

NO. 46218-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

RICHARD JAMES SCHMELING, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00754-1

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ANSWERS TO ASSIGNMENTS OF ERROR..... 1

I. THE TRIAL COURT DID NOT ERR BY DENYING MR. SCHMELING’S MOTION TO SUPPRESS..... 1

II. THE SEARCH OF MR. SCHMELING’S CAR DID NOT VIOLATE HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, SEC. 7. .... 1

III. THE TRIAL COURT DID NOT ERR BY FINDING THAT MR. SCHMELING VOLUNTARILY CONSENTED TO A SEARCH OF HIS CAR, INCLUDING CONTAINERS..... 1

IV. THE TRIAL COURT DID NOT SHIFT ANY BURDEN TO MR. SCHMELING. .... 1

V. THE POLICE DID NOT VIOLATE MR. SCHMELING’S RIGHTS WHEN THEY SEARCHED HIS CAR PURSUANT TO HIS CONSENT..... 1

VI. THE TRIAL COURT DID NOT ERR BY CONCLUDING THAT MR. SCHMELING CONSENTED TO A SEARCH OF HIS CAR AND HIS PERSONAL ITEMS..... 1

VII. MR. SCHMELING’S FELONY CONVICTION DOES NOT VIOLATE THE EIGHTH AMENDMENT’S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT..... 1

VIII. RCW 69.50.4013 DOES NOT VIOLATE DUE PROCESS. ... 1

IX. THE ORDER IMPOSING \$800 IN ATTORNEY FEES DID NOT VIOLATE DUE PROCESS OR MR. SCHMELING’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL..... 1

X. THE TRIAL COURT DID NOT ERR WHEN IT IMPOSED ATTORNEY FEES. .... 2

XI. THE TRIAL COURT DID NOT ERR BY ADOPTING FINDING OF FACT NO. 2.5 IN THE JUDGMENT AND SENTENCE..... 2

|      |  |    |
|------|--|----|
| B.   | STATEMENT OF THE CASE.....   | 2  |
| I.   | PROCEDURAL HISTORY .....   | 2  |
| II.  | STATEMENT OF FACTS.....  | 2  |
| C.   | ARGUMENT.....  | 6  |
| I.   | THE EVIDENCE ADMITTED AT TRIAL AGAINST MR. SCHMELING WAS LAWFULLY SEIZED PURSUANT TO VALID CONSENT. ....   | 6  |
| II.  | RCW 69.50.4013 IS NOT UNCONSTITUTIONAL AS APPLIED TO MR. SCHMELING BECAUSE HE DID NOT RECEIVE A SENTENCE THAT VIOLATED THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT NOR DID THE STATUTE PREVENT HIM FROM RECEIVING DUE PROCESS..... | 11 |
| a.   | The Eighth Amendment .....   | 11 |
| b.   | Due Process .....  | 14 |
| III. | MR. SCHMELING WAIVED HIS RIGHT TO CONTEST THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BY NOT OBJECTING AT THE TRIAL COURT LEVEL.....   | 15 |
| D.   | CONCLUSION.....  | 19 |

## TABLE OF AUTHORITIES

### Cases

|  |        |
|--|--------|
| <i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183,<br>11 P. 3d 762 (2001)..... | 11     |
| <i>DeHeer v. Seattle Post–Intelligencer</i> , 60 Wn.2d 122,<br>372 P.2d 193 (1962).....          | 13     |
| <i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116 (1974).....                                 | 18     |
| <i>Gregg v. Georgia</i> , 428 U.S. 153, 96 S.Ct. 2909,<br>49 L.Ed.2d 859 (1976).....             | 12     |
| <i>Harmelin v. Michigan</i> , 501 U.S. 957, 111 S.Ct. 2680,<br>115 L.Ed.2d 836 (1991).....       | 12     |
| <i>Lambert v. California</i> , 355 U.S. 225, 78 S.Ct 240 (1957).....                             | 15     |
| <i>Miller v. Alabama</i> , --- U.S. ----, 132 S.Ct. 2455,<br>183 L.Ed.2d 407 (2012).....         | 11     |
| <i>State v. Afana</i> , 169 Wn.2d 169, 233 P.3d 879 (2010).....                                  | 7      |
| <i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....                                 | 18     |
| <i>State v. Blazina</i> , 17 Wn.App. 906, 301 P.3d 492 (2013).....                               | 15     |
| <i>State v. Bluehorse</i> , 159 Wn.App. 410, 248 P.3d 537 (2011).....                            | 7      |
| <i>State v. Bradshaw</i> , 152 Wn.2d 528, 98 P.3d 1190 (2004).....                               | 14     |
| <i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....                                    | 17     |
| <i>State v. Bustamante–Davila</i> , 138 Wn.2d 964, 983 P.2d 590 (1999) .....                     | 8      |
| <i>State v. Calvin</i> , --- Wn.App. ----, 316 P.3d 496 (2013).....                              | 15     |
| <i>State v. Cleppe</i> , 96 Wn.2d 373, 635 P.2d 435 (1981).....                                  | 14, 15 |
| <i>State v. Crook</i> , 146 Wn.App. 24, 189 P.3d 811 (2008).....                                 | 18     |
| <i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....                                  | 17, 18 |
| <i>State v. Dow</i> , 162 Wn.App. 324, 253 P.3d 476 (2011).....                                  | 14     |
| <i>State v. Duncan</i> , 180 Wn.App. 245, 327 P.3d 699 (2014).....                               | 15     |
| <i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998) .....                               | 7      |
| <i>State v. Garvin</i> , 166 Wn.2d 242, 207 P.3d 1266 (2009).....                                | 6      |
| <i>State v. Hayes</i> , 165 Wn.App. 507, 265 P.3d 982 (2011) .....                               | 15, 16 |
| <i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....                                 | 11     |
| <i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012) .....                                 | 16     |
| <i>State v. Jones</i> , 146 Wn.2d 328, 45 P.3d 1062 (2002).....                                  | 7      |
| <i>State v. Kronich</i> , 160 Wn.2d 893, 161 P.3d 982 (2007).....                                | 16, 17 |
| <i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991) .....                                  | 14     |
| <i>State v. Lynn</i> , 67 Wn.App. 339, 835 P.2d 251 (1992).....                                  | 16, 17 |
| <i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....                             | 16, 17 |
| <i>State v. Morin</i> , 100 Wn.App. 25, 995 P.2d 113 (2000).....                                 | 12     |

|  |          |
|--|----------|
| <i>State v. Ortega</i> , 177 Wn.2d 116, 297 P.3d 57 (2013).....                          | 7        |
| <i>State v. Patton</i> , 167 Wn.2d 379, 219 P.3d 651 (2009) .....                        | 7        |
| <i>State v. Rivas</i> , 126 Wn.2d 443, 896 P.2d 57 (1995) .....                          | 15       |
| <i>State v. Ruem</i> , 179 Wn.2d 195, 313 P.3d 1156 (2013).....                          | 8        |
| <i>State v. Russell</i> , 180 Wn.2d 860, 330 P.3d 151 (2014).....                        | 7, 8, 11 |
| <i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1998).....                          | 16, 17   |
| <i>State v. Shoemaker</i> , 85 Wn.2d 207, 533 P.2d 123 (1975) .....                      | 8        |
| <i>State v. Smith</i> , 93 Wn.2d 329, 610 P.2d 869 (1980).....                           | 12, 13   |
| <i>State v. Smits</i> , 152 Wn.App. 514, 216 P.3d 1097 (2009).....                       | 18       |
| <i>State v. Staley</i> , 123 Wn.2d 794, 872 P.2d 502 (1994) .....                        | 14       |
| <i>State v. Stein</i> , 144 Wn.2d 236, 27 P.3d 184 (2001) .....                          | 16       |
| <i>State v. Vike</i> , 125 Wn.2d 407, 885 P.2d 824 (1994).....                           | 14       |
| <i>State v. Weller</i> , --- Wn.App. ---, --- P.3d ---,<br>2015 WL 686791, 4 (2015)..... | 6, 7     |
| <i>State v. Witherrite</i> , --- Wn.App. ---, 33 P.3d 992 (2014) .....                   | 8        |
| <i>State v. Young</i> , 89 Wn.2d 613, 574 P.2d 1171 (1978).....                          | 13       |
| <i>U.S. v. Macias</i> , 740 F.3d 96 (2nd Cir. 2014).....                                 | 15       |
| <i>Weems v. United States</i> , 217 U.S. 349, 30 S.Ct. 544,<br>54 L.Ed. 793 (1910).....  | 11       |

### **Statutes**

|                      |            |
|----------------------|------------|
| RCW 10.01.160 .....  | 18, 19     |
| RCW 69.50.4013 ..... | 15         |
| RCW 9.94A.030.....   | 17, 18, 19 |
| RCW 9.94A.760.....   | 17, 19     |

### **Other Authorities**

|   |    |
|---|----|
| The Supreme Court—Leading Cases, 1990 Term, 105 HARV. L.REV.<br>177, 2522 (1991)..... | 13 |
|---|----|

### **Rules**

|                  |            |
|------------------|------------|
| RAP 2.5(a) ..... | 15, 16, 19 |
|------------------|------------|

A. ANSWERS TO ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT DID NOT ERR BY DENYING MR. SCHMELING'S MOTION TO SUPPRESS.
- II. THE SEARCH OF MR. SCHMELING'S CAR DID NOT VIOLATE HIS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, SEC. 7.
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- IV. THE TRIAL COURT DID NOT SHIFT ANY BURDEN TO MR. SCHMELING.
- V. THE POLICE DID NOT VIOLATE MR. SCHMELING'S RIGHTS WHEN THEY SEARCHED HIS CAR PURSUANT TO HIS CONSENT.
- VI. THE TRIAL COURT DID NOT ERR BY CONCLUDING THAT MR. SCHMELING CONSENTED TO A SEARCH OF HIS CAR AND HIS PERSONAL ITEMS.
- VII. MR. SCHMELING'S FELONY CONVICTION DOES NOT VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.
- VIII. RCW 69.50.4013 DOES NOT VIOLATE DUE PROCESS.
- IX. THE ORDER IMPOSING \$800 IN ATTORNEY FEES DID NOT VIOLATE DUE PROCESS OR MR. SCHMELING'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL.

**X. THE TRIAL COURT DID NOT ERR WHEN IT IMPOSED ATTORNEY FEES.**

**XI. THE TRIAL COURT DID NOT ERR BY ADOPTING FINDING OF FACT NO. 2.5 IN THE JUDGMENT AND SENTENCE.**

**B. STATEMENT OF THE CASE**

**I. PROCEDURAL HISTORY**

Richard Schmeling was charged by amended information with Possession of a Controlled Substance on or about April 18, 2013, and Theft in the Third Degree for an incident on or about April 13, 2013. CP 32. The case originally proceeded to trial before The Honorable Scott Collier, which commenced on January 22, 2014, and concluded on the same day with a mistrial because there was a hung jury. RP 100-320. The case was retried beginning on April 21, 2014, and concluding on the same with a jury verdict. RP 371-631.

The jury found Mr. Schmeling guilty as charged and the trial court sentenced him to a standard range sentence of 30 days jail and fifteen days of work crew. RP 630-31, 646-48; CP 86-106. Mr. Schmeling filed a timely notice of appeal. CP 107.

**II. STATEMENT OF FACTS**

On April 13, 2013, Suleiman Musa, manager of Young's Deli in Camas, had contact with Mr. Schmeling. RP 413-17. Mr. Musa turned his

back to Mr. Schmeling when Mr. Schmeling ordered jojo potatoes, but when he turned around to ask Mr. Schmeling if he wanted “some ranch” he noticed, out of the corner of his eye, Mr. Schmeling make a quick movement that aroused his suspicion. RP 418-421, 432, 437-38. Mr. Schmeling paid for the jojos and a glass pipe and left the store. RP 420. Mr. Musa immediately went to watch store surveillance to confirm his suspicion. RP 419-425. Mr. Musa believed the surveillance videos showed Mr. Schmeling grab product from the store without paying for it. RP 426-430, 432, 434-35. Mr. Musa also noticed that some of his product was missing from the area around where Mr. Schmeling had been. RP 440-41. As a result, Mr. Musa called the police. RP 421.

Sergeant David Chaney of the Camas Police Department responded to Mr. Musa’s call the next day. RP 447. Mr. Musa told Sergeant Chaney that a regular customer of his had purchased some jojos and a glass pipe the previous day, but that he believed the customer had stolen some male sexual enhancement pills. RP 448. Sergeant Chaney then reviewed the video surveillance with Mr. Musa. RP 448, 451. During the next couple days Sergeant Chaney worked on identifying the customer and was able to identify him as Richard Schmeling. RP 452-53.

On April 18, 2013, Mr. Schmeling was pulled over and detained as a result of the probable cause stemming from the theft on April 13, 2013.

He had a passenger with him on that day, but she was released on foot shortly after the stop. RP 455, 483, 485. Sergeant Chaney asked Mr. Schmeling to step out of the car and then read him his *Miranda* rights. RP 455. Sergeant Chaney told Mr. Schmeling that he was caught on video stealing from Young's Deli and asked him if he still had the pills. RP 456. Mr. Schmeling responded that he had taken all the pills and admitted that had stolen "Steel Rod" male enhancement pills from Young's Deli on that day because he did not have enough money. RP 456-57. Mr. Schmeling contested, however, that he took as many of the pills as was alleged; rather, he would only admit to taking one or two packages. RP 548. Mr. Schmeling also admitted that he used pipes like the one he purchased to smoke methamphetamine. RP 457, 549.

Following the admissions, Sergeant Chaney told Mr. Schmeling that he wanted to search Mr. Schmeling's vehicle to make sure it did not contain the stolen merchandise. RP 458. Thus, Sergeant Chaney read Mr. Schmeling the *Ferrier* warnings. RP 458. Mr. Schmeling consented to the search. RP 458. During the search of the vehicle, a blue duffel bag was found. RP 459, 487. Inside the blue duffel bag was an empty package of the Steel Rod male enhancement product and a fanny pack that contained a glass drug pipe, a scale, marijuana, unused, tiny Ziploc baggies, and two

small Ziploc baggies that contained methamphetamine. RP 459, 470-71, 487, 508, 510-511.

Sergeant Chaney got Mr. Schmeling out of the police car to show him the items that were discovered. RP 460. Mr. Schmeling immediately said “not everything in the bag is mine.” RP 460, 491, 533. When Sergeant Chaney showed Mr. Schmeling the two baggies of methamphetamine, Mr. Schmeling indicated that they were not his property. RP 460, 491. But when Sergeant Chaney asked him if his fingerprints would be found on the baggies containing the methamphetamine, Mr. Schmeling dropped his head and said “[y]eah, probably.” RP 460, 466, 533, 549, 554, 557-58. Mr. Schmeling also told Sergeant Chaney that he had been smoking methamphetamine for about a year and that is why he had the glass drug pipe. RP 460, 467, 549.

After Mr. Schmeling admitted to convictions for theft on January 7, 2011, April 23, 2011, and November 18, 2012, he testified that he did not commit the theft in question and that he did not confess to doing so to Sergeant Chaney. RP 525-27, 529, 531, 556. Mr. Schelling acknowledged that he had purchased “Steel Rod” male enhancement pills from the store before, but that on the day in question, he did not have the money to buy them so instead he just looked at them on the shelf. RP 526-27. Additionally, Mr. Schmeling claimed that while the duffel bag that

was discovered was his, the fanny pack inside of it was that of his passenger. RP 533-34. When asked why he answered that his fingerprints would probably be on the baggies of methamphetamine, Mr. Schmeling responded “[t]hat I knew it was -- I knew it wasn't mine, but I knew I had touched it. It was [the passenger]'s and, you know, we had smoked together before, but you know, not that day or anything. So mine might have been on those baggies, you know?” RP 557-58.

**C. ARGUMENT**

**I. THE EVIDENCE ADMITTED AT TRIAL AGAINST MR. SCHMELING WAS LAWFULLY SEIZED PURSUANT TO VALID CONSENT.**

When an appellate court reviews the denial of a suppression motion, the court determines “whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law.” *State v. Weller*, --- Wn.App. ----, --- P.3d ----, 2015 WL 686791, 4 (2015) (citing *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009)). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. *Garvin*, 166 Wn.2d at 249. An appellate court reviews “de novo the trial court's conclusions of law pertaining to the suppression of evidence” and “[s]pecifically, whether an exception to the warrant requirement applies. . . .” *Weller*, 2015 WL

686791 at 4. A failure to enter findings of fact and conclusions of law is error, but harmless if the trial court's oral findings are sufficient to permit appellate review. *Id.* (citing *State v. Bluehorse*, 159 Wn.App. 410, 423, 248 P.3d 537 (2011)).

Article I, section 7 of our state constitution provides greater protection to individuals from warrantless searches and seizures than does the Fourth Amendment of the United States Constitution. *State v. Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013). “A warrantless search is per se unreasonable and its fruits will be suppressed unless it falls within one of the carefully drawn and jealously guarded exceptions to the warrant requirement.” *Id.* (citing *State v. Afana*, 169 Wn.2d 169, 176–77, 233 P.3d 879 (2010); *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009)). In other words, the State must show one of the exceptions exists for a warrantless search or seizure to be considered lawful. *Weller*, 2015 WL 686791 at 3; *Ortega*, 177 Wn.2d at 122 (citing *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002)).

“[C]onsent to a warrantless search is one of the narrow exceptions to the warrant requirement” and the State has the burden to show that the consent was voluntarily given. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Russell*, 180 Wn.2d 860, 871, 330 P.3d 151 (2014) (citing *State v. Bustamante–Davila*, 138 Wn.2d 964, 981, 983 P.2d

590 (1999)). Simply put, the “[p]olice do not need a warrant for searches if they have valid consent.” *Russell*, 180 Wn.2d at 871. The validity of a defendant’s consent to search is “a *question of fact* dependent on the totality of the circumstances.” *Id.* (emphasis added) (citation omitted); *State v. Shoemaker*, 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975).

In employing this totality of the circumstances test, the court should consider “(1) whether Miranda warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right not to consent” as well as any express or implied claims of police authority to search. *Id.* at 872-73 (quoting *Shoemaker*, 85 Wn.2d at 212); *State v. Ruem*, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013). No single factor, however, is dispositive. *Ruem*, 179 at 207; *Russell*, 180 Wn.2d at 872. When a vehicle search is at issue, “*Ferrier* warnings need not be given prior to obtaining consent” from the defendant to search his or her vehicle. *State v. Witherrite*, --- Wn.App. ----, 33 P.3d 992, 994 (2014).

Here, Sergeant David Chaney was the only witness who testified at the CrR 3.6 hearing. He testified that he read Mr. Schmeling his *Miranda* rights to which Mr. Schmeling expressed no confusion and replied that he understood his rights. RP 7-9, 33-34. Next, Sergeant Chaney gave Mr.

Schmeling the *Ferrier* warnings prior to asking for consent to search his vehicle. RP 10-11, 15, 19-20, 36-37. Once again, Mr. Schmeling expressed no confusion and indicated he understood the *Ferrier* warnings when asked by nodding his head and saying “yeah.” RP 11, 16-17, 36-37, 41-42. Mr. Schmeling then gave consent to search his vehicle. RP 10-12, 18.

At this point, another officer began searching Mr. Schmeling’s vehicle which was parked a few feet directly in front of Sergeant Chaney’s car in which Mr. Schmeling was seated. RP 12, 16. From that vantage point, the search of Mr. Schmeling’s vehicle was easily observable, though one could not see exactly what the searching officer was looking at inside the vehicle. RP 12-13, 16, 18, 38-39. The windows of Sergeant Chaney’s car were rolled down and Sergeant Chaney was standing nearby so that during the search Mr. Schmeling could revoke his consent or limit the scope of the search if he so chose. RP 12-13, 16, 18. Mr. Schmeling never gave any indication during the search that he wanted the search to stop or that wished the police not to search certain areas or items. RP 13-14. During the search of Mr. Schmeling’s vehicle, evidence was found. RP 13. Mr. Schmeling was then escorted from Sergeant Chaney’s car and asked questions about the evidence. RP 13-14, 37. Following those

questions, the officer asked Mr. Schmeling if they could continue their search by searching the trunk of his vehicle; he assented. RP 14, 37, 41.

Based on the above facts, and employing the proper totality of the circumstances test, the trial court held that the police received valid consent to search Mr. Schmeling's vehicle. RP 33 ("was this consent voluntary, alright? And I agree with [the State], you get the subparts on that and you look at this [sic] totality of the circumstances."), RP 32-42. In particular, the court noted that Mr. Schmeling was read his *Miranda* rights and the *Ferrier* warnings and affirmatively expressed that he understood both while expressing no confusion to the officer. RP 33-34, 36-37, 41-42. The court also noted, regarding Mr. Schmeling's education and intelligence, that "[t]hey're [(Sergeant Chaney and Mr. Schmeling)] engaged in a conversation and the answers match up. . . . [T]he way it's being described to me, it appears that the officer is engaged in this type of conversation and is getting appropriate responses without the showing of confusion." RP 34.<sup>1</sup> As a result, keeping in mind that the validity of a defendant's consent to search is a "question of fact," the trial court properly employed the totality of the circumstances test and did not err

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<sup>1</sup> The trial court also indicated that the officer did not know if Mr. Schmeling had "a high-school education, two years at Clark College after that, or a master's degree somewhere." RP 34. While the State attached a plea form showing that Mr. Schmeling had completed the 12<sup>th</sup> grade to its memorandum in response to Mr. Schmeling's motion to suppress and discussed the plea form in argument, it does not appear the trial court relied on that fact in making its ruling. RP 30, 32-42; CP 8-23.

when it found that the police received valid consent to search Mr. Schmeling's vehicle. *Russell*, 180 Wn.2d at 871.

**II. RCW 69.50.4013 IS NOT UNCONSTITUTIONAL AS APPLIED TO MR. SCHMELING BECAUSE HE DID NOT RECEIVE A SENTENCE THAT VIOLATED THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT NOR DID THE STATUTE PREVENT HIM FROM RECEIVING DUE PROCESS.**

Courts presume that statutes are constitutional; a party challenging a "statute's constitutionality bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P. 3d 762 (2001); *State v. Hunley*, 175 Wn.2d 901, 908, 287 P.3d 584 (2012).

**a. The Eighth Amendment**

The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. *Miller v. Alabama*, --- U.S. ----, 132 S.Ct. 2455, 2463, 183 L.Ed.2d 407 (2012) (citation and quotation omitted). The Eighth Amendment right is derived from the "'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). "[I]n assessing a punishment selected by

a democratically elected legislature against the constitutional measure,” reviewing courts are to presume its validity. *State v. Smith*, 93 Wn.2d 329, 341, 610 P.2d 869 (1980) (quoting *Gregg v. Georgia*, 428 U.S. 153, 175, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859 (1976)). Moreover, a reviewing court cannot strike down a punishment or penalty because it believes that there are less severe penalties that are “adequate to serve the ends of penology.” *Id.*

A punishment that is grossly disproportionate violates the Eighth Amendment; however, a punishment is “grossly disproportionate only if the conduct should never be proscribed . . . or if the punishment is clearly arbitrary and shocking to the sense of justice.” *Id.* at 344-45 (citing cases). Under this rubric, the United States Supreme Court upheld a mandatory sentence of life without the possibility of parole on a first strike drug offense where the defendant possessed more than 650 grams of cocaine. *Harmelin v. Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). *Harmelin* caused one commentator to note: “[i]f the imposition of a life sentence for first-offense drug possession is consistent with the Eighth Amendment, no prison sentence short of life can be deemed disproportionate for any offense, and even a life sentence cannot be considered constitutionally unsound for any arguably serious crime.” *State v. Morin*, 100 Wn.App. 25, 29, 995 P.2d 113 (2000) (quoting The

Supreme Court—Leading Cases, 1990 Term, 105 HARV. L.REV. 177, 2522 (1991)). Thus, it is no surprise that in *State v. Smith* when a defendant complained that his sentence for possession of over 40 grams of marijuana violated the Eighth Amendment because of its classification as a felony offense our Supreme Court responded that it was “shown no authority for the proposition that classification of a person's offense, or the disabilities attached to that classification can, without more, constitute cruel and unusual punishment,” and denied his Eighth Amendment claim. 93 Wn.2d. at 342.

Here, as in *Smith*, Mr. Schmeling does not claim his *actual* sentence of 30 days of confinement and 15 days of work crew is cruel and unusual, but rather that his crime should not be punished as a felony with its attendant disadvantages. Br. of App. 9-11; CP 88. But, also like the defendant in *Smith*, Mr. Schmeling fails to provide any authority “for the proposition that classification of a person's offense, or the disabilities attached to that classification can, without more, constitute cruel and unusual punishment.” 93 Wn.2d. at 342. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962));

*State v. Dow*, 162 Wn.App. 324, 331, 253 P.3d 476 (2011). An appellate court need not consider issues unsupported by citation to authority. *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991). Consequently, Mr. Schmeling's Eighth Amendment claim fails.

**b. Due Process**

In a prosecution for simple possession of a controlled substance there is no intent requirement. *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). "The State need not prove either knowledge or intent to possess." *Id.* (citing *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994)). Consequently, "possession is a strict liability crime." *Id.* (citation omitted). Thus, the State must only prove two elements: "the nature of the substance and the fact of possession by the defendant." *Staley*, 123 Wn.2d at 798. This area of the law is well-settled. *See State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981) (holding that the mere possession statute does not contain a mens rea element); *State v. Bradshaw*, 152 Wn.2d 528, 534, 98 P.3d 1190 (2004) (refusing to overrule *Cleppe* and noting that in the 22 years "[s]ince *Cleppe* the legislature has amended [the drug possession statute] seven times and has not added a mens rea element").

"There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition" and our legislature has chosen to do just that with the simple drug possession

statute. *Lambert v. California*, 355 U.S. 225, 228, 78 S. Ct 240 (1957); *State v. Rivas*, 126 Wn.2d 443, 452, 896 P.2d 57 (1995); *Cleppe*, 96 Wn.2d 373.<sup>2</sup> This decision does not run afoul of due process and this court should decline, following controlling law from our Supreme Court, Mr. Schmeling’s invitation to employ its inherent authority to craft a *mens rea* element for possession of a controlled substance.

**III. MR. SCHMELING WAIVED HIS RIGHT TO CONTEST THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BY NOT OBJECTING AT THE TRIAL COURT LEVEL.**

Legal financial obligations cannot be challenged for the first time on appeal. *State v. Duncan*, 180 Wn.App. 245, 327 P.3d 699 (2014); *State v. Blazina*, 17 Wn.App. 906, 911, 301 P.3d 492 (2013); *State v. Calvin*, --- Wn.App. ----, 316 P.3d 496, 507 (2013). The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251

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<sup>2</sup> Mr. Schmeling directly states that “Washington’s possession law violates due process,” citing *U.S. v. Macias*, 740 F.3d 96 (2nd Cir. 2014). Br. of App. at 18. *Macias*, however, addresses whether a defendant convicted of being found in the United States as a previously-deported alien was actually “found in” the United States, it does not address Washington law, RCW 69.50.4013, drug possession, due process, or strict liability crimes. 740 F.3d 96-102. The concurring opinion of one judge discusses strict liability crimes and finds an implicit *mens rea* requiring proof of voluntary presence in the United States for the crime charged. *Id.* at 102-08. This holding does not directly support the conclusion that Washington’s possession law violates due process and cannot be authority for said proposition.

(1995)). This “rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted).

An exception to rule exists, however, for manifest errors affecting a defendant’s constitutional rights. RAP 2.5(a)(3); *Hayes*, 165 Wn.App. at 514. To determine whether the exception applies, a reviewing court employs a two-part test. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007) (citing *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992)) (overruled on other grounds by *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012)). “First, the court determines whether the alleged error is truly constitutional. Second, the court determines whether the alleged error is ‘manifest.’” *Id.*

To be manifest, the alleged error must have had “practical and identifiable consequences in the trial of the case.” *Kronich*, 160 Wn.2d at 899 (citing *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)). In other words, the defendant must show, in the context of the trial, actual prejudice as it is this “prejudice that makes the error ‘manifest,’ allowing appellate review.” *McFarland*, 127 Wn.2d at 333 (citing *Scott*, 110 Wn.2d

at 688). Consequently, a “purely formalistic error will not be deemed manifest,” nor will an error that is not “unmistakable, evident, or indisputable.” *Kronich*, 160 Wn.2d at 899; *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (citation omitted). Because “permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts,” courts must not give the term “manifest” an expansive reading. *Lynn*, 67 Wn.App. 343-44; *McFarland*, 127 Wn.2d at 333.

The trial court has broad discretion to impose costs, fines, and fees. *See State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (stating a trial court’s imposition of legal financial obligations is reviewed for abuse of discretion). RCW 9.94A.760 entitled “Legal financial obligations” allows the superior court to order a person who is convicted of a crime to pay a legal financial obligation as part of his or her sentence. RCW 9.94A.760(1). Pursuant to RCW 9.94A.030(30), “legal financial obligation” means

a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds,

*court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction.*

RCW 9.94A.030(30) (emphasis added). In addition, the trial court is not required to enter factual findings on a defendant's ability to pay legal financial obligations. *Curry*, 118 Wn.2d at 916.

Washington's repayment statute, RCW 10.01.160, does not violate the Sixth Amendment by chilling the right to counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997); *Curry*, 118 Wn.2d at 916; *State v. Smits*, 152 Wn.App. 514, 523–24, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn.App. 24, 27, 189 P.3d 811 (2008). Our Supreme Court has consistently held that *Fuller v. Oregon* does not require a court to find that the accused has the actual future ability to pay before ordering payment of court-appointed counsel fees. *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116 (1974); *Blank*, 131 Wn.2d at 239; *Curry*, 118 Wn.2d at 916; *Smits*, 152 Wn.App. at 523–24; *Crook*, 146 Wn.App. at 27. The court is required to find that the defendant will be able to pay, but RCW 10.01.160(3) does not require the trial court to enter formal, specific findings of the defendant's ability to pay when it initially imposes legal financial obligations. Instead, when a defendant is unable to pay the cost of his legal financial obligations, including attorney fees, Washington law permits him to petition for modification of the payments. RCW 10.01.160(4).

Here, this court should decline to consider the issue because Mr. Schmeling failed to preserve this issue for review or meet the requirements of RAP 2.5(a)(3) allowing the issue to be raised for the first time on appeal. Assuming *arguendo* that the issue is properly before the court, this court should affirm the order imposing attorney fees pursuant to RCW 9.94A.760, RCW 9.94A.030, and the above cited cases analyzing RCW 10.01.160.

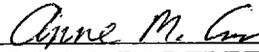
**D. CONCLUSION**

For the reasons argued above, Mr. Schmeling's conviction and the order imposing attorney fees should be affirmed.

DATED this 9<sup>th</sup> day of March, 2015.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:   
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Deputy Prosecuting Attorney

# CLARK COUNTY PROSECUTOR

**March 09, 2015 - 4:01 PM**

## Transmittal Letter

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Court of Appeals Case Number: 46218-4

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