

NO. 43659-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

DAVID C. DICKJOSE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Brian Tollefson

Cause No. 07-1-06241-8

BRIEF OF RESPONDENT/CROSS-APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in its finding of fact 1 when it concluded that the arrest of Dickjose was unlawful because the officers lacked probable cause to enter his house to search for evidence. CP 38-39.

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the appeal should be dismissed because it is not properly before the court on discretionary review?
2. Whether the trial court properly admitted Dickjose's post-arrest statements to police because he was lawfully arrested notwithstanding the trial court's conclusion to the contrary?
3. Whether the State expressly waives any argument in reliance upon a theory of attenuation where the validity of attenuation in Washington is ambiguous and it is contrary to the State's interests to rely upon such an argument?

C. STATEMENT OF THE CASE

1. Procedure

On December 14, 2007, the State filed an information charging the defendant with three counts of unlawful delivery of a controlled substance, as well as one count of possession of a controlled substance with intent to

deliver. CP 1-3. Dickjose was not in custody at the time, so he was summonsed to court and arraigned on January 17, 2008. CP 71; CP 72-73.

The case was assigned for trial on April 7, 2009, at which point the defense filed a motion to suppress evidence under CrR 3.6. CP 74; CP 6-11. In that motion, the defense argued that the probable cause declaration failed to establish a sufficient nexus between the criminal activity and the defendant's property. CP 9.

The State responded and the trial court conducted a joint hearing re: suppression of statements by the defendant under CrR 3.5; suppression of evidence under CrR 3.6, and apparently also considered arguments with regard to a discovery violation in the context of the CrR 3.6 hearing. CP 12-29; CP 75-79. The court denied the motion(s). CP 75-79.

On April 9, 2009, the defense filed a premature notice of appeal for interlocutory discretionary review to the Court of Appeals. CP 30. The findings of fact and conclusions of law were not entered until May 29, 2009. CP 31-37.

On April 13, 2009, defense counsel for Dickjose then claimed a conflict had arisen and the court allowed him to withdraw from the case. CP 75-79.

On April 18, 2009, the Court of Appeals issued a ruling granting review of the defendant's case. CP 81-83. Pursuant to RAP 7.2, the trial

court proceedings were stayed pending the appeal. The Court of Appeals issued an unpublished opinion in which it held that there was not a sufficient nexus between the deliveries of controlled substances and Dickjose's residence, and excluded the evidence found in the search of his residence. *State v. Dickjose*, No. 39160-1-II, 160 Wn. App. 1011 (2011) (Unpublished)). On April 12, 2011, the Court of Appeals issued its mandate. CP 84-85.

On October 28, 2011, the defense filed a motion to request a *Franks* Hearing. CP 86-92. On November 16, 2011, the court denied the motion for a *Franks* hearing. CP 93-95. The court entered its findings on November 29, 2011. CP 109-111.

On November 28, 2011, the defense filed a new motion to suppress evidence, claiming that the probable cause declaration did not contain sufficient facts to establish the reliability of the informant. CP 97-106. The court also denied the motion to suppress evidence. CP 112-114; CP 116-118.

On December 19, 2011, the defense then filed what it captioned "Second Motion to Suppress Evidence." CP 121-129. This time the defense sought to suppress the evidence obtained in the search of Dickjose's vehicles. CP 121-129. The State responded. CP 130-141.

The trial court granted the motion and suppressed the evidence obtained from the vehicles pursuant to the search warrant. CP 142-143; CP 38-39.

On March 19, 2012, the defense filed a motion to suppress Dickjose's statements made to police after his arrest. CP 43-45. The basis for the motion was that the Dickjose's statements were the fruits of the unlawful search of his home. *See* CP 44. The court denied that motion. 58-61. Dickjose timely filed a notice for discretionary review on July 13, 2012. CP 62-66.

The State opposed discretionary review on the grounds that the petitioner's claim did not satisfy the requirements for such. However, the State also argued in the alternative that if review were granted, it should be entitled to challenge the trial court's conclusion that the arrest of Dickjose was unlawful. *See* Response to Mot. Discr. Rev. at 16ff. The Commissioner issued a ruling granting review, and also ordered that the State could challenge the trial court's conclusion that Dickjose was arrested unlawfully. *See* Ruling Granting Review, 43659-1-II, p. 11-13.

This is the State's response to the brief of appellant.

2. Facts of the Case

a. Facts At Suppression Hearing

The court entered the following findings of fact and conclusions of law at the suppression hearing.

FINDINGS OF FACT

I.

A Superior Court Judge signed a search warrant authorizing the Lakewood Police Department to serve a warrant on defendant's house on December 7, 2007. Pursuant to its issuance, officers executed the warrant on December 13, 2007, at 7:00 a.m. During the search of defendant's house, defendant was given his *Miranda* warnings and questioned. During the questioning he denied that methamphetamine found in his silver Dodge truck were his drugs. His girlfriend, Tammie Wright told officers that the drugs in the truck were hers, but she could not identify the quantity, price, or wrapping.

Later on the morning of December 13, 2007, defendant was transported to the Lakewood police station. During the course of the day, he was told that he would not be booked on these charges if he; 1) set up a buy of methamphetamine from his drug dealer, and 2) made a full confession about his role in drug dealing. Defendant made a verbal statement that he has been a drug dealer for several years, that he buys a

half a pound of meth at a time, and that he is trying to get out of the business.

In April of 2009, the Court of Appeals, Division Two, determined that the warrant was not valid because the basic legal premise to support probable cause to enter defendant's house was faulty. Because the police had no probable cause to enter defendant's house, his arrest therein was illegal. *U. S. v. Payton*, 445 U.S. 573, 100 S. Ct. L.ED 2nd 639 (1980).

II.

The burden is on the State to show that the taint of an initial illegal entry is sufficiently attenuated from defendant's subsequent statements that any taint has dissipated. To meet this burden under the United States 4th Amendment and under Article 1 section 7 of the Washington State Constitution, the State must show a lack of temporal proximity between the illegal entry and the subsequent statement, and an intervening circumstance. *State v. Ibarra-Cisneros*, 172 Wash.2d 880, 884-85, 263 P.3d 591 (2011.)

Defendant's first set of statements at the house were close in time and location to the illegal entry, sometime after 7 a.m. The method of entry was designed to cause surprise or confusion; flash grenades were used, clothing concealed the identity of the officers, it was early morning, and an element of surprise was used so that people would not get weapons

or destroy evidence. In his first set of statements which he made at the house, defendant denied that the drugs in the truck were his, but claimed that they belonged to his girlfriend who was also present at the house during the raid.

The statements made by defendant at the police station were significantly later in the day, and well after defendant had first been advised of his Miranda warnings and had taken the opportunity to deny the officer's accusations about his drug dealing. Finally, while at the police station Officer Conlon offered to refrain from taking defendant to jail that night if he would turn in his supplier and admit to his role in drug dealing. Defendant made his confession and called his drug dealer to arrange for the purchase of a pound of methamphetamine. Defendant was not booked into jail that night, but was released from custody.

CONCLUSIONS OF LAW

That the statements defendant made to Officer Conlon in the late morning or early afternoon while at the police station satisfied the following factors which are set forth in *State v. Eserjose*, 171 Wn. 2d 907, 2259 P 3d 172 (2011);

1. Defendant had been advised of and had waived his Miranda warnings when police officers initially entered his house at approximately 7 .a.m. on December 13, 2007. He acknowledged and waived his Miranda

warnings before making his initial exculpatory statements to Officer Conlon while at his house.

2. Defendant was removed from his house and taken to the Lakewood Police Station in the late morning on December 13, 2007. He was advised that he would not be booked into jail sometime during his stay at the police, which lasted into the evening.

3. While at the police station, Officer Conlon offered defendant the opportunity to avoid being booked into jail on his charges if he would make a truthful statement about his involvement in drug dealing and would call his supplier and arrange to have a pound of drugs delivered to him that evening. After this inducement, defendant made a confession about his involvement in drug dealing.

The State has met its burden to show that the defendant's subsequent statement was sufficiently attenuated from the illegal entry into his home, and that the officer's promise not to take him to jail was significantly intervening to dissipate any taint of the entry into the house. The statements defendant made at the police station are admissible at trial.

b. Facts of the Case

The following facts are taken from the declaration for determination of probable cause for the search warrant [CP 21-25], the

search warrant itself [CP 19-20], as well as testimony at the May 11, 2012, hearing on the defense motion to suppress Dickjose's statements. [RP 05-11-12].¹

On 08-24-07 at about 1900 hours, Officer Conlon met with Reliable Confidential Informant (CI) to conduct a controlled buy of Methamphetamine from a dealer known as David Dickjose. RP 05-11-12, p. 2, ln. 16-19; CP 22. The CI has known Dickjose for several years and knows he deals Methamphetamine. RP 05-11-12, p. 3, ln. 1-3; CP 22. The CI has first hand knowledge that Dickjose has been a Meth cook in the past. CP 22.

Earlier in the day, the CI told Officer Conlon where Dickjose lived and that he recently purchased a silver Dodge Pickup, [unclear]fted with rims. CP 22. Officer Conlon drove to Dickjose's house and saw the pickup parked in the rear of the residence. CP 22.

Officer Conlon strip searched the CI and issued him pre recorded buy funds. CP 22. Officer Conlon also searched the vehicle with nothing found. CP 22. He followed the CI as he drove his own vehicle. CP 22.

¹ The State notes that the transcript from May 11, 2012 includes only through page 28 and does not contain a signature page by the court reporter. Without conceding that it is in fact accurate or reliable, the State notes that on its face it does appear to be a portion of a legitimate transcript of the hearing.

They went to the 5400 Block of S Warner to meet with another person, Kenny Gross. CP 22. Kenny called Dickjose and told him he wanted a half ounce of Methamphetamine. CP 22. Dickjose agreed and said he was in the area. CP 22. The CI got into his vehicle and drove a short distance away as Officer Conlon followed. CP 22. The CI told Officer Conlon that Dickjose was on his way. CP 22. Officers stated that they saw a Silver Dodge Pickup, WA #B84621C, pull up in front of Gross's residence and Gross get into the passenger side. CP 22. At one point the driver got out and went to the back door of his truck then got back in. CP 22. A short time later Dickjose drove off as Officers Brown, Crommes, Hamilton, Sgt. Estes and Det. Punzalan followed. CP 22.

Officer Conlon followed the CI back to the 5400 block of Warner. CP 22. Gross walked up to the CI as he exited his vehicle. CP 22. Officer Conlon saw Gross hand the CI a brown paper bag and then part ways. CP 22. Officer Conlon followed and met up with the CI a short distance away. CP 22. The CI handed Officer Conlon a paper bag containing 14.1 grams of Methamphetamine. CP 22.

Officer Conlon again strip searched the CI and searched the CI's vehicle with nothing found. CP 22.

Officers then followed Dickjose for a few hours, during which time he made several short stops contacting different individuals

consistent with narcotics trafficking. CP 23. Officers continued keeping Dickjose under constant surveillance and followed Dickjose until he returned to his residence at 18111 41st Av E. CP 23.

On 10-25-07 at about 1600 hours Officer Conlon met with reliable CI to conduct a second controlled buy of Methamphetamine from David Dickjose. CP 23. The CI was strip searched and issued pre recorded buy funds. CP 23.

The informant met up with Kenneth Gross at 72nd and Pacific Avenue and gave Gross the pre-recorded buy funds. CP 23. Gross left southbound on Pacific Avenue as officers followed, however, a few blocks away officers lost sight of Gross. CP 23.

Officer Conlon followed the CI as he drove northbound. CP 23. The CI informed Officer Conlon that Gross told him he was going to meet with Dickjose and he would meet the CI back at his residence at 5421 S Warner. CP 23.

Officer Conlon followed the CI as he pulled in front of 5421 S Warner and went inside. CP 23. About 30 minutes later, Gross returned to his residence and went inside. CP 23. During this time Officer Brown was on surveillance at Dickjose's residence. CP 23. Dickjose returned to his residence in a time consistent with meeting up with Gross. CP 23.

A few minutes later the CI exited Gross's residence and left to a predetermined meet location. CP 23. The CI handed Officer Conlon 12 grams of suspected Methamphetamine which was later filed-tested with positive results. CP 23. The CI and his vehicle were again searched with nothing found. CP 23.

On 12-05-07, at about 1600 hours, Officer Conlon met with the CI to conduct a third controlled buy of Methamphetamine from David Dickjose. CP 23. Officers were aware Dickjose has many vehicles. CP 23.

Officer Conlon strip searched the CI and issued him/her pre-recorded buy funds. CP 23. Officer Conlon also searched the vehicle with nothing found. CP 23. Officer Conlon followed the CI who drove the CI's own vehicle. CP 23.

Officer Conlon followed the CI to 5421 S Warner to meet with Kenny Gross. CP 23. En-route the CI called Gross. CP 23. Gross stated that he called Dickjose and told him he wanted a half ounce of Methamphetamine. CP 23. Dickjose agreed and said he was in the area.

Officers were staged in the area and saw Gross leave his residence. CP 23. Officers followed and saw him meet up with a white Mercedes WA plate, URDARTZ. CP 23. Det. Punzalan saw Gross briefly contact the driver of the Mercedes at the Mercedes driver's window. CP 23.

Gross then returned to his vehicle and drove back to his residence. CP 23. Det. Punzalan's description of the driver of the Mercedes was consistent with Dickjose. CP 23.

The CI pulled in front of 5421 S Warner and went inside. CP 23. The CI gave Gross the pre-recorded buy funds and returned to his vehicle. CP 23. The CI got into his vehicle and drove a short distance away as Officer Conlon followed. CP 24. The CI told Officer Conlon that Gross called Dickjose and he was on his way. CP 24. A few minutes later, Officers saw a White Mercedes pull up in front of Gross's residence and Gross get into the passenger side. CP 24. A short time later Gross exited and went back to his house. CP 24. The Mercedes drove off as Officers Crommes, Hamilton, Sgt. Estes, Det. Jordan and Det. Punzalan followed. CP 24. Officer Conlon was parked down the street and recognized the driver, Dickjose as he drove past. CP 24.

Officer Conlon followed the CI back to the 5400 block of Warner. CP 24. Gross walked up to the CI as he exited his vehicle and approached the porch. CP 24. They did a brief hand to hand transaction. CP 24. The CI got into her/his vehicle and drove off. Officer Conlon followed and met up with the CI a short distance away. CP 24. The CI handed Officer Conlon 13.2 grams of Methamphetamine. CP 24.

Officer Conlon again strip searched the CI and searched the CI's vehicle with nothing found. CP 24.

Officers advised they lost sight of the Mercedes for a very brief period and then again located it. CP 24.

Officers then followed the Mercedes as it pulled into the driveway of 313 S 67th St. Dickjose went inside for a few minutes, then exited and left. CP 24. Officer Conlon pulled up alongside the Mercedes again and saw Dickjose was driving. CP 24. Officers then followed him directly to his residence at 18111 41st Av E, where he parked and went inside. CP 24.

The court approved the search warrant, which authorized the officers to:

...enter into and/or search the said house, person, place or thing, to wit:

The residence: 1811 41st AV E, Tacoma, WA 98446, 1811 41ST AV E is listed as a two acre parcel. The residence appears to be a blue double wide manufactured home. There are also two detached garages. One four car garage and one appears to be an RV/shop type garage.

All out buildings, trailers and vehicles on the property.

The person: A W/M known as David C. Dickjose, 05-26-67.

CP 20.

Officers served the warrant on December 13 [2007] and found methamphetamine in the search of Dickjose's truck [ultimately suppressed by the trial court]. RP (05-11-12), p. 14, ln. 13-19; p. 20, ln. 6-7. About half an hour after the methamphetamine was found in the truck, officers advised Dickjose of his Miranda warnings and asked Dickjose about the methamphetamine he found. RP (05-11-12), p. 14, ln. 20 to p. 15, ln. 6.

Initially Dickjose denied knowing anything about the methamphetamine and said he wasn't the only person who drove the truck. RP (05-11-12), p. 15, ln. 8-10. Officer Conlon advised Dickjose he was under arrest for delivery of a controlled substance and that he had probable cause to arrest Dickjose for those deliveries. RP (05-11-12), p. 15, ln. 15-19. Dickjose continued to make a general denial. RP (05-11-12), p. 15, ln. 20.

Within the initial hour, officers spoke to Dickjose again, and told him that if he arranged a purchase of methamphetamine from his supplier, the officers would not book him into jail that night. RP (05-11-12), p. 20, ln. 6 to p. 21, ln. 17. Dickjose agreed to act as an informant for the police and indicated that he could purchase a pound of methamphetamine from his supplier to which the officers tentatively agreed. RP (05-11-12), p. 21, ln. 18 to p. 22, ln. 10.

The officers then made arrangements to bring Dickjose back to the police station and talk further about the intended target from which Dickjose would be purchasing methamphetamine. RP (05-11-12), p. 22, ln. 3-6. By this time it was about 10:00 or 11:00 a.m., a couple hours after the initial service of the search warrant, Dickjose was at the police station with the officers and was still under arrest. RP (05-11-12), p. 22, ln. 17-24.

In the course of discussing the purchase from his supplier the officers debriefed Dickjose about involvement [in drug sales] and Dickjose admitted that he does deal methamphetamine and that a fairly large Hispanic male was his supplier. RP (05-11-12), p. 23, ln. 13-15. Dickjose indicated that he deals about half a pound [of methamphetamine] at a time. RP (05-11-12), p. 23, ln. 23-24.

Dickjose again agreed to act as an informant for police and arranged a large purchase of methamphetamine from his supplier. However, the officers did not have the approximately \$15,000 necessary to complete the transaction. So instead, they had Dickjose ride in an undercover police vehicle from which he identified his supplier to police at the designated location so that police could stop the supplier. RP (05-11-12), p. 25, ln. 18 to p. 26, ln. 17. Pursuant to his agreement with the

officers, Dickjose was not booked into jail that evening. RP (05-11-12), p. 27, ln. 4.²

D. ARGUMENT

1. THE APPEAL SHOULD BE DISMISSED WHERE IT IS NOT PROPERLY BEFORE THE COURT ON DISCRETIONARY REVIEW AND WHERE THE RECORD IS NOT SUFFICIENT TO PERMIT REVIEW.

- a. This matter is not properly before the court.

Where discretionary review has been improvidently granted, the court may still dismiss the appeal. See *State v. Smith*, 90 Wn. App. 856, 862, 954 P.2d 362 (1998).

Under RAP 2.3(b) the court may only accept review in the following circumstances:³

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

² As indicated in the procedural facts, Dickjose was summonsed into court.

³ Because this case does not involve the superior court's review of a decision of a court of limited jurisdiction, RAP 2.3(d) is inapplicable here.

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

First, in his motion for discretionary review, Dickjose failed to analyze his claim with regard to any of the four required bases.

Accordingly, as a preliminary matter the court should have dismissed the petition due to Dickjose's failure to meet his burden.

The Commissioner granted discretionary review on the grounds that under RAP 2.3(b)(2) the superior court committed probable error and the decision of the court substantially altered the status quo or substantially limited the freedom of a party to act. *See* Ruling Granting Review 43659-1-II, p. 5, 13.

In its ruling granting discretionary review, the Commissioner ruled that the trial court committed probable error when it concluded that Dickjose's second confession was so attenuated from the circumstances of his unlawful arrest so as to dissipate the taint of that unlawful arrest. *See* Ruling Granting Review 43659-1-II at 13. However, the Commissioner never reached the second prong as to whether the trial court's alleged ruling substantially changed the status quo, instead relying on this court's prior opinion in this case that both prongs were satisfied because there

would be no evidence to support the possession charge. Ruling Granting Review 43659-1-II, at 13, n. 8.

The Commissioner's analysis of reviewability was fatally flawed as to both prongs. Dickjose has failed to establish probable error, or that the court's decision substantially altered the status quo. Indeed, he cannot show such under the record here where the court merely denied his suppression motion (and therefore, among other things, did nothing to alter the status quo). The matter is not properly before this court and should therefore be dismissed.

There is not a wealth of case law that discusses what is required to satisfy either of the two elements under RAP 2.3(b)(2) in the criminal context. The only case that seems to give it meaningful consideration is *State v. Haydel*, 122 Wn. App 365, 369, 95 P.3d 760 (2004). In *Haydel*, the court held that the trial court committed probable error when it concluded that the defendant's plea was not voluntary and could be withdrawn because it didn't contain any reference to the State's burden to disprove self-defense. *Haydel*, 122 Wn. App. at 367.

The court's analysis in *Haydel* is particularly instructive as to the second element under RAP 2.3(b)(2) that the trial court's order substantially alter the status quo between the parties. The court in *Haydel* held the trial court altered the status quo because allowing the defendant to

withdraw his plea put the State in the position of having to try the case. If the court of appeals did not grant discretionary review, the State faced the prospect of being permanently deprived of the ability to appeal the trial court's erroneous ruling in the event the defendant were acquitted after trial. *Haydel*, 122 Wn. App. at 370. Under those circumstances the court's ruling substantially altered the status quo between the parties. *Haydel*, 122 Wn. App. at 370.

There are a few other cases in which the court has held that both elements of RAP 2.3(b)(2) were satisfied in the criminal context. In *State v. Lee* the court accepted review where the court improperly orally advised a defendant at sentencing that the conviction prevented the defendant from being "anywhere near a firearm" or "in the same house or the same car with a firearm. *State v. Lee*, 158 Wn. App. 513, 516, 243 P.3d 929 (2010). The oral statement was not appealable as a matter of right, and deprived the defendant of his constitutional freedoms because it went well beyond the legal prohibition of constructive possession. *Lee*, 158 Wn. App. at 516.

In *State v. Young* the court granted discretionary review of a trial court order directing that public funds be expended for a psychosexual evaluation of the defendant. *State v. Young*, 125 Wn.2d 688, 888 P.2d

142 (1995). The court ultimately upheld the trial court's authority to order such expenditure as granted by statute. *Young*, 125 Wn.2d at 697.

In *State v. Hegge*, the court granted discretionary review and reversed a trial court order that rescinded the defendant's *pro se* status and imposed counsel on him against his will. *State v. Hegge*, 53 Wn. App. 345, 349, 766 P.2d 1127 (1989).

In *State v. Swain*, the court held that the defendant's challenge to a court order determining him to be incompetent and committing him to Eastern State Hospital. *State v. Swain*, 93 Wn. App. 1, 968 P.2d 412 (1998). The court of appeals held that the superior court's order clearly limited Swain's freedom to act, but that the order did not constitute probable error even though his lawyer's opinion was that he was competent. *Swain*, 93 Wn. App. at 10.

The State could find no authority for the proposition that a defendant is entitled to discretionary review because he disagrees with the trial court's suppression ruling. Moreover, there are good policy reasons against such a standard where it would impose a substantial burden on the appellate courts from defendants routinely seeking discretionary review of suppression rulings. In this context, it is worth noting that because of double jeopardy, the State may appeal a suppression ruling as a matter of right, but only where the trial court "expressly finds" that the practical

effect of the order is to effectively terminate the case. *See* RAP 2.2(b)(2). This reinforces the State's position that the suppression rulings should not be subject to discretionary review in most circumstances.

This case involves a routine suppression issue that is not meaningfully different from any other of the vast multitude of run of the mill suppression rulings trial courts make on a daily basis. There is nothing remarkable about the trial court's order admitting the statements in this case such that it substantially alters the status quo, or limits the freedom of Dickjose to act.

Here, the Commissioner concluded that the trial court committed probable error when it concluded Dickjose's statements were attenuated from his unlawful arrest. Ruling Granting Review, 43659-1-II, p. 9-10. In adopting a theory of attenuation, the trial court relied on the Supreme Court's opinion in *State v. Eserjose*. CP 60. Because the opinion in *Eserjose* is a plurality opinion, the trial court's reliance on the lead opinion in *Eserjose* could not constitute probable error. The Commissioner therefore assumed for purposes of analysis that the attenuation doctrine is allowable under the Washington Constitution. *See* Ruling Granting Review 43659-1-II, at 8. However, the Commissioner held that the trial court nonetheless committed probable error. Ruling

Granting Review 43659-1-II, at 13. The Commissioner concluded that there was probable error for two reasons.

First, the Commissioner concluded that the trial court committed obvious and probable error when it “ignored that Dickjose made inculpatory statements in his home within one hour after being arrested.” See Ruling Granting Review 43659-1-II, at 9. The Commissioner concluded this was so, because established attenuation law demonstrates that the presence or absence of a prior confession is highly relevant in determining the admissibility of a suspect’s later confession.

Second, the court went on to note that “Although approximately four hours elapsed until Dickjose made the second set of inculpatory statements at the police station, it is *arguable* that ‘the second statement was clearly the result and fruit of the first.’” Ruling Granting Review 43659-1-II, at 10 (Citing *Brown*, 422 U.S. at 605). [Emphasis added.]

The first reason leads into and is necessarily part and parcel of the second. However, the fact that it was “arguable” that Dickjose’s second statement was the fruit of his first, does not rise to the level of establishing that the court committed “probable error” when the trial court admitted Dickjose’s statements.

Moreover, the trial court’s admission of the statements did not “substantially alter the status quo.”

As the Commissioner noted, and as the trial court apparently failed to recognize, that the Supreme Court's opinion in *State v. Eserjose* was a plurality opinion. *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011)).

Plurality opinions have limited precedential value and are not generally binding on the court. *Kallin v. Clallam County*, 152 Wn. App. 974, 985, 220 P.3d 222 (2009); *In re Personal Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). This is because when no rationale for a decision of an appellate court receives a clear majority, the holding of the court is the position taken by those concurring on the narrowest grounds. See *State v. Patton*, 167 Wn.2d 379, 391, 219 P.3d 651 (2009) (citing *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998)).

The vote to affirm the conviction in *Eserjose* was 3-1-1, with four votes to reverse the conviction. Because there were four votes for Justice (Charles) Johnson's dissent, technically it was in fact the plurality opinion with the most votes, although it was not controlling and was in the minority as to the result of affirmance of Eserjose's conviction.

In *Eserjose*, the Supreme Court granted direct review. *Eserjose*, 171 Wn.2d at 909. Therefore, the case did not result in a prior opinion from the Court of Appeals that remains in effect as controlling precedent.

b. The Record Is Insufficient To Permit Proper Review.

The hearing on the motion to suppress the defendant's statements was heard starting on May 11, 2012, which was on the second day of trial. CP 147. The hearing continued off and on over a period of days while trial simultaneously progressed. *See* CP 147, 152, 153, 154. Testimony was taken on May 11 and 21 of 2012. *See* CP 147, 152-153. The court presented its decision to the parties on May 21 at 2:32 p.m. CP 154.

The record only contains a transcript of the proceedings on May 11, 2012. Where the record lacks a transcript of the testimony and proceedings on May 21, and where there is similarly no transcript of the court's oral presentation of its ruling, the record is insufficient to permit adequate review of the issues before the court.

Because the record is insufficient to permit proper review, Dickjose cannot meet his burden, and the appeal should be dismissed without further review.

2. THE TRIAL COURT PROPERLY ADMITTED DICKJOSE'S POST-ARREST STATEMENTS WHERE HIS ARREST PURSUANT TO THE WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

The Court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. *State v.*

Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

At the end of its finding of fact I, the court made the following determination

In April of 2009, the Court of Appeals, Division Two, determined that the warrant was not valid because the basic legal premise to support probable cause to enter defendant's house was faulty. Because the police had no probable cause to enter defendant's house, his arrest therein was illegal. U. S. v. Payton, 445 U.S. 573, 100 S. Ct. L.ED 2nd 639 (1980.)

CP 59. First, this is not properly a finding of fact, but rather, at a minimum a mixed finding of fact and conclusion of law.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal.

State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Hill*, 123 Wn.2d at 644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 877

P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact. *Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)). *See Hoke v. Stevens-Norton, Inc.*, 60 Wn.2d 775, 778, 375 P.2d 743 (1962); *See also Neil F. Lampson Equip. Rental & Sales, Inc. v. West Pasco Water Sys., Inc.*, 68 Wn.2d 172, 174, 412 P.2d 106 (1966) (stating that where conclusions of law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law).

The court reviews conclusions of law *de novo*. *State v. Smith*, 154 Wn. App. 695, 699, 226 P.3d 195 (2010) (citing *State v. O'Neill*, 148

Wn.2d 564, 571, 62 p.3d 489 (2003); *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008)).

Moreover, the conclusion that Dickjose's arrest was unlawful is without merit because the warrant also authorized the arrest of Dickjose, and probable cause to arrest Dickjose existed independently of whether there was probable cause to search the residence for evidence of the crimes of delivery or possession with intent to deliver.

It is the State's position that the trial court erred its conclusion (expressed in Finding of Fact I) that "Because the police had no probable cause to enter defendant's house, his arrest therein was illegal." Where conclusions of law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law. *Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.*, 68 Wn.2d 172, 174, 412 P.2d 106 (1966).

The trial court's conclusion overlooks the fact that the warrant separately listed Dickjose's person as one of the items to be searched. The warrant stated:

THEREFORE, in the name of the State of Washington, you are commanded that within ten days from this date, with necessary and proper assistance, you enter into and/or search the said house, person, place or thing, to-wit:

The residence: 18111 41st AV E, Tacoma WA 98446. 18111 41st AV E is listed as a two acre parcel. The residence appears to be a blue double wide manufactured home. There are also two detached garages, One four car garage and one appears to be an RV/shop type garage.

All out buildings, trailers and vehicles on the property.

The person: A W/M known as David C. Dickjose, 05-26-67.

And then and there diligently search for said evidence, and any other, and if same, or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search, bring the same forthwith before me, to be disposed of according to law. ...

CP 18-19. [Emphasis added.]

While the officers did not have a basis to search for other evidence of the crimes, they did have probable cause to search the house for Dickjose's person. Once they were in the house, the officers were entitled to arrest Dickjose because they also had probable cause to believe he committed the deliveries.

Because Dickjose's person was listed as an object of the search in the warrant, and because the officers had probable cause to arrest him for the deliveries to the informant, the entry into the house was lawful in order to find his person and his arrest was therefore also lawful.

Where officers have probable cause to believe a felony has been committed, a warrant is required before they can enter into a home to

effect an arrest. See *State v. Ruem*, 179 Wn.2d 195, 313 P.3d 1156, 1160-61 (2013); *State v. Hatchie*, 161 Wn.2d 390, 166 P.3d 698 (2007); *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).⁴ The Washington Supreme Court has held that an arrest warrant founded on probable cause allows law enforcement officers the limited power to enter a residence for an arrest where 1) the entry is reasonable, 2) the entry is not a pretext for conducting other unauthorized searches or investigations, 3) the officers have probable cause to believe the person named in the arrest warrant is an actual resident of the home; and 4) the named person is actually present at the time of entry. *Ruem*, 313 P.3d at 1160.

However, when officers seek to arrest a suspect at the residence of a third party, a higher standard applies to protect the privacy interests of the third party. An arrest warrant will not suffice, and instead a search warrant is required. See Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 4th ed., vol. 3 § 6.1(b), p. 280-281 (2004). Because a search warrant provides greater protection, the use of a search warrant is sufficient to effect a lawful arrest of the suspect. See LaFave, vol. 3, § 6.1(b), p. 281-82.

Here, Dickjose was charged with one count of unlawful possession

⁴ At the time of the drafting of this brief, the pinpoint citations for the Washington reporter were not available for the *Ruem* case, accordingly, pinpoint citations are to the Pacific Reports.

of a controlled substance with intent to deliver. CP 1-3. The evidence in support of that count was obtained in the search of his residence and his vehicles. When the tainted evidence was suppressed, that count was no longer viable. However, Dickjose was also charged with three counts of delivery for the transactions he completed to the informant. CP 1-3.

The officers had probable cause to arrest Dickjose for the deliveries he made to the informant. That probable cause existed regardless of the fact that there was not a sufficient nexus to support the search of his residence or his vehicles.

The trial court erred because it failed to recognize that the search of the residence, search of the vehicles, and search for Dickjose to arrest him each had different probable cause requirements. The trial court failed to recognize that probable cause to arrest Dickjose existed independent of whether a sufficient nexus existed to render the search of his residence was lawful.

The evidence collected from the residence was the issue before the Court of Appeals in earlier opinion from Dickjose's first discretionary review. It was not before the court whether the arrest of Dickjose was lawful. The trial court incorrectly assumed Dickjose's arrest was unlawful based on the Court of Appeal's suppression of the evidence obtained in the search of the house. That conclusion was error where the warrant

specifically permitted the officers to search for Dickjose's person, which it was reasonable to believe would be in his residence.

Because Dickjose's arrest was lawful, his statements to police were not the fruit of an unlawful arrest. Accordingly, the statements were properly admissible and the attenuation analysis undertaken by the court was irrelevant.

Where Dickjose was lawfully arrested, the court properly admitted his post-arrest statements, notwithstanding the fact that it mistakenly applied a misplaced attenuation analysis

3. THE TRIAL COURT PROPERLY RULED THAT DICKJOSE'S STATEMENTS TO POLICE WERE ADMISSIBLE.

Where *Eserjose* is a plurality opinion, discretionary review was improperly granted because Dickjose cannot meet his burden to establish probable error. However, because of the ambiguity regarding the validity of attenuation under the Washington Constitution, the State hereby expressly abandons any argument in reliance upon attenuation. Rather, the State asserts that its sole argument for relief is based upon the argument in the preceding section that the arrest of Dickjose was lawful pursuant to the warrant.

For a variety of reasons, on appeal the State intentionally and with forethought elects to rely solely on the lawfulness of Dickjose's arrest and abandon any argument that depends upon attenuation.

E. CONCLUSION.

The court should dismiss the appeal because discretionary review was improvidently granted and because the record is insufficient to permit review. The court properly admitted Dickjose's pre-arrest statements because he was lawfully arrested pursuant to the warrant. The State abandons any argument based upon attenuation.

DATED: March 18, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney


STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/18/14 Johnson
Date Signature

PIERCE COUNTY PROSECUTOR

March 18, 2014 - 2:43 PM

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