

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

SARA KAY LEWIS
Appellant

42679-0-II

On Appeal from the Superior Court of Skamania County
Superior Court Cause number 10-1-00001-0

The Honorable Brian Altman

APPELLANT'S SUPPLEMENTAL BRIEF

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CONTENTS

I. Authorities Cited ii

II. Assignments of Error and Issues vii

III. Summary of the Case

IV. Statement of the Case 1

V. Argument 5

 1. The June 3, 2010, suppression findings lack substantial
 evidence 5

 2. The “undisputed” findings are disputed
 12

 3. The stipulated facts exceed the stipulations 16

 4. Requesting a second suppression hearing was
 ineffective assistance 19

 5. The delayed filing of findings was prejudicial 21

 6. The late filing violated the appearance of
 fairness 24

 7. The stop was pretextual 25

 8. The community caretaking exception
 did not apply 26

 9. The custodial arrest and incident
 search were unlawful 28

V. Conclusion 33

I. AUTHORITIES CITED

Washington Cases

Jenkins v. Snohomish County, 105 Wn.2d 99
713 P.2d 79 (1986) 6, 7

Smith v. Skagit County, 75 Wn.2d 715, 453 P.2d 832 (1969) 6

State v. Abuan, 161 Wn. App. 135
257 P.3d 1 (2011) 21, 31, 32

State v. Armenta, 134 Wn.2d 1
948 P.2d 1280 (1997) 18

State v. Bliss, 153 Wn. App. 197
222 P.3d 107 (2009) 27

State v. Byrd, 83 Wn. App. 509
922 P.2d 168 (1996) 21

State v. Cross, 156 Wn.2d 580
132 P.3d 80 (2006) 19

State v. Dominguez, 81 Wn. App. 32
914 P.2d 141 (1996) 24

State v. Frazier, 82 Wn. App. 576
918 P.2d 964 (1996) 6

State v. Gaddy, 114 Wn. App. 702
60 P.3d 116 (2003) 21, 22

State v. Grier, 171 Wn.2d 17
246 P.3d 1260 (2011) 20

State v. Hehman, 90 Wn.2d 45, 47 578 P.2d 527 (1978)	29
State v. Hill, 123 Wn.2d 641 870 P.2d 313 (1994)	5, 12, 14
State v. Ibarra-Cisneros, 172 Wn.2d 880 263 P.3d 59 (2011)	26
State v. Johnson, 128 Wn.2d 431 909 P.2d 293 (1996)	5
State v. Kinzy, 141 Wn.2d 373, 386-87 5 P.3d 668 (2000)	27
State v. Ladenburg, 67 Wn. App. 749 840 P.2d 228 (1992)	24
State v. Ladson, 138 Wn.2d 343 979 P.2d 833 (1999)	26, 30
State v. Logan, 102 Wn. App. 907 10 P.3d 504 (2000)	15
State v. Madry, 8 Wn. App. 61 504 P.2d 1156 (1972)	24
State v. Marcum, 116 Wn. App. 526 66 P.3d 690 (2003)	32
State v. McFarland, 127 Wn.2d 322 899 P.2d 1251 (1995)	20
State v. McGary, 37 Wn. App. 856 683 P.2d 1125 (1984)	21
State v. Mendez, 137 Wn.2d 208 970 P.2d 722 (1999)	27, 31
State v. Moore, 161 Wn.2d 880 169 P.3d 469 (2007)	9

State v. Neth, 165 Wn.2d 177 196 P.3d 658 (2008)	9, 10
State v. O’Neill, 148 Wn.2d 564 62 P.3d 489 (2003)	18, 31
State v. Oppelt, 172 Wn.2d 285 257 P.3d 653 (2011)	22, 23
State v. Parker. 139 Wn.2d 486 987 P.2d 73 (1999)	28, 29
State v. Potter, 156 Wn.2d 835 132 P.3d 1089 (2006)	30
State v. Radka, 120 Wn. App. 43 83 P.3d 1038 (2004)	31
State v. Ringer, 100 Wn.2d 686 674 P.2d 1240 (1983)	28
State v. Schultz, 170 Wn.2d 746 248 P.3d 484 (2011)	27
State v. Setterstrom. 163 Wn.2d 621 183 P.3d 1075 (2008)	10
State v. Thomas, 109 Wn.2d 222 743 P.2d 816 (1987)	19, 20
State v. Thomas, 89 Wn. App. 774 950 P.2d 498 (1998)	30
State v. Valdez, 167 Wn.2d 761, 768 224 P.3d 751 (2009)	28
State v. White, 97 Wn.2d 92 640 P.2d 1061 (1982)	9, 10

Washington Statutes

RCW 9A.44.120 7

RCW 10.31.100 29

RCW 46.20.015 30, 31

RCW 46.20.342 30

RCW 46.37.080 8

RCW 46.37.090 8, 16

RCW 46.61.021 29, 33

RCW 46.64.015..... 29

RCW 46.61.305 11

RCW 69.50.407 5

Washington Court Rules

CJC 3 24

CrR 3.6 5, 21, 26

CrR 8.3 22, 23

ER 602 7

ER 801 5

ER 802 5

Federal Cases

Brendlin v. California, 551 U.S. 249
127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007) 27

Terry v. Ohio, 392 U.S. 1
88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 32

U.S. v. West, 219 F.3d 1171 (10th Cir. 2000) 32

U.S. v. Wald, 208 F.3d 902 (10th Cir. 2000) 32

Constitutional Provisions

Const. Art. I, § 7 10, 12, 18, 28

Fourth Amendment 10, 12, 28

II. Assignments of Error and Issues

A. Assignments of Error.

1. The suppression findings are not supported by substantial evidence. Appellant challenges the sufficiency of the following findings:

Finding I, CP 99; Finding II, CP 100; Finding V, CP 101; Finding I(1), CP 103; Finding I(1), CP 108; Finding I(2), CP 108; Finding I(3), CP 108; Finding I(4), CP 109; Finding I(7), CP 110; Finding I(8), CP 109; Finding I(10), CP 109; Finding I(14), CP 109; Finding I(15), CP 109; Finding I(19), CP 110; Finding I(23), CP 110; Finding I(29), CP 111; Finding II, CP 104; Finding III(1), CP 111; Narrative Findings IV, CP 100 and CP 104; Conclusion I(5), CP 112;* Conclusion IV(6), CP 112;* Conclusion IV(7), CP 112;* Finding 3, CP 114; Finding 10, CP 115; Finding 11, CP 115; Finding 13, CP 115; and Finding 14, CP 115.

* Actually findings of fact.

2. The late filing of the findings violated Due Process.

3. Holding multiple suppression hearings without written findings violated Due Process.

4. Holding multiple suppression hearings without written findings denied Appellant the effective assistance of counsel.

5. The court erroneously concluded that the stop of Appellant was not pretextual.

6. The court erroneously concluded that the community caretaking exception to the warrant requirement applied.

7. The court erroneously concluded that Appellant was lawfully arrested and searched.

B. Questions Presented.

1. Are the Findings supported by the record?
2. Are the June 3, 2010, suppression findings inadmissible hearsay?
3. Did the court erroneously characterize disputed facts as undisputed?
4. Did the court exceed the stipulations in the Order following the stipulated facts trial?
5. Did the late entry of findings violate the appearance of fairness doctrine?
5. Was defense counsel ineffective in requesting a second suppression hearing where no findings were entered following a prior hearing?
6. Was the police contact with Appellant pretextual?
7. Was Appellant subjected to an unlawful custodial arrest and incident search?

III. SUMMARY OF THE CASE

Sara Kay Lewis was charged with possession of methamphetamine found during a search incident to her custodial arrest for not presenting a valid license and identification during a traffic stop. Lewis claimed the stop was pretextual and moved to suppress the evidence. The court held a suppression hearing on June 3, 2010, but did not enter any findings. A second suppression hearing was held 15 months later, on September 26, 2011, again with no written findings. The court stated on the record that it retained no independent recollection of the June, 2010, hearing. Lewis was convicted on stipulated facts on October 10, 2011. She was sentenced on an amended charge of one count of attempted possession.

This Court accepted review and appointed appellate counsel on October 19, 2011. On October 27, after appellate counsel designated the Clerk's Papers, the prosecutor supplemented the superior court record with four sets of written findings without serving appellate counsel or seeking this Court's permission.

Not having received notice of the late-filed findings, counsel did file an opening brief based upon the court's oral pronouncements. After the brief was filed, the prosecutor designated the findings as Supplemental Clerk's Papers. This court denied Lewis's motion to strike, accepted the

findings into the appellate record, and invited Lewis to file this supplemental brief.

Lewis assigns error to the findings, many of which are not supported by the evidence and do not support the conclusions of law.

IV. **STATEMENT OF THE CASE**

Please see Appellant's opening brief for the substantive facts. In summary:

Early on New Years Eve, December 31, 2009, Appellant, Sara Kay Lewis visited a friend in Washougal, Washington. RP 46. The residence was the site of suspected drug activity. RP 46, 47, 123, 125. Sheriff's Deputy Chadd Nolan had driven by and noticed Ms. Lewis's car parked there. RP 47-48, 125. Nolan stationed himself at a nearby intersection and "just kind of [hung] out" observing traffic. RP 16, 18, 46, 109.

About an hour and a half before headlights were required, Ms. Lewis approached the intersection and turned left. RP 51-52.

At the June 3, 2010, suppression hearing Nolan testified that Ms. Lewis's vehicle had a defective "marker light." RP 17, 109. He also thought Lewis turned left without signaling for the required 100 feet. RP 30-31, 31-32, 39. Nolan testified that he followed but did not signal for Lewis to stop. RP 20. Lewis pulled over of her own accord to attend to a

malfunctioning windshield wiper. Nolan parked and approached Lewis on foot. RP 20, 111.

Lewis ignored Nolan and made clear that any social contact was unwelcome. RP 39, 112, 114, 118. Nolan asked Lewis for her name. She refused to tell him unless she was under arrest. RP 21, 113. Nolan found this suspicious and described Lewis as nervous and evasive. RP 21, 112, 143. He asked where Lewis was coming from and where she was going. RP 141; CP 10. When Lewis made a call on her cell phone, Nolan wanted to know whom she was calling. RP 112. He called dispatch to verify the information she gave him. RP 115. Nolan testified that he wanted to know “just exactly what was going on, maybe who she was.” RP 33. His curiosity had nothing to do with enforcing traffic laws. RP 144.

During this interaction, Nolan did not mention a traffic infraction and did not request Lewis’s license, registration, insurance, etc. This was because he was “trying to gather information from her.” RP 33. Rather, he affirmatively assured Lewis that his sole purpose was to help her with the wipers. RP 115.

Nolan continued to press Lewis for her name. Finally she relented and gave him her alias, Matilda Free. RP 114. Nolan then disclosed that he was conducting a traffic stop and demanded her driver’s license. RP 22. Lewis did not have her license with her. RP 22. When Nolan ran the

name Matilda Free, dispatch reported a non-valid driver's license associated with that name. Nolan then asked Lewis for ID, which she declined to provide, although she did have identification documents in her purse. RP 22, 37, RP 119.

Nolan handcuffed Lewis and arrested her for NOVOL¹ without identification. RP 23, 41. Nolan searched Lewis incident to this custodial arrest and found a small quantity² of methamphetamine in a pocket. RP 23, 25. Nolan then read Lewis her Miranda rights. RP 25. He did not recall asking if she wished to waive her rights, but she did answer his questions. RP 26, 40. Nolan asked what a reasonable person would think if they saw the baggie, to which Lewis replied, "Drugs." RP 27.

Lewis had told Nolan she had an Alaska driver's license before he arrested her. RP 119. It was only after she was in custody in the back seat of his patrol car, however, that Nolan ran a check and learned that the Alaska license was either invalid or suspended. RP 119, 120, 123.

The court concluded that Nolan had probable cause for a custodial arrest. 9/26 Conclusions 10 and 11, Sub. 120, at 5. The court issued an oral decision from the bench finding that Ms. Lewis turned left without signaling for 100 feet, and Nolan was engaged in traffic control, not drug

¹ No Valid Operator's License.

² 0.70 grams. CP 11.

enforcement. Therefore, the court concluded that Nolan's investigation of Lewis was not pretextual and denied the motion to suppress. RP 74.

Ms. Lewis was convicted following a stipulated facts trial. RP 187, 192, 198. At sentencing, the State amended the charge to attempted possession of methamphetamine, RCW 69.50.407. CP 73. Lewis was sentenced to 113 days on a standard range of zero to 12 months. RP 192, 198, 202. She appeals.

IV. ARGUMENT

1. THE JUNE 3, 2010, SUPPRESSION FINDINGS LACK SUBSTANTIAL EVIDENCE.

When reviewing CrR 3.6 suppression findings, this Court evaluates the evidence to determine whether substantial evidence supports them. *State v. Hill*, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994). Conclusions of law are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

The June 3, 2010, Findings Are Hearsay: Out-of-court statements are not admissible to prove the matter asserted. ER 801(c); ER 802. The rule excludes testimony at the trial or hearing are from the definition of hearsay. ER 801(c). But the phrase "at the trial or hearing" is more than a semantic frill. The Rule presumes that the trial court has

personal knowledge of the witnesses' in-court statements and can enter dispositive findings accordingly. That is not the case here.

The preamble to the statement that the court based its findings on the testimony of witnesses and arguments of counsel at the June 3, 2010, hearing is false. CP 99. The judge stated unequivocally on the record that he recalled nothing about the June 3, 2010, hearing after fifteen months. RP 103. The June 3 "findings" are based on no more than an erstwhile prosecutor's unfiled contemporaneous notes.³

This Court will not disturb a trial court's findings of fact provided they are supported by substantial evidence. *State v. Frazier*, 82 Wn. App. 576, 588, 918 P.2d 964 (1996). But the Court accords no deference to determinations the trial court made on documentary evidence rather than on the judge's personal observations. *Jenkins v. Snohomish County Public Utility Dist. No. 1*, 105 Wn.2d 99, 102, 713 P.2d 79 (1986), citing *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969).

Here, the June 3, 2010, findings were not based on the judge's personal observations because the judge stated on the record that he retained no independent recollection of the June 3, 2010, suppression proceedings. The purported findings constitute no more than a written

³ As if to underscore the unreliability of the prosecutor's recollection, he got the hearing date wrong. CP 99. The first suppression hearing was June 3, not June 3, 2010.

summary by the former prosecutor based on his purported recollection of the testimony, offered fifteen months later for the truth of the matter asserted. But the record suggests no reason to suppose that when findings were finally presented on October 27, 2011, the former prosecutor's recollection was any better than that of the judge. The proposed findings thus are analogous to a deposition, which receives no judicial deference. *See, e.g., Snohomish County*, 105 Wn.2d at 102.

Alternatively, a judge entering findings of fact is analogous to a witness. The Rules of Evidence preclude the insertion of alleged facts into a judicial proceeding except from personal knowledge. ER 602. It is axiomatic that every witness must retain an independent memory of the events. *See, e.g., RCW 9A.44.120* (child witnesses). The same principle applies *a fortiori* to the judge. This Court should hold that Due Process precludes a trial court from signing off on so-called "findings" that were not presented while the trial court retained sufficient independent recollection of the evidence to be able at least to recognize the facts when it sees them.

The Findings Lack Substantial Evidence: This record does not support many of the court's findings, and findings for which substantial evidence can be found either are not material or do not support the court's conclusions of law.

(a) Lewis had a defective marker light. Finding I, CP 103.

This finding is not material because the trial court correctly concluded that the condition of Lewis's marker light was irrelevant. Conclusion I, CP 106.

As a matter of law, Washington's traffic code requires that so-called "marker lights" be displayed only by oversized vehicles such as buses, trucks, motor homes, and vehicles with mounted campers, and only when such vehicles are operated upon a highway. RCW 46.37.080 and RCW 46.37.090(1)(c). Lewis was driving a two-door passenger vehicle. RP 109; CP 4, 14. Moreover, Nolan did not usually ticket people during daylight hours for defective lights unless they were a hazard. RP 29. He did not recall any particular hazard from Lewis's defective "marker" light at 3:25 in the afternoon. RP 28.

Nolan testified that he did not include the short left turn signal in the traffic stop. He told Lewis he was stopping her for the defective marker light. RP 150-51.

(b) Lewis turned left without signaling within 100 feet of the turn. Finding II, CP 104. This finding is supported by substantial evidence, but Nolan had no other lawful reason to stop Lewis. RP 19.

(c) Nolan's purpose in interacting with Lewis was that he "was trying to offer assistance." Narrative Finding IV, CP 100. Nolan's own

testimony established that his primary purpose was to obtain information from Lewis about her private affairs unrelated to the recent left turn. RP 33, 144.

(d) Nolan asked Lewis for her name, but she refused to provide it. Narrative Findings IV, CP 100 and CP 104. These findings are immaterial. Moreover, the same findings state that Nolan started asking Lewis to identify herself when he “became suspicious due to the driver’s overly nervous behavior.” Findings IV, CP 100 and CP 104.

A person’s refusal to identify herself to the police is not grounds for suspicion where she has no obligation to make any statement whatsoever. *State v. Moore*, 161 Wn.2d 880, 886, 169 P.3d 469 (2007). Washington does not permit the police to disturb a person’s privacy merely because she cannot produce identifying documents. *State v. Neth*, 165 Wn.2d 177, 184, 196 P.3d 658 (2008). In Washington, as in the United States generally, a citizen need not respond to a demand for identification except under specific lawful authority. “The right to be let alone is inviolate; interference with that right is to be tolerated only if it is necessary to protect the rights and welfare of others.” *State v. White*. 97 Wn.2d 92, 99, 640 P.2d 1061 (1982).

In *White*, our Supreme Court upheld this principle in the context of city ordinances purporting to authorize the police to do precisely what

Deputy Nolan did here — pester citizens for identification on mere suspicion that the inquiry might turn up grounds for prosecution. *White*, 97 Wn.2d at 99-100.

(e) Lewis was visibly nervous and tried to change the subject. Finding IV, CP 100. This is immaterial.

Washington does not permit searches merely because people appear nervous. *Neth*, 165 Wn.2d at 184. The police must have some basis beyond nervousness, evasiveness, or even outright lying, to justify an intrusion. *State v. Setterstrom*, 163 Wn.2d 621, 627, 183 P.3d 1075 (2008).

(f) Nolan was working routine traffic enforcement at the intersection of Washougal River Road and Salmon Falls Road. Finding 1, CP 99; Finding I(1), CP 103; Finding I(3), CP 108. The court also issued a bench finding that Deputy Nolan was not engaged in drug enforcement. RP 74. These findings are not supported by substantial evidence. Nolan testified that he was on “stationary patrol” at the intersection, by which he meant just “kind of hanging out.” RP 16.

For Fourth Amendment and Article I, section 7 purposes, once Lewis raised a pretext challenge, the State had the burden to establish that “hanging out” at an intersection 200 yards from a known drug house was

routine traffic enforcement rather than surveillance of vehicles leaving the target location of a drug enforcement action. The State did not do this.

(g) The June 3, 2010, findings fail to mention that Nolan recognized Ms. Lewis's car and had seen it parked at the suspected drug house prior to contacting Lewis. September 26 Finding I(29), CP 111.

(h) Nolan observed a broken marker light. Finding I, CP 99-100. See (a).

(i) Lewis did not signal for more than 100 feet. Finding II, CP 100. See (b). The statute does require a signal of more than 100 feet (just not less). RCW 46.61.305(2). Moreover, this finding is immaterial, because Nolan testified that he did not include the alleged turn-signal violation when he finally commenced the traffic stop. RP 150-51.

(j) Nolan asked if he could help Lewis with a jammed wiper and she tried to place a call on her cell phone. Finding IV, CP 100; Finding IV, CP 104. This finding omits significant facts. The record shows that Nolan badgered Lewis for her name after she clearly chose not to give it, persisted in asking her where she was going and where she was coming from, and called dispatch for information about her phone call.

(k) Nolan informed Lewis about the alleged traffic infractions before she gave him her name. Finding V, CP 101. Nolan told Lewis about the infractions before he asked for her license. Finding V, CP 101.

The court concluded that Lewis's custodial statements to Nolan were admissible because they were voluntary. Conclusion of Law, CP 102. The question before the court, however, was not whether the statements were involuntary, but whether they were obtained in violation of the Fourth Amendment and Const. Art. I, 7 and were thus inadmissible fruit of the poisoned tree. RP 122.

To the degree the findings are not supported by substantial evidence, the Court will ignore them. *Hill*, 123 Wn.2d at 644-45.

2. THE "UNDISPUTED" CrR 3.6 FINDINGS ARE LARGELY DISPUTED.

The State erroneously characterizes most of the belated September 26, 2011, Findings as "Undisputed Facts." CP 108. Lewis disputed the following:

(a) Nolan was on regular patrol at the intersection. Undisputed Fact I(1), CP 108. The whole point of Lewis's suppression motion was to dispute what Nolan was doing at the intersection and whether he stopped Lewis as a pretext for investigating visitors to a suspected drug house. CP 111.

(b) Nolan was "fully trained." Undisputed Fact I(2), CP 108. On June 3, Nolan testified that he was a rookie, having just recently graduated from the academy. RP 15, 126.

(c) Only Lewis's marker light was out. All her other lights were on. Undisputed Fact I(4), CP 109.

(d) Lewis was "acting nervously." Undisputed Fact I(8), CP 109. Nolan testified that Lewis strongly expressed her wish to be left alone, which Nolan characterized as suspicious, nervous and evasive. RP 21, 112, 143; Finding I(10), I(14), I(15), CP 109.

(e) Lewis was "playing with" the wipers. Undisputed Findings I(8), I(12), CP 109. Lewis's wipers were jammed and they both worked on them. RP 116, 118; Finding I(19), CP 110.

(f) Nolan was merely trying to help Lewis complete her phone call when he ran the information through dispatch. Undisputed Fact I(7), CP 110. Nolan testified that what he was trying to do was to extract information about Lewis's comings and goings and her social contacts. RP 33, 144.

(g) Nolan did not testify that he did not proceed with the traffic stop because he wanted to get information. Undisputed Finding I(15), CO 109. This directly contradicts Nolan's direct testimony. RP 33, 114.

(h) Nolan checked the Alaska license before the arrest and learned it was not valid. Undisputed Fact I(23), CP 110. Nolan testified that it was only after Lewis was in handcuffs and in his patrol car that he ran a check on the Alaska license. RP 119, 120, 123.

(i) There was no connection between Nolan's interest in Lewis and the fact she was leaving a suspected drug house. Findings III(1), CP 111. Nolan testified that he had noticed Lewis's car at the suspected drug house that afternoon. Finding I(29), CP 111. He admitted that he contacted Lewis because he wanted to know "just exactly what was going on, maybe who she was." RP 33. He admitted his curiosity was unrelated to enforcing the traffic laws. RP 144.

Lewis did not dispute the following:

(j) Nolan did not mention the infractions that constituted the sole grounds for him to contact Lewis because he wanted to gather information from her. Undisputed Fact (I)15, CP 109. Nolan testified that he proceeded with the traffic stop based solely on the marker light, not an alleged short left turn signal. RP 150-51.

(k) Nolan asked Lewis to identify herself and inquired where she was coming from and where she was going. Finding I(16), CP 109-110.

To the extent the September 26, 2011, suppression findings are immaterial or not supported by substantial evidence, this Court will disregard them. *Hill*, at 444-45.

(b) A traffic stop may convert to community caretaking and then back to the traffic stop. The officer need not mention the traffic stop

before the community caretaking function is completed. Conclusion IV(4), CP 112.

This is not a conclusion of law derived from facts based on substantial evidence in the record. It is a legal opinion for which no authority is cited. When no authority is cited, the Court presumes none was found. *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000).

(c) Nolan elected not to proceed with a traffic stop because Lewis began “fiddling” with her windshield wipers. Conclusion I(5), CP 112. This is a finding of fact, unsupported by the record. Nolan elected not to proceed with a traffic stop because he wanted to pursue an unrelated investigation of Lewis. RP 33, 114.

(d) Nolan believed he had grounds for a community caretaking function and he did in fact have grounds to undertake community caretaking. Conclusion IV(6), CP 112. To the extent these are not conclusions of law but findings of fact, they directly contradict Undisputed Fact No. I(15), which says the reason Nolan did not undertake a traffic stop was that he wanted to obtain information from Lewis and also to investigate her for possible DUI. Undisputed Fact I(15), CP 109.

(e) Conclusion IV(7), CP 112, (also a finding of fact) says that only when Lewis firmly put an end to Nolan's unsolicited and unwelcome attempts to "help" her did Nolan invoke the alleged infraction.

(f) The court concluded that Nolan's shifting justifications for detaining Lewis could not be deemed evidence of pretext because Nolan was not officially part of a drug investigation. Conclusion IV(9). CP 112.

3. THE STIPULATED FACTS FINDINGS EXCEED
THE SCOPE OF WHAT WAS STIPULATED, AND
THE CONCLUSIONS ARE MOSTLY ARGUMENT.

The essential stipulated facts were that on December 31, 2009, Nolan stopped Lewis, placed under arrest for a driving offense and found methamphetamine during the search incident to arrest. RP 196. The Findings in the Order on Stipulated Facts include extensive disputed suppression findings that are not relevant to the conviction. CP 114-116.

(a) Lewis had a defective marker light. Finding 3, CP 114. This is a conclusion of law based on testimony that one of Lewis's marker lights was out. Since Lewis was driving a passenger car, however, not a bus, truck or motor home, she was not required to display any marker light, so a non-functioning marker light was not "defective" as a matter of law. RCW 46.37.090(1).

(b) Nolan asked Lewis for her name, but she refused to provide it. Eventually, she said her name was Sara. Finding 10, CP 115. Later,

she said her name was Matilda Free. Finding 14, CP 115. This is not material. Please see Issue 9.

(c) Lewis was visibly nervous and tried to change the subject. Finding 12, CP 115. Not material. Please see Issue 9.

(d) Nolan requested Lewis's license when she first refused to tell him her name. Finding 13, CP 115. Lewis challenged Nolan's entire account of the stop, including the order of events. Nolan testified that he repeatedly tried to get Lewis to identify herself and proceeded with the traffic stop only after she refused to volunteer any personal information. RP 21. Finding IV, CP 100.

(e) Lewis stated that she did not have a license. Finding 14, CP 115. This is false. Lewis did not stipulate to this, and it forms the crux of Lewis's unlawful arrest argument. Please see Issue 9.

According to Nolan's testimony, Lewis "said she did not have a driver's license on her." RP 22. Upon checking with dispatch, Nolan learned that Lewis had a "non-valid" driver's license. RP 22. Finding 14 omits that dispatch told Nolan that Lewis had a license that was merely invalid, not suspended or revoked. Moreover, Finding 14 contradicts the suppression findings. CrR 3.5 and 3.6 Findings V correctly state (1) that Lewis said only that she did not "have her license" (implying that she did

have one, just not with her) and (2) that dispatch told Nolan she had a license that was invalid. Findings V, CP 101 and CP 104-5.

A finding on whether Lewis had no license or did have one but not with her, is essential to support the CrR 3.6 Conclusion of Law that Lewis was lawfully arrested and thus that Nolan lawfully searched her incident to a lawful arrest. Conclusion V, CP 106. The finding is notably absent from the CrR 3.6 findings, however. CP 108-113. If a trial court does not enter a finding on a disputed fact, this Court presumes the party with the burden of proof failed to sustain its burden. *State v. Armenta*, 134 Wn.2d 1. 14, 948 P.2d 1280 (1997). Accordingly, Conclusion V is not supported by the findings and is therefore erroneous.

(f) Nolan tried to help Lewis to contact her friends. Finding 11, CP 115. Lewis challenged this characterization of Nolan's conduct, and it is not supported by the testimony. Nolan testified that his primary purpose initially was to investigate Lewis. "Helping" was Nolan's investigative strategy, not his purpose. RP 33, 144.

Article I, section 7 prohibits the police from disturbing people in their private affairs. Once a person refuses to comply voluntarily with an officer's request, repeated requests constitute coercion. *State v. O'Neill*, 148 Wn.2d 564, 591, 62 P.3d 489 (2003) (consent to search). Lewis had

unequivocally refused voluntary compliance with Nolan's requests for information and her wish to be left alone. Nolan violated this right.

(g) Nolan arrested Lewis. Finding 16, CP 115. This was a custodial arrest. Nolan placed Lewis in handcuffs and did a body search. RP 23. This arrest was unlawful, as discussed in Issue 9.

Conclusions II — VII are not based on the Findings of Fact. They are legal argument without citation to authority. CP 116. Conclusion VIII is a finding of fact. CP 117.

The pertinent Conclusions of Law are IX, X, and XI.

4. REQUESTING A RE-DO OF THE CrR 3.6 HEARING WITHOUT FIRST FINALIZING FINDINGS FROM THE FIRST HEARING WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

The Court reviews a claim of ineffective assistance of counsel *de novo*. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). To prove ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced him, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). This standard is "highly deferential and courts will indulge in a strong presumption of

reasonableness” until the defendant shows in the record the absence of legitimate or tactical reasons supporting trial counsel’s conduct. *Thomas*, 109 Wn.2d at 226.

Counsel’s decision whether or not to request a suppression hearing is not per se deficient provided a legitimate strategic or tactical reason can be found to explain counsel’s conduct. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The defendant bears the burden of establishing the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). The question is whether counsel’s choice was reasonable. *Grier*, 171 Wn.2d at 34.

Here, new counsel, appointed after the first suppression hearing, thought additional suppression arguments should have been made. RP 102, 106. It was, therefore, arguably a legitimate strategic reason to request a second hearing. But counsel knew that no findings had been entered after the June 3, 2010, hearing. RP 105-06. Counsel rendered deficient representation by not protecting his client by requesting written findings from the first hearing. This would have closed the door on the State’s ability to rehabilitate Nolan’s testimony by omitting or obfuscating facts supporting the conclusion that Nolan’s interaction with Lewis was such as to require suppression.

Actual prejudice occurs if suppression is erroneously denied. *See, e.g., State v. Abuan*, 161 Wn. App. 135, 154, 257 P.3d 1 (2011). Lewis was prejudiced by counsel's deficient performance because reopening the CrR 3.6 proceedings permitted the State to significantly clean up Nolan's testimony to eliminate or ameliorate adverse facts he had testified to in the first hearing.

The Court should reverse the conviction.

5. THE LATE FINDINGS PREJUDICED LEWIS.

CrR 3.6(b) requires the trial court to enter written findings of fact and conclusions of law at the conclusion of a suppression hearing. *State v. Gaddy*, 114 Wn. App. 702, 705, 60 P.3d 116 (2003), *aff'd on other grounds*, 152 Wn.2d 64, 93 P.3d 872 (2004). Findings may be entered while an appeal is pending, but only so long as the appellant is not prejudiced. *State v. McGary*, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984). Reversal is the remedy where tardy entry of mandatory findings prejudices the defendant. *Gaddy*, 114 Wn. App. at 705; *State v. Byrd*, 83 Wn. App. 509, 512, 922 P.2d 168 (1996).

A court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect[s] the accused's right to a fair

trial.” CrR 8.3(b).⁴ Relief including dismissal is authorized where the defendant shows (a) arbitrary government action or misconduct and (b) prejudice. *State v. Oppelt*, 172 Wn.2d 285, 297, 257 P.3d 653 (2011). Government misconduct may include simple mismanagement if negligent delay by the prosecutor violates due process. *Oppelt*, 172 Wn.2d at 297.

Our Supreme Court has established an analytical framework for determining whether prosecutorial delay violates due process. The court must balance the prejudice to the defendant with the prosecutor’s reason for delay. *Oppelt*, 172 Wn.2d at 294, 298.

No Articulable Reason: The State has offered no reason for the delay beyond simple lack of diligence.

Manifest Prejudice: The appellant has the burden to prove that the delayed findings prejudiced her. *Gaddy*, 114 Wn. App. at 705. Here, withholding until October 27, 2011, purported findings from a proceeding on June 3, 2010, prejudiced Lewis.

First, 15 months after the June suppression hearing, the judge retained no independent recollection of the suppression proceeding or the

⁴ **On Motion of Court.** The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial. CrR 8.3(b).

testimony. In *Oppelt*, a State's witness suffered memory loss. *Oppelt*, 172 Wn.2d at 288. Here, the passage of time erased the judge's memory.

This prejudiced Lewis in multiple ways. Besides burdening the record with "findings" by a jurist with no independent recollection of the testimony or the argument, withholding the suppression findings until after the appeal was filed and trial counsel was off the case denied Lewis the opportunity to seek relief under CrR 8.3(b).

It is common practice for defense counsel to make a CrR 8.3 motion to alert the court to prejudicial delay. *Oppelt*, 172 Wn.2d at 297.

Moreover, appellate counsel was not served when the State filed these findings, so that the first notice counsel received was the motion to supplement the record filed by the State an hour after counsel uploaded the opening brief. Undertaking a second reading of the trial record to review 67 findings several of which are narratives encompassing multiple findings, and 37 conclusions, was extremely time-consuming, challenged counsel's skill and endurance and justified extra compensation which the State would have no compunction about adding to Lewis's cost bill in the event she does not prevail.

Accordingly, purported findings and conclusions from June 3, 2010, are inadmissible under the *Oppelt* balancing analysis. The Court should strike the June 3, 2010, findings and conclusions.

Lewis incorporates her motion to strike the tardy findings in which she argues that this Court permitted the State to supplement the trial record contrary to the Rules of Appellate Procedure.

6. WAIVING THE REQUIREMENT FOR TIMELY SUPPRESSION FINDINGS VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing. *State v. Ladenburg*, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992). It is not sufficient that the judge be impartial. “[The law] also requires that the judge appear to be impartial.” *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972) (emphasis added.) “The test is whether a reasonably prudent and disinterested observer would conclude [that the claimant] obtained a fair, impartial, and neutral trial.” *State v. Dominguez*, 81 Wn. App. 325, 330, 914 P.2d 141 (1996). Where the judge’s ability to be impartial is open to question, he should disqualify himself. CJC 3(D)(1) (“Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.”); *Dominguez*, 81 Wn. App. at 330.

Here, the judge’s integrity is not in question. However, a reasonably prudent and disinterested observer would question the fairness

of permitting the prosecutor to dictate dispositive suppression findings to a judge with no independent recollection of the evidence or the arguments of counsel. The judge should have disqualified himself from accepting proffered findings.

The appropriate remedy is to reverse the conviction.

7. NOLAN'S STOP OF LEWIS WAS PRETEXTUAL.

Please see the Appellant's Brief at 5. The evidence establishes an irrefutable connection between Nolan's surveillance of an intersection 200 yards from a known drug house and his decision to follow Ms. Lewis as she left the target premises. RP 182. Nolan had seen Ms. Lewis's car parked there. RP 47-48. He reluctantly conceded that her association with that house was the reason for his interest in her.

Q. Was that one of the reasons that you wanted to know more information from her? ...

A. No.

Q. Okay. Not at all?

A. I can't say whether it was or was not.

Q. Okay.

A. You know, if I had to guess, I would already have guessed that she was coming from Robert Heater's place. I wouldn't have to ask her."

RP 48. And:

Q. And you were aware — and you did believe she was coming from his house?

A. It could be concluded that, yeah.

RP 49. Nolan attempted to deny that Ms. Lewis having been at the suspect residence was the reason he stopped her. RP 50. But unsupported subjective denials are insufficient to overcome obvious contrary implications based upon reasonable inferences from the objective facts. *State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). The implications here are undeniable.

Finally, Nolan switched his purported reason for detaining Ms. Lewis from a defective light to an illegal turn to DUI. “Well, with her behavior, I was seeing if she was under the influence.” RP 143. He said he was investigating “maybe a possible DUI.” RP 144.

The reasonable inference from the objective facts is that Deputy Nolan was fishing for an excuse to search Lewis for reasons having nothing to do with traffic enforcement.

8. THE FINDINGS DO NOT SUPPORT THE CONCLUSION THAT NOLAN WAS ENGAGED IN COMMUNITY CARETAKING.

“Courts should not consider grounds to limit application of the exclusionary rule when the State at a CrR 3.6 hearing offers no supporting facts or argument.” *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 885, 263

P.3d 59 (2011) (Court of Appeals erred in sua sponte raising the attenuation doctrine to justify denying suppression.) This Court reviews challenged findings of fact for substantial evidence and reviews de novo whether those findings support the trial court's conclusions of law. *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009), citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

Here, the trial court sua sponte decided that Nolan lawfully detained Lewis under the community caretaking, or emergency aid exception to the warrant requirement. Conclusion IV(2). No facts support this conclusion.

The emergency aid exception applies when an officer believes that someone likely needs assistance for health or safety reasons and a reasonable person in the same situation would so believe. *State v. Kinzy*, 141 Wn.2d 373, 386–87, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001); *State v. Schultz*, 170 Wn.2d 746, 759–60, 248 P.3d 484 (2011). This does not mean an officer may intrude himself in the capacity of an officious intermeddler whenever an item of personal property appears to be malfunctioning. That is to say, the officer may do so, but he is acting

outside the warrant exception and any incriminating evidence he turns up is not admissible.

There was no evidence that Nolan thought Lewis was in need of medical help or that she was in danger and the court made no such finding. Moreover, while a stuck windshield wiper in winter weather might be deemed a safety issue, Nolan was obliged to desist from inflicting his help on Lewis once she unequivocally expressed, by word and deed, that she did not appreciate his interference.

9. NOLAN LACKED LAWFUL AUTHORITY TO SUBJECT LEWIS TO A CUSTODIAL ARREST.

Warrantless searches and seizures are per se unreasonable under both the Fourth Amendment and Const. art 1, § 7, unless one of the narrow exceptions to the warrant requirement applies. *State v. Buelna Valdez*, 167 Wn.2d 761, 768, 771-72, 224 P.3d 751 (2009); *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Exceptions to the warrant requirement are narrowly drawn. *Parker*, 139 Wn.2d at 496. Article I, section 7 creates “an almost absolute bar to warrantless arrests, searches, and seizures.” *Valdez*, 167 Wn.2d at 772, quoting *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983). The State has the burden to prove that a challenged search falls within an exception to the

warrant requirement. *Parker*, 139 Wn.2d at 496. The State did not meet its burden here.

The court erroneously concluded that Nolan was justified in subjecting Lewis to a custodial arrest because she “had no driver’s license.” Conclusion III, CP 106. This conclusion is not supported either by the suppression findings or the testimony.

Nolan testified that Lewis “said she did not have a driver’s license on her” and that, upon checking with dispatch, Nolan learned that Lewis had a “non-valid” driver’s license. RP 22. This is what the court found. Finding V, CP 101 (Lewis told Nolan she did not have her driver’s license (not a license), and dispatch told Nolan she had no valid license.)

An officer generally has the authority to arrest for a misdemeanor committed in his presence. *State v. Hehman*, 90 Wn.2d 45, 47, 49, 578 P.2d 527 (1978). An officer may detain the motorist for a period of time reasonably necessary to identify the person, check for outstanding warrants, check the status of the person’s license, insurance identification card, and the vehicle’s registration, and complete and issue a notice of traffic infraction. RCW 46.61.021. But, unless the driver is intoxicated, a custodial arrest for minor traffic violations is unlawful if the defendant promises to appear as provided in RCW 46.64.015. *Hehman*, 90 Wn.2d at 47. It is well settled that, “without sufficient justification, police officers

may not use routine traffic stops as a basis for generalized, investigative detentions or searches.” *Ladson*, 138 Wn.2d at 355.

RCW 10.31.100 controls when a police officer may make a custodial arrest for a traffic violation. *State v. Thomas*, 89 Wn. App. 774, 777, 950 P.2d 498 (1998). When a motorist commits a misdemeanor violation of the traffic laws, the police may serve him with a traffic citation and notice to appear in court. RCW 46.64.015(1). They may not detain the person “for a period of time longer than is reasonably necessary to issue and serve a citation and notice.” RCW 46.64.015(1). The time limitation does not apply if the police have probable cause to believe the motorist has committed any of the offenses enumerated in RCW 10.31.100(3).

Offenses enumerated in RCW 10.31.100(3) include driving while the operator’s license is suspended or revoked in violation of RCW 46.20.342.⁵ RCW 10.31.100(3)(e). This is grounds for custodial arrest. *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). But the police must have reliable information about the status of the motorist’s license. *Potter*, 156 Wn.2d at 842. Driving without a valid license in one’s possession is merely an infraction warranting only a citation and notice to

⁵ RCW 46.20.342(1): It is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state.

appear. RCW 46.20.015(1)(a). Driving without a valid license subjects a person to a penalty of two hundred fifty dollars, which the court will reduce to fifty dollars if the person obtains a valid license after being cited. RCW 46.20.015(2).

Nolan did not have any information, reliable or otherwise, that Lewis's license was suspended or revoked. All he knew was that she had an Alaska license. Only after he arrested her did Nolan learn that her license was invalid — not suspended or revoked.

The Incident Search Also Was Unlawful: As a corollary, the trial court also erroneously concluded that Nolan lawfully searched Lewis incident to a lawful arrest. Conclusion V, CP 106.

A search incident to arrest is an exception to the warrant requirement. *O'Neill*, 148 Wn.2d at 585; *State v. Radka*, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004). But it is a prerequisite to any search incident to arrest that the arrest be lawful. *Id.*

In the context of a traffic stop, the showing required to justify searching a citizen is a substantial possibility that she has or is about to engage in criminal conduct. *State v. Mendez*, 137 Wn.2d at 223. In *Abuan*, 161 Wn. App., officers arrested a driver for driving with a suspended license. But it was unlawful to search him absent any evidence of grounds to suspect the driver was armed or dangerous or engaged in

criminal activity. *Abuan*, 161 Wn. App. at 147-48. More than a hunch is required. *State v. Marcum*, 116 Wn. App. 526, 531, 66 P.3d 690 (2003); *Terry v. Ohio*, 392 U.S. 1, 23, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Generally, the police may not ask people to identify themselves without articulating some lawful reason for inquiring. *State v. White*, 97 Wn.2d at 99. Washington does not permit the police to search a person merely because she cannot produce satisfactory identification papers or is nervous. *Neth*, 165 Wn.2d at 184. The police must have some basis beyond nervousness, or even lying, to justify an intrusion. *Setterstrom*, 163 Wn.2d at 627. Courts generally recognize that most people, even innocent ones, are nervous when pulled over by police. *United States v. West*, 219 F.3d 1171, 1179 (10th Cir. 2000), citing *United States v. Wald*, 208 F.3d 902, 907 (10th Cir. 2000).

If an officer asks a motorist to identify herself during a traffic stop, she must comply. RCW 46.61.021(3). That is not the case here. Nolan did not commence a traffic stop until after he had satisfied his curiosity about Ms. Lewis's identity and her private affairs. Second, the ordinary meaning of "to identify oneself" is to state one's name, not to produce one's papers. And Nolan articulated no grounds to suspect she might be armed, dangerous, or engaged in criminal activity.

The court also erroneously concluded that Nolan's conduct comported with routine traffic patrol and lawful traffic stop procedures. Conclusion V, CP 106; bench finding at RP 35. This is not supported by the findings or the testimony and is erroneous as a matter of law.

Nolan did not follow the standard traffic stop procedure set forth in RCW 46.61.021(2). Instead, he began following Lewis without signaling for her to stop, hung around after she stopped of her own accord and pestered her for information, persisted in trying to "help" her after she clearly indicated his presence was unwelcome and kept quiet about any alleged infractions. He never did get around to telling Lewis about the turn-signal violation which was the sole lawful grounds for a traffic stop. RP 150-51.

The stop, the custodial arrest and the incident search were unlawful. The remedy is to suppress the evidence.

VI. **CONCLUSION:**

The Court should vacate the order denying suppression, reverse Lewis's conviction, and dismiss the prosecution with prejudice.

Respectfully submitted this 19th day of March, 2012.

Jordan B McCabe

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CERTIFICATE OF SERVICE

Jordan McCabe served a copy of this Appellant's Brief upon opposing counsel, Yarden F. Weidenfeld, via the Division II upload portal:
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