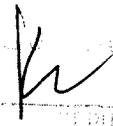


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STATE OF WASHINGTON

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No. 40154-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Drew Byron,**

Appellant.

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Thurston County Superior Court Cause No. 09-1-01253-2  
The Honorable Judges Christine Pomeroy and Carol Murphy

**Appellant's Reply Brief**

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## ARGUMENT

### **I. THE POLICE VIOLATED MR. BYRON'S RIGHTS UNDER THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7.**

#### A. Standard of Review

Without citation to authority, Respondent argues for an abuse-of-discretion standard, and “urges deference to the discretion of the trial court.” Brief of Respondent, p. 6. However, the validity of a warrantless search is reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Respondent’s argument that “the trial court did not abuse its discretion” is without merit, and should be disregarded. Brief of Respondent, p. 6.

#### B. The state bears the heavy burden of establishing admissibility when it obtains evidence without a search warrant.

Warrantless searches and seizures are *per se* unreasonable, “subject only to a 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. Einfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008). The state bears a heavy

burden to establish an exception by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

C. Mr. Byron was detained in violation of the Fourth Amendment and Wash. Const. Article I, Section 7.

Any investigatory detention must be supported by 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*, 138 Wn.App. 463, 470, 157 P.3d 893 (2007). Suppression of evidence is required unless the state proves that the officers' actions were (1) justified at their inception, and (2) reasonably related in scope to the justification. *State v. Rankin*, 151 Wn.2d 689, 704, 92 P.3d 202 (2004). Three factors guide the determination under the Fourth Amendment: (1) the purpose of the stop, (2) the amount of physical intrusion, and (3) the length of the detention. *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.

Police must use the least intrusive means available to effectuate an investigatory stop. *Belieu*, at 599. The force used must bear a reasonable relationship to the threat. *Id.* Drawn guns and handcuffs may be used

“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). Such force is justified only if warranted by the nature of the crime being investigated, the degree of suspicion, the location of seizure, the time of day and the suspect’s reaction. *Belieu*, at 600. A generalized fear that burglars are dangerous is insufficient. *Id.*, at 603-604; *Williams*, at 740.<sup>1</sup>

Here, the police did not have information warranting a felony stop with drawn guns and handcuffs: they knew a suspect had fled on foot from a daytime burglary, and that Mr. Byron emerged from the woods, running. Officers may or may not have yelled at him to stop.<sup>2</sup> There was no indication that the suspect was armed or had threatened anyone.<sup>3</sup> Accordingly, Sergeant Dehan did not have a legitimate fear of danger, and acted unreasonably by drawing his gun, aiming at Mr. Byron, ordering him to the ground, handcuffing him, and frisking him. *Williams, supra*.

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<sup>1</sup> *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).

<sup>2</sup> Sergeant Dehan claimed he heard officers yelling for the running man to stop. RP (12/7/09) 12. Deputy Clark, by contrast, testified that neither he nor the officer he was with yelled at the running man. RP (12/7/09) 37-38.

<sup>3</sup> As Respondent points out, “[i]t was unknown whether he was armed.” Brief of Respondent, p. 11. Of course, the same is true of any citizen encountered in almost any location. Respondent’s implication—that Mr. Byron might have been armed—is based on nothing, and is exactly the kind of inference forbidden under *Williams*.

Because Sgt. Dehan did not use the least intrusive means available to detain Mr. Byron, the evidence must be suppressed. *Id.*

2. The prosecution failed to establish the duration of the pre-arrest seizure.

The length of an investigatory seizure can render it unconstitutional. *United States v. Place*, 462 U.S. 696, 709, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). Furthermore, the police must diligently pursue their investigation during any investigatory seizure. *Id.*; *see also Williams*, at 741-742.

Here, the state failed to establish the duration of the seizure. *See* Appellant's Opening Brief, pp. 17-19. Nor does the record establish that the police diligently pursued their investigation while Mr. Byron waited. RP (12/7/09) 5-44; RP (12/8/09) 46-74. Because the state failed to meet its "heavy burden" of establishing—by clear and convincing evidence—the duration of the investigatory detention and the diligence of the officers, the seizure was unlawful. *Place, supra*; *see also Williams*, at 742 (applying Article I, Section 7). The evidence and statements must be suppressed. *Id.*

D. Mr. Byron was arrested without probable cause.

The arrest was unlawful, because Sergeant Dehan did not have "knowledge of facts sufficient to cause a reasonable person to believe that

an offense has been committed” by Mr. Byron. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). Although he was wearing a dark, long-sleeved shirt when he was seized, he did not otherwise match the homeowner’s description of the suspect who had burglarized her home.<sup>4</sup> RP (12/7/09) 31; RP (12/8/09) 53, 65; RP (12/12/09) 150-151. The seizure occurred more than an hour-and-a-half after the 911 call, a mile away from the crime scene “as the crow flies.” RP (12/7/09) 6, 10, 22. A tracking dog followed his scent—but not from the crime scene. RP (12/15/09) 73-91. Respondent argues that these facts, combined with evidence of “flight” (in that Mr. Byron was running) were sufficient to establish probable cause. But this information would not lead a reasonable person to believe Mr. Byron had committed a crime.

The arrest was not based on probable cause. *Moore, supra*. Accordingly, the evidence and Mr. Byron’s statements must be suppressed. *Id.*

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<sup>4</sup> Respondent misrepresents the evidence by stating that Mr. Byron was wearing pants. Brief of Respondent, p. 9. In fact, Mr. Byron was wearing camouflage shorts. RP (12/7/09) 16, 23, 31; RP (12/15/09) 128.

**II. MR. BYRON MUST BE GRANTED A NEW TRIAL BECAUSE DEFENSE COUNSEL WAS INEFFECTIVE.**

Respondent does not claim that defense counsel performed adequately. Brief of Respondent, pp. 15-18. This failure to argue the issue may be treated as a concession. *See, e.g., In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Instead, Respondent argues there was no prejudice from counsel's deficient performance. Brief of Respondent, p. 16-18.

The erroneous introduction of Mr. Byron's statements prejudiced him at trial. The state's evidence was substantial, but not overwhelming; the admission of Mr. Byron's statements—his claim that he was out jogging, and his denial that he owned the red bag—made it clear that he lied to the police. RP (12/14/09) 29, 53-59; RP (12/15/09) 94-97. This eliminated any chance that the jury might have found the evidence insufficient for conviction. Accordingly, Mr. Byron was prejudiced by his attorney's failure to seek suppression of his statements.

Mr. Byron was denied the effective assistance of counsel. *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004). His conviction must be reversed and his case remanded for a new trial. *Id.*

**III. THE INFORMATION WAS LEGALLY AND FACTUALLY DEFICIENT.**

- A. The Information omitted an essential element of Residential Burglary, which requires proof that the accused person entered or remained unlawfully in a dwelling other than a vehicle.

Residential Burglary requires proof that a person “enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025. Accordingly, in order to charge the crime, a charging document must allege that the accused person entered or remained unlawfully “in a dwelling other than a vehicle.” *Id.* A complaint that fails to allege this element does not charge Residential Burglary. Respondent concedes that the First Amended Information does not include language alleging Mr. Byron entered a dwelling other than a vehicle. According to Respondent, this language is not an essential element, but is merely “descriptive.” Brief of Respondent, p. 21. Respondent cites no authority in support of this proposition. Brief of Respondent, p. 21. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

There is no basis to decide that the phrase “other than a vehicle” is merely “descriptive,” or that descriptive language is somehow mere surplusage. Under RCW 9A.52.025, a person who burglarizes a dwelling that *is* a vehicle cannot be convicted of Residential Burglary. Thus, the language “other than a vehicle” is essential to the charged crime. RCW

9A.52.025. Omission of this element requires reversal, whether or not Mr. Byron was prejudiced. *See, e.g., State v. Brown*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2010) (per curiam).

Respondent contends that the phrase “other than a vehicle” was not “essential to this particular case because there was no vehicle being burgled,” and that the omitted language “would have provided no additional knowledge to Mr. Byron concerning the charges against him, nor influenced his defense.” Brief of Respondent, p. 21. This argument appears to be directed at the issue of prejudice, and is therefore misplaced. *Id.* Where a charging document omits an element, prejudice is conclusively presumed; reversal is required regardless of the effect (or lack thereof) on the defendant. *Id.*, at \_\_\_ (citing *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991)).

Because the First Amendment Information omitted an element of the offense, the case must be dismissed without prejudice. *Id.* The state did not charge Mr. Byron with Residential Burglary; therefore, his conviction of that crime cannot stand. *Id.*

B. The Information was factually deficient because it failed to include a description of Mr. Byron’s specific conduct.

The Washington Constitution includes a guarantee that the accused person will be provided notice of both the nature and the cause of an

accusation. Wash. Const. Article I, Section 22. This right, combined with the more general right of due process, requires a charging document to “*allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.” *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (emphasis in original); *see also Auburn v. Brooke*, 119 Wn.2d 623, 629-630, 836 P.2d 212 (1992). In other words, an Information alleging Residential Burglary must include specific allegations of the conduct committed by the accused person; this description will be unique to each case. *Id.*

In this case, the First Amended Information identified the crime charged and the aggravating factor by setting forth the elements (albeit incompletely, as argued in the preceding section). CP 2. However, the charging document did not include “a description of the specific *conduct* of the defendant which allegedly constituted that crime.” *Id.* The First Amended Information was wholly generic; it included *only* language from the statute, with no details connecting it to any specific act Mr. Byron is alleged to have performed. CP 2.

Respondent apparently misunderstands the requirements set forth in *Leach*, *Brooke*, and other cases requiring that specific facts be formally alleged. *See* Brief of Respondent, p. 22-23. The complaint need not be a recitation of inessential details, but the constitution requires the

prosecution to set forth the *essential* details. *Leach, supra; Brooke, supra.*

Respondent is correct that, as a practical matter, an accused person can obtain any additional information needed for trial through discovery or a motion for a bill of particulars;<sup>5</sup> however, such remedies do not excuse deficiencies in the complaint.

The charging document here did not include a single specific fact relating to the elements of Residential Burglary or the aggravating factor. CP 2. Without any facts, the complaint was an empty document, with no legal effect. *Leach, supra; Brooke, supra.* Mr. Byron's conviction must be reversed, and the case dismissed without prejudice. *Id.*

**IV. MR. BYRON'S CASE MUST BE REMANDED FOR RESENTENCING WITH AN OFFENDER SCORE OF EIGHT.**

An offender "cannot agree to a sentence in excess of that which is statutorily authorized,"<sup>6</sup> and "cannot waive a challenge to a miscalculated offender score." *In re Goodwin*, 146 Wn.2d 861, 873-874, 50 P.3d 618 (2002). Despite this, Respondent contends, without citation to authority, that Mr. Byron waived any challenge. Brief of Respondent, p. 23.

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<sup>5</sup> See Brief of Respondent, p. 23.

<sup>6</sup> *In re Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005).

Respondent is presumed to have diligently searched for authority supporting its position, and to have found none. *Coluccio*, at 779.

Respondent concedes that the trial court's findings support an offender score of eight. Brief of Respondent, p. 24. Respondent does not assign error to these findings; accordingly, they are verities on appeal. *State v. Afana*, \_\_\_ Wn.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2010). Respondent erroneously argues that an additional point should be added to the offender score because Mr. Byron was on community custody at the time of the offense. Brief of Respondent, p. 24. But the trial court left unchecked the box indicating that Mr. Byron was under supervision at the time of the offense. CP 8. Respondent did not assign error to this finding; accordingly, it, too, is a verity on appeal. *Afana*, at \_\_\_.

In light of Respondent's concession, Mr. Byron's sentence must be vacated and the case remanded for sentencing with an offender score of eight. *Cadwallader, supra*. The trial court is free to re-impose an exceptional sentence; however, it must do so after considering that Mr. Byron has eight points and a standard range of 53-70 months (instead of nine points and 63-84 months). *See* RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.525.

**V. 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.**

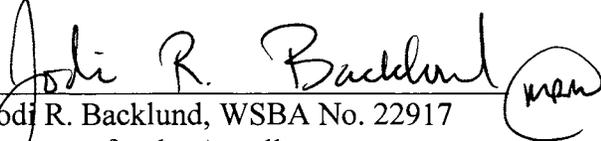
Mr. Byron stands on the argument set forth in Appellant's Opening Brief.

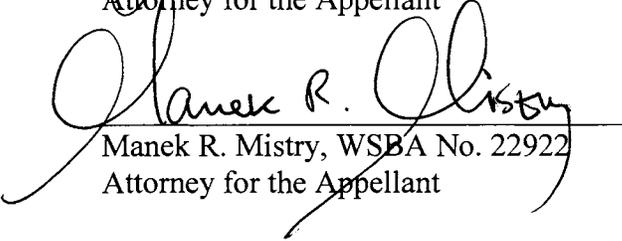
**CONCLUSION**

Mr. Byron's conviction must be reversed with instructions to suppress the evidence and his statements and dismiss without prejudice. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on July 16, 2010.

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CERTIFICATE OF MAILING

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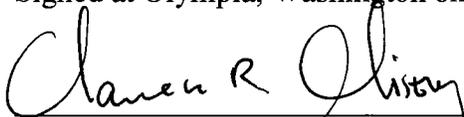
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 16, 2010.



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