. [1-2-07 RP 8-9]. The officers then asked if they could search the premises going over Ferrier warnings and obtaining written consent to search the premises from both Hoshall and Violet. [CP 10; 1-2-07 RP 9-11, 20]. After consenting to the search of the premises, Hoshall asked that the officers not search his parents' bedroom, and the officers honored this limitation on the scope of the consent to search the premises. [1-2-07 RP 9-11, 20].

Price accompanied by Violet, and Rudloff accompanied by Hoshall then searched the home. [1-2-07 RP 11, 20]. In a garage/storage area Rudloff found a small tin that contained a small amount of suspected marijuana and Zigzag smoking papers. [1-2-07 RP 11-12]. Hoshall eventually admitted that the suspected marijuana was his upon questioning by Rudloff. [1-2-07 RP 12]. Hoshall was not Mirandized nor was he placed under arrest. [1-2-07 RP 12]. Rudloff continued to search the home and RV parked outside the residence along with Hoshall finding nothing further of interest. [1-2-07 RP 12]. As things were "wrapping up" while standing in the front yard, Rudloff without warning given that the consent to search was limited to the premises, given that there was no concern regarding officer safety, and without informing Hoshall of his right to refuse such a search said, "the only other place that I haven't searched is your person. Do you mind emptying your pockets out for me

so that I can assure that you don't have any other illegal drugs or drug paraphernalia on your person?" [1-2-07 RP 13, 16-17, 21]. Hoshall without responding emptied his pockets eventually revealing a cigarette packed that contained suspected illegal mushrooms. [1-2-07 RP 13]. Again, Hoshall was not arrested. [1-2-07 RP 13].

D. ARGUMENT

- (1) HOSHALL'S CONVICTONS FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (COUNTS I AND II) SHOULD BE REVERSED AND DISMISSED FOR THE STATE'S FAILURE TO FILE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE BENCH TRIAL.

Prior to trial, a motion to suppress evidence occurred with the State ultimately filing written findings without notifying appellate counsel or seeking leave of this court to do so as required by the Rules of Appellate procedure. [Supp. CP 37-39]. These deficiencies aside, this matter involved a bench trial, which by court rule require written findings of fact and conclusions of law upon its conclusion. As of this date no such written findings have been filed.

Under RAP 10.4(d), a party may include in the brief a "motion which, if granted, would preclude hearing the case on the merits." Therefore, Hoshall moves this court for reversal and dismissal of his convictions for unlawful possession of a controlled substance (Counts I and II) based on the State's failure to file written findings of fact and conclusions of law following a bench trial. This motion, if granted, would

preclude hearing the case on the merits as the matter would be decided based on the State's failure to comply with applicable rules.

As stated by our Supreme Court:

CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial. (footnote omitted). The purpose of CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal. *See City of Bremerton v. Fisk*, 4 Wn. App. 961, 962, 486 P.2d 294 (1971), *disapproved on other grounds by State v. Souza*, 60 Wn. App. 534, 805 P.2d 237 (1991); *cf. State v. McGary*, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984) (JuCR 7.11); *State v. Stock*, 44 Wn. App. 467, 477, 722 P.2d 1330 (1986) (CrR 3.6)...A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966). An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *Id* at 533-34[.]

State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. *Mairs v. Department of Licensing*, 70 Wn. App. 541, 545, 954 P.2d 665 (1993). Unchallenged findings of fact are verities on appeal and an appellate court "will review only those facts to which error has been assigned." *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The failure to challenge findings of fact is not a technical flaw contemplated in RAP 10.3(a)(3).

See State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). Moreover, error cannot be predicated on the oral decision of the trial court. State v. Reynolds, 80 Wn. App. 851, 860 n. 7, 912 P.2d 494 (1996). The State, as the prevailing party, has the primary obligation of presenting findings, which accurately reflect the trial court's oral ruling, but the trial court also shares some responsibility of ensuring that the record is complete. State v. Portomene, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995).

Where there is an absence of findings or inadequate written findings, the appellant cannot properly assign error as required and the appellate court cannot conduct the appropriate review. Here, it is true the trial court found Hoshall guilty of both counts but has yet to comply with the mandatory rules as condemned by Head, supra. For the reasons stated in Head, supra, this court should reverse and dismiss Hoshall's convictions.

- (2) THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE OBTAINED AGAINST HOSHALL DURING A WARRANTLESS SEARCH OF HIS PERSON WHERE THE STATE FAILED TO MEET ITS BURDEN IN ESTABLISHING HIS CONSENT TO THE SEARCH OF HIS PERSON WAS VALID.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and Art. 1, sec. 7 of the Washington Constitution, provide that warrantless searches are per se illegal unless

they come within one of the few, narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). When a violation of both the federal and state constitutions is alleged, the state constitutional claim will be examined first. Munns v. Martin, 131 Wn.2d 192, 199, 930 P.2d 318 (1997) (citing State v. Hendrickson, 129 Wn.2d at 69). In order to enable courts to determine whether greater protection under the state constitution is warranted in a particular case, our Supreme Court has set forth six nonexclusive criteria in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).¹ If these criteria are present, a court must decide the case on independent state constitutional grounds, which affords more protection to individuals from searches and seizures by government than the Fourth Amendment to the United States Constitution. See State v. Carter, 127 Wn.2d 836, 847, 904 P.2d 290 (1995) (citing cases); also see State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990). A Gunwall analysis, therefore, is not necessary in this case. Once our Supreme Court has conducted an analysis under Gunwall and has determined a provision of the state constitution independently applies to a particular legal issue, in subsequent cases it is unnecessary to repeat a Gunwall analysis of the

¹ The Gunwall factors are: (1) the textural language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Gunwall, 106 Wn.2d at 58.

same legal issue. State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998).

Exceptions to the warrant requirement are narrowly drawn and jealously guarded. State v. Parker, 139 Wn.2d at 496; State v. Hendrickson, 129 Wn.2d at 71. In each case, the State bears the burden of demonstrating that a warrantless search falls within an exception. State v. Parker, 139 Wn.2d at 496. One exception to the warrant requirement is a search granted based on consent. State v. Hendrickson, 129 Wn.2d at 70-71. The burden is on the State to show that consent to search was voluntarily given. State Shoemaker, 85 Wn.2d 207, 210, 533 P.2d 123 (1975). The State must meet three requirements in order to show that a warrantless but consensual search was valid: (1) the consent must be voluntary; (2) the person granting consent must have authority to consent; and (3) the search must not exceed the scope of the consent. [Citations omitted]. State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Whether consent is voluntary depends on the total circumstances, including (1) whether Miranda warnings were given before obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of his right not to consent. State v. Reichenbach, 153 Wn.2d 126, 132, 101 P.3d 80 (2004).

Here, officers went to Hoshall's home and obtained a valid consent to search the premises. [CP 10]. During the search of the premises the officers validly uncovered evidence forming the basis for Count II. However, the officers then conducted a second and entirely separate search of Hoshall's person not covered by his consent to search the premises when they asked him to empty his pockets. [1-2-07 RP 13, 16-17, 21].

Applying the applicable law, this second and separate search of Hoshall's person was not valid because it was not consensual as it was not voluntary. First, there is no evidence in the record that Hoshall was Mirandized prior to being asked or allegedly giving his consent to a search his person—emptying his pockets. In fact, Hoshall was not even arrested as a result of any of the evidence discovered during this entire incident, which also rules out the exception to the warrant requirement that could have justified the search of Hoshall's person as a search incident to lawful arrest. To rule out another exception to the warrant requirement, there is also absolutely no evidence that the officers feared for their safety since Hoshall was cooperative the entire time and thus no reason for a frisk based on "officer safety." Second, there is no evidence in the record pertaining to Hoshall's education or intelligence other than the fact that when he consented to the search of the premises, out of courtesy to his

parents, he had the wherewithal to ask that the officers not disturb his parents' bedroom. Third and more importantly, the officers did not before conducting the search of Hoshall's person ever advise him that he could refuse his consent to a search of his person even though he had given his written consent to search the premises. It was incumbent upon the officers to do so under the totality of the circumstances as they were conducting a second and separate search that was not covered by Hoshall's consent to search the premises in order to ensure that this second search was valid and voluntary. The search of Hoshall's person was unlawful because the officers failed to obtain Hoshall's valid and voluntary consent to such a search.

Simply stated, this matter involved two searches—one justified the other not. The first search was of the premises in which the officers validly discovered based on Hoshall's written consent the marijuana forming the basis of Count II; and a second search of Hoshall's person not covered by the valid consent to search the premises wherein the officers illegally discovered evidence forming the basis of Count I. To make the point by way of clarification, say officers obtained a lawful search warrant (more powerful than an exception to the warrant requirement here) that allowed them only to search a certain building belonging to a suspect then say the suspect was present when the warrant was executed, and then say

the officers without obtaining an additional warrant or establishing any exception to the warrant requirement searched the suspect's person and obtained DNA evidence. The DNA evidence would be suppressed because the search of the suspect's person could in no way be said to be an "extension" of the search warrant. Two searches were involved and the second search of the suspect's person was not valid as it was not covered by the search warrant and the officers failed to establish an exception to the warrant requirement to conduct the search of the suspect's person. That is what happened here, and the evidence from the unlawful search of Hoshall's person should have been suppressed.

When "an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Hoshall's alleged consent to the search of his person was not valid; the State has failed to satisfy its burden in establishing that this consent was valid. All evidence seized as a result of this search must be suppressed with the result that Count I should be reversed and dismissed with prejudice. *See* Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992).

Finally, the trial court's findings and conclusions following the suppression hearing are error in that they do not comport with the law as set forth above and entirely "miss" the issue presented by the facts of this incident. [Supp. CP 37-39]. The courts Findings of Fact Nos. 7 and 8 simply state what happened, but fail to note that the officers were conducting a second separate search and failed to note that the officers did not seek to obtain Hoshall's consent to this search. The court's Findings of Fact Nos. 9 and 10 are in actuality conclusions of law in that they conclude that Hoshall's prior *Ferrier* warnings related solely to the consent to search the premises extend to a second a separate search of his person and that the officers did not coerce Hoshall into consenting to a search of his person ignoring the law that it is the officers/State who have to justify this warrantless search. The court's Conclusions of Law Nos. 1,2, 4, 5, and 6 suffer from these same defects in that the court mistakenly concludes that there was "one big search" not to separate and distinct searches—a search of the home that needs to be lawfully justified and a search of Hoshall's person that needs to be lawfully justified. It is on this latter search that the State failed to meet its burden and the court should have suppressed the evidence obtained from the search of Hoshall's person. Hoshall's conviction for unlawful possession of a controlled substance in Count I should be reversed and dismissed with prejudice.

(3) HOSHALL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO PROPERLY ARGUE THE MOTION TO SUPPRESS EVIDENCE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Assuming, arguendo, this court finds that counsel waived the errors claimed and argued in the preceding section of this brief by failing to properly raise the suppression issues set forth therein, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to raise all the issues presented with regard to the suppression hearing when these issues would have resulted in the dismissal of Count I.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent in that but for counsel's failure to raise all the issues presented with regard to the suppression hearing for the reasons set forth in the preceding section, had counsel done so, the outcome would have been different.

- (4) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING AS THE STATE FAILED TO PROPERLY ESTABLISH HOSHALL'S PRIOR CONVICTION FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.

Recently, this court has held that a remand for resentencing is required where the State attempts to establish prior criminal history for purposes of calculating an offender score solely by means of a "prosecutor's statement of criminal history" regardless of whether a

defendant objects at sentencing. State v. Mendoza, Slip Opinion No. 34698-2-II, ___ Wn. App. ___, ___ P.3d ___ (July 17, 2007).

Here, the State, solely using a “prosecutor’s statement of criminal history” indicating Hoshall had a prior VUCSA/drug conviction from Pierce County, [CP 25-26], asserted and established that Hoshall’s offender score for his felony conviction (Count I) was 1. Hoshall, neither through his counsel nor during allocution acknowledged this prior conviction. [1-8-07 RP 4]. Moreover, this prior conviction does not even appear on the judgment and sentence filed in this matter. [CP 27-35]. Yet the trial court found that Hoshall’s offender score on his felony (Count I) was 1. Given the facts of this case coupled with this court’s recent ruling in Mendoza, a remand for resentencing is required.

E. CONCLUSION

Based on the above, Hoshall respectfully requests this court to reverse and dismiss his convictions and/or remand for resentencing.

DATED this 6th day of August 2007.

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 6th day of August 2007, I delivered a true and correct copy of the brief of appellant to which this certificate is attached by United States Mail, to the following:

Timothy Hoshall
DOC#
441 Ranger Dr. SE
Olympia, WA 98503

Carol La Verne
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502
(and the transcript)

BY _____
DEPUTY
STATE OF WASHINGTON
07 AUG -7 PM 12:05
COUNTY CLERK
TACOMA, WASHINGTON

Signed at Tacoma, Washington this 6th day of August 2007.

Patricia A. Pethick
Patricia A. Pethick