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COURT OF APPEALS

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STATE OF WASHINGTON
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No. 40154-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Drew Byron,

Appellant.

Thurston County Superior Court Cause No. 09-1-01253-2

The Honorable Judges Christine Pomeroy and Carol Murphy

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence and statements obtained in violation of Mr. Byron's Fourth Amendment rights.
2. The trial court erred by admitting evidence and statements obtained in violation of Mr. Byron's right to privacy under Wash. Const. Article I, Section 7.
3. The trial court erred by denying Mr. Byron's motion to suppress evidence and his statements.
4. The police violated Mr. Byron's right to privacy and his right to be free from unreasonable seizures by seizing him at gunpoint.
5. The police violated Mr. Byron's right to privacy and his right to be free from unreasonable seizures by ordering him to lie on the ground.
6. The police violated Mr. Byron's right to privacy and his right to be free from unreasonable seizures by handcuffing him.
7. The police violated Mr. Byron's right to privacy and his right to be free from unreasonable seizures by detaining him for an unknown period of time before arresting him.
8. The police violated Mr. Byron's right to privacy and his right to be free from unreasonable seizures by arresting him without probable cause.
9. The trial judge erred by adopting Finding of Fact No. 2.
10. The trial judge erred by adopting Finding of Fact No. 4.
11. The trial judge erred by adopting Finding of Fact No. 9.
12. The trial judge erred by adopting Finding of Fact No. 11.
13. The trial court erred by entering Conclusion of Law No. 1.
14. Mr. Byron was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

15. Defense counsel was ineffective for stipulating to the admissibility of Mr. Byron's statements.
16. Mr. Byron's conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.
17. Mr. Byron's conviction violated his Article I, Section 22 right to notice of the charges against him.
18. The First Amended Information was deficient because it failed to allege an essential element of Residential Burglary.
19. The First Amended Information was deficient because it failed to allege any specific facts describing Mr. Byron's alleged conduct.
20. The trial judge failed to properly determine Mr. Byron's criminal history and offender score.
21. The trial judge erred by sentencing Mr. Byron with an offender score of nine.
22. The SRA, as amended in 2008, violates the Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In the absence of probable cause, both the Fourth Amendment and Article I, Section 7 limit the amount of force officers can use when seizing a suspect. Here, Sergeant Dehan lacked probable cause when he seized Mr. Byron at gunpoint, ordered him to the ground, and handcuffed him. Did the warrantless seizure violate Mr. Byron's rights under the Fourth Amendment and Article I, Section 7?
2. An investigatory seizure must be limited in duration, and officers must use the least intrusive means available to dispel or confirm their suspicions. Here, Mr. Byron was held for an unknown period of time while Sergeant Dehan waited for other

officers to arrive and then conferred with them, prior to arresting Mr. Byron. Did the prosecution fail to prove that the seizure fit within an exception to the warrant requirement?

3. An arrest must be based on probable cause. In this case, Mr. Byron was arrested for burglary primarily because he wore a single item of clothing—a long-sleeved dark shirt—that matched a description provided by the homeowner. Was Mr. Byron arrested without probable cause, in violation of the Fourth Amendment and Article I, Section 7?
4. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel erroneously stipulated to the admissibility of statements that should have been excluded because they were obtained by violating Mr. Byron's constitutional rights. Was Mr. Byron denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
5. An accused person is constitutionally entitled to be informed of the charges against him. The First Amended Information in this case did not provide notice that Residential Burglary requires proof of entry into a dwelling "other than a vehicle." Was Mr. Byron denied his constitutional right to adequate notice of the charge?
6. At sentencing, the offender score is based on a person's criminal history. The trial court found that Mr. Byron had criminal history yielding an offender score of eight, but sentenced him with an offender score of nine. Must the sentence be vacated and the case remanded for resentencing with an offender score of eight?
7. Under the Fifth and Fourteenth Amendments, an offender has a constitutional right to remain silent pending sentencing, and the state is constitutionally required to prove criminal history by a preponderance of the evidence. The 2008 amendments to the SRA permit the court to use a prosecutor's bare assertions as

prima facie evidence of criminal history, and allow the court to draw adverse inferences from the offender's silence pending sentencing. Do the 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On July 27, 2009, Heather Hilf-Barr's rural home was burglarized while she was home. From her upstairs bathroom, she saw a small gray car in her driveway. RP (12/14/09) 29-30. A person approached her door. She called 911 while the person entered the house, gathered electronic and other items and put them in bags by the door. RP (12/15/09) 146-161. She overheard a voice announce on a two-way radio that the police were coming, and the burglar left her house. She did not see the person's face. RP (12/15/09) 154, 164-165.

Almost two hours later, about a mile away, the police arrested Drew Byron for the burglary. RP (12/7/09) 6, 10, 22. He was charged with Residential Burglary, and the state alleged (as an aggravating factor) that the burglary was committed while the victim was present in the residence. CP 2. The substance of the charge and the aggravating factor read as follows:

Count I: Residential Burglary, RCW 9A.52.025(1) – Class B Felony: In that the defendant, Drew Lynn Byron, in the State of Washington, on or about July 27, 2009, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a dwelling.

And further, the current offense – a burglary – was committed when the victim of the burglary was present in the residence when the crime was committed. RCW 9.94A.535(2)(u).
CP 2.

Prior to trial, Mr. Byron moved to suppress the fruits of a warrantless seizure. Motion to Suppress, Supp. CP. At the suppression hearing, the state offered the testimony of Sgt. Dehan, who supervised the search for a suspect. RP (12/7/09) 4-7. Dehan said that he got a call about the burglary at 3:41 pm, and he arrived in the area around 4:20. RP (12/7/09) 6-7. The description he had was of a person with a dark shirt, camouflage pants, and some sort of hat. RP (12/7/09) 7, 20. He later heard that a suspicious person had been seen running through someone's yard. RP (12/7/09) 7. Dehan acknowledged that he did not write a report on the case, and was testifying from his own memory, following review of another deputy's report and the "CAD log" (prepared by the 911 operator). RP (12/7/09) 21.

Deputy Cole was the lead officer on the case, and responded to the victim's home first. RP (12/8/09) 46-48. On his way there, he saw a small gray car, which matched the general description of the car given by the homeowner. RP (12/8/09) 48, 50. Cole arrived at the house at 3:53, and spoke with Hilf-Barr. RP (12/7/09) 52-53. She told him that she heard communication over what sounded like a two-way radio. RP (12/8/09) 53. Cole testified at the suppression hearing that she described the suspect as wearing a bandana or mask, a gray stocking cap, and a long-

sleeved dark top. RP (12/8/09) 53, 65. She also told him the man had a red bag. RP (12/8/09) 65.

A search dog was used, but was unable to track anything from the victim's home. RP (12/7/09) 7, 23; RP (12/8/09) 54. According to the CAD log, the victim told the police that the person ran away to the north. RP (12/7/09) 39. The dog later found the scent of adrenaline in another area unrelated to the victim's home. RP (12/7/09) 23-24.

Deputy Clark testified that he positioned himself so that anyone being driven by the dog would run towards him, in a southeast direction. RP (12/7/09) 26-27. At some point, he saw a man wearing dark clothing, running in a low crouch. RP (12/7/09) 30. Soon after this, he heard that Mr. Byron had been seized. RP (12/7/09) 30.

At 5:15pm, Dehan saw Drew Byron come out of some woods. He drew his gun and ordered Mr. Byron onto the ground. Mr. Byron complied and was handcuffed. RP (12/7/09) 13-14; Exhibits 2-4, entered 12/8/09. Dehan patted him down and found no weapons. RP (12/7/09) 14. He described Mr. Byron as sweaty, breathless, brush-covered, and wearing a dark shirt and camouflage shorts. He noted that the temperature was over 100 degrees that day. RP (12/7/09) 16. Clark went over to where Mr. Byron was, and described him as wearing camouflage shorts, a black shirt, and gloves. RP (12/7/09) 31. Clark could not testify that Mr. Byron

was the same person he had seen running earlier, since he had not seen that person's face. RP (12/7/09) 31-32.

At 5:27 p.m., Deputy Cole heard that Dehan had a suspect in custody. He left his position and drove to Dehan's location. When he arrived, the officers discussed the investigation, and agreed that they had probable cause to arrest Mr. Byron. RP (12/7/09) 17, 34; RP (12/8/09) 54-58. The record does not indicate how long it took for Cole to reach Dehan's location, or how long they conferred before arresting Mr. Byron. Before formally arresting Mr. Byron and reading him his *Miranda* rights, Cole asked what he was doing in the area. RP (12/8/09) 58. Mr. Byron replied that he was outrunning. Following this exchange, Cole told Mr. Byron he was under arrest. RP (12/8/09) 58.

According to Dehan, Cole read Mr. Byron his rights while Dehan searched him. RP (12/7/09) 17-18. According to Clark, the search was completed before *Miranda* rights were read. RP (12/7/09) 35, 36, 41. Cole was not sure if Mr. Byron was searched first or advised of his rights first. RP (12/8/09) 58-59. He acknowledged that his written report indicated that he first questioned Mr. Byron, then searched him, then placed him under arrest, and then read him his *Miranda* rights. RP (12/8/09) 71. The search of Mr. Byron yielded a two-way radio, a flashlight, and a stocking cap. RP (12/7/09) 18.

Mr. Byron was asked what he wanted done with a red bag the officers had found. RP (12/8/09) 61. The record does not establish where the bag was found, or whether it was found before or after Mr. Byron's arrest. Mr. Byron paused for a few seconds, and then denied that the bag was his. RP (12/8/09) 61. Cole also asked him about an empty knife sheath; Mr. Byron replied that he had lost his knife while running. RP (12/8/09) 72.

The officers concluded that Mr. Byron invoked his right to remain silent. RP (12/8/09) 59. Cole testified that he did this by not responding to their questions. RP (12/8/09) 60, 72.

The court denied Mr. Byron's suppression motion, and entered Findings of Fact and Conclusions of Law. RP (12/8/09) 80-83; CP 3-5.

At trial, the court admitted the items seized from Mr. Byron, as well as his statements to the officers. These statements included his claim that he was just out jogging, his explanation that an item¹ must have fallen away while he was running, and his denial of ownership of the red bag. RP (12/15/09) 96-97. After hearing the evidence, the jury convicted Mr.

¹ The knife, missing from its sheath. At defense counsel's request, the knife was not identified as a knife.

Byron of Residential Burglary, and answered “yes” on a special verdict form regarding the aggravating factor. RP (12/16/09) 254-257.

At sentencing, the state alleged that Mr. Byron’s offender score was nine. Prosecutor’s Statement of Criminal History, Supp. CP. Defense counsel disagreed, and asserted that Mr. Byron had only nine points. Ultimately, the state agreed that the correct calculation was nine points. RP (12/23/09) 3-10. In its findings on Mr. Byron’s criminal history, the court listed four juvenile felony convictions (including a Burglary in the Second Degree), and five adult felony convictions (including a Burglary in the First Degree). The court concluded that Mr. Byron had nine points, and a standard range of 63-84 months. CP 8. Judge Murphy sentenced Mr. Byron to an exceptional sentence of 116 months. RP (12/23/09) 8, 11.

Mr. Byron timely appealed. CP 6.

ARGUMENT

I. THE ADMISSION OF EVIDENCE SEIZED WITHOUT A WARRANT VIOLATED MR. BYRON’S RIGHTS UNDER THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7.

A. Standard of Review

The validity of a warrantless search is reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A trial court’s

findings of fact are reviewed for substantial evidence; conclusions of law are reviewed de novo. *Id.*

- B. The state and federal constitutions generally prohibit searches and seizures conducted without authority of a warrant.

The Fourth Amendment to the federal constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.² Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.³

Under both provisions, searches and seizures conducted without authority of a search warrant “are *per se* unreasonable...subject only to a

² The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

³ It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

few specifically established and well-delineated exceptions.”” *Arizona v. Gant*, ___ U.S. ___, ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); see also *State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008).

The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

One exception to the search warrant requirement is where the search is performed incident to arrest. The rationale behind the exception is that an arrest triggers a concern not only for the officer’s safety, but also for the preservation of potentially destructible evidence within the arrestee’s control. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

The search incident to arrest exception to the warrant requirement is narrower under Article I, Section 7 than under the Fourth Amendment. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). A lawful custodial arrest is a constitutional prerequisite to any search incident to

arrest. *Id.* An arrest is unlawful when it is based on information unlawfully obtained: “If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government’s illegality.” *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009); *see also, e.g., State v. Allen*, 138 Wn.App. 463, 471-472, 157 P.3d 893 (2007).

C. The initial seizure and detention violated Mr. Byron’s rights under the Fourth Amendment and Wash. Const. Article I, Section 7.

Both the Fourth Amendment and Article I, Section 7 apply to brief detentions that fall short of formal arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d (1975), *State v. Martinez*, 135 Wn.App. 174, 180, 143 P.3d 855 (2006). A seizure occurs following an officer’s display of authority whenever a reasonable person would not feel free to leave or otherwise disregard the officer’s request. *Harrington*, at 663; *State v. Beito*, 147 Wn.App. 504, 509, 195 P.3d 1023 (2008). To justify a warrantless seizure, the police must be able to point to specific and articulable facts giving rise to an objectively reasonable belief that the person seized is engaged in criminal activity or is armed and presently dangerous. *State v. Xiong*, 164 Wn.2d 506, 514, 191 P.3d 1278 (2008); *State v. Allen*, at 470.

If the state asserts that the seizure was justified as an investigatory detention, it must demonstrate that the officers' actions were (1) justified at their inception, and (2) reasonably related in scope to the circumstances which justified the interference in the first place. *State v. Rankin*, 151 Wn.2d 689, 704, 92 P.3d 202 (2004). The reasonableness of the detention depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. *State v. Dorey*, 145 Wn.App. 423, 434, 186 P.3d 363 (2008).

Under the Fourth Amendment, courts consider three factors "in determining whether intrusion upon a suspect's liberty is so substantial that its reasonableness is dependent upon probable cause and hence cannot be supported by suspicion alone: (1) the purpose of the stop, (2) the amount of physical intrusion upon the suspect's liberty, and (3) the length of time the suspect is detained." *State v. Belieu*, 112 Wn.2d 587, 595, 773 P.2d 46 (1989).

1. The initial seizure at gunpoint was unconstitutional because Sergeant Dehan lacked a reasonable belief that he was in danger when Mr. Byron emerged from the woods.

When stopping an individual for investigative purposes, the police must use the least intrusive means available. *Belieu*, at 599. There is no bright line standard for determining the degree of invasive force which may convert an investigative stop into an arrest; however, however, "[t]he

force used should bear some reasonable proportionate relationship to the threat apprehended by the officers.” *Id.* The use of “[d]rawn guns and handcuffs, generally, [is] permissible only when the police have a legitimate fear of danger.” *State v. Williams*, 102 Wn.2d 733, 740 n. 2, 689 P.2d 1065 (1984).

When an officer draws a gun during an investigatory stop, the reviewing court must “look at the nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day and the reaction of the suspect to the police, all of which bear on the issue of reasonableness.” *Belieu*, at 600. A generalized fear that certain kinds of crimes involve people who are armed or dangerous “is insufficient to support a maximum use of force... If generalization alone was sufficient, any suspect, even if unknown to the agents and giving no indication that force is necessary, could be faced with a maximal intrusion based on mere reasonable suspicion.” *Id.*, at 603 (citations and internal quotation marks omitted).

In particular, the Supreme Court has noted that “a suspicion of burglary by itself would not support an inference that a suspect was

armed.” *Id.*, at 604.⁴ In *Belieu*, police investigating a burglary were aware that weapons had been stolen during earlier burglaries in the area. This justified a felony stop with drawn guns: “Because the [detainees] were suspected of burglary or attempted burglary in an area where numerous burglaries had resulted in weapons being stolen, there was a reasonable inference that they might have been armed.” *Id.*, at 603-604. This contrasts with the situation in *Williams*, *supra*, where police stopped the defendant at gunpoint as he was driving away from the scene of a burglary. In reversing the conviction, the Supreme Court pointed out that “the facts of the alleged crime [did not] justify assuming that the suspect was armed or likely to harm the police.” *Id.*, at 740.⁵

In this case, as in *Williams*, the police did not have information warranting a felony stop with drawn guns and handcuffs. Sergeant Dehan, responding to a reported burglary, received a description of the suspect.⁶ RP (12/7/09) 6-7. Later, he received an update relating to a suspicious

⁴ *But see State v. Smith*, 67 Wn.App. 81, 88, 834 P.2d 26 (1992); *State v. Harvey*, 41 Wn.App. 870, 875, 707 P.2d 146 (1985).

⁵ Other problems with the detention also compelled reversal in *Williams*.

⁶ Sergeant Dehan’s recollection of the description—a dark shirt, camouflage pants, and some sort of hat—is itself suspect, because he did not write a report. His recollection did not match the information provided by the victim to Deputy Cole, but it did match Mr. Byron’s clothing. RP (12/7/09) 5-25.

person running. RP (12/7/09) 7. An hour-and-a-half after the initial call, he heard other officers yelling at someone to stop. RP (12/7/09) 7. Based on this information, he drew his gun when he saw Mr. Byron emerge from the woods, ordered him to lie facedown on the ground, handcuffed him, and frisked him. RP (12/7/09) 13-14.

Nothing in the record suggested that Mr. Byron was armed and dangerous. Prior to the arrest, there was no indication that the suspect had possessed a weapon or threatened anyone with harm. Under these circumstances, Sergeant Dehan was not justified in drawing his gun, in pointing it at Mr. Byron, in ordering him to the ground, in handcuffing him, or in frisking him. *Williams, supra*. Accordingly, the evidence and statements made by Mr. Byron must be suppressed,⁷ and the case remanded to the superior court. *Id.*

2. The investigatory seizure was unconstitutional because the prosecution failed to establish its duration.

⁷ Under the heading "Confession/Suppression" and the subheading "Custodial Statements by Defendant" on a "Consolidated Omnibus Order," a box was checked that "Defendant's statements may be admitted into evidence without hearing by stipulation of the parties." Consolidated Omnibus Order, p. 3, Supp. CP. From the context provided by adjacent checkboxes, it is clear that this stipulation waived a Fifth Amendment/Sixth Amendment/*Miranda* hearing under CrR 3.5. This should not be read as a stipulation to admissibility in the face of violations of the Fourth Amendment and Article I, Section 7.

To be valid, an investigatory stop “must be limited as to [its] length.” *State v. Dorey*, at 434. The length of an investigatory detention can, by itself, render the detention unconstitutional. *United States v. Place*, 462 U.S. 696, 709, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). The Supreme Court has said that

[T]he brevity of the invasion of the individual’s Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation.

Id.; see also *Williams*, at 741-742. In *Place*, the U.S. Supreme Court held that a 90-minute seizure of luggage was *per se* unreasonable. In *Williams*, the Washington Supreme Court held that a 35-minute detention “appear[ed] to approach excessiveness.” *Id.*, at 741.

In this case, the prosecutor failed to establish the duration of the detention. Sergeant Dehan testified that he handcuffed Mr. Byron at about 5:15 p.m. RP (12/7/09) 10. Deputy Cole testified that he learned Mr. Byron had been detained at 5:27 p.m. RP (12/8/09) 54. The record does not disclose how long it took for Cole and Deputy Clark to get to Dehan’s location. Nor does the record disclose how long it took for the three of them (and any other arriving officers) to confer before they made the decision to formally arrest Mr. Byron. Furthermore, it does not appear

that the officers performed any additional investigation during this waiting period, however long it may have been. Nor was there any testimony explaining why the officers could not confer and come to a decision over the radio, instead of making Mr. Byron wait while they all converged at the arrest site. RP (12/7/09) 5-44; RP (12/8/09) 46-74.

The state failed to meet its “heavy burden” of establishing—by clear and convincing evidence—the duration of the investigatory detention. *Garvin, supra*. The prosecutor also failed to establish that the officers “diligently pursue[d] their investigation” while Mr. Byron was being held. *Place*, at 709.

Because of this, the seizure was unlawful, and violated Mr. Byron’s rights under both the state and federal constitutions. *Id; see also Williams*, at 742 (applying Article I, Section 7). Accordingly, the evidence and statements must be suppressed,⁸ and the case remanded to the trial court. *Id.*

⁸ See note above, regarding Mr. Byron’s stipulation to the admissibility of his statements.

D. The warrantless arrest was unlawful because the officers lacked probable cause to arrest Mr. Byron.

A warrantless arrest is lawful only if supported by probable cause.

Moore, at 885. Probable cause exists when the arresting officer has knowledge of facts sufficient to cause a reasonable person to believe that an offense has been committed. *Id.*

In this case, Mr. Byron was arrested without probable cause. First, he did not match the description Deputy Cole received from the homeowner. According to Cole, the homeowner told him the burglar wore a long-sleeved dark shirt, a mask or bandana, and a gray stocking cap, and that he carried a red bag.⁹ RP (12/8/09) 53, 65. Mr. Byron wore a long-sleeved dark shirt; that was the only part of the description that matched. RP (12/7/09) 31. (The police discovered a red and black bag at some point; however, the testimony at the suppression hearing did not establish where it was found, or whether it was discovered before or after the arrest.)

Second, Mr. Byron was stopped more than an hour-and-a-half after the homeowner called police. RP (12/7/09) 6, 10. Third, the stop

⁹ Deputy Cole's testimony at the suppression hearing does not match the homeowner's testimony at trial. She testified that the suspect wore all black with a black and white bandana and carried a black and red bag. RP (12/12/09) 150-151.

occurred a mile away from the scene of the burglary “as the crow flies.” RP (12/7/09) 22. Although the police brought a tracking dog to the burglarized home, they were unable to find a scent for the suspect. RP (12/15/09) 75, 78, 85-87. Ultimately, the dog stumbled across Mr. Byron’s scent, and the police used it to chase him. RP (12/15/09) 73-91.

Under these circumstances, the prosecutor failed to establish that the arrest was based on probable cause. *Moore, supra*. Because the arrest was unlawful, the search violated Mr. Byron’s rights under the Fourth Amendment and under Wash. Const. Article I, Section 7. *Id.* Accordingly, the evidence and statements must be suppressed¹⁰ and the case remanded to the trial court. *Id.*

II. MR. BYRON WAS DENIED SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

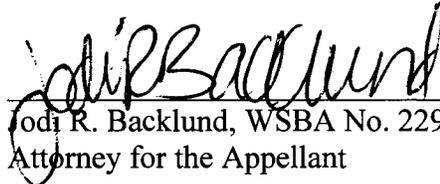
An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

CONCLUSION

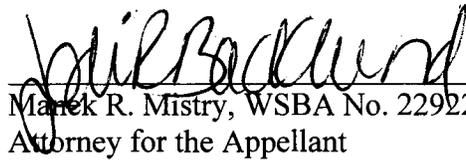
For the foregoing reasons, Mr. Byron's conviction must be reversed and the case dismissed without prejudice. Furthermore, the evidence and his statements must be suppressed. If the conviction is not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on May 13, 2010.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Drew Byron, DOC #872629
Washington State Penitentiary
1313 N 13th Ave.
Walla Walla, WA 99362

and to:

Thurston County Prosecutor's Office
2000 Lakeridge Dr SW Bldg 2
Olympia WA 98502-6045

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 13, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 13, 2010.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant