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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 298850

**STATE OF WASHINGTON COURT OF APPEALS
DIVISION THREE**

STATE OF WASHINGTON

Respondent,

v.

SCOTT SHUPE

Appellant

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

A. Contrary to the suggestions of the respondent, State of Washington, on page 2 of its brief, it is an established law of appellate review that the merits of an appeal will be reached by the court, notwithstanding the absence of proper assignments of error as contemplated by Rule 10.3(a)(4) of the Washington Rules of Appellate Procedure (RAP).

When the issues as framed by the appellant are reasonably clear from the brief, the opposing party as a result cannot show any undue prejudice therefrom and the court has not been inconvenienced in terms of its review process by way of the lack of assignment of error.

(Respondent's First Issue). On page 2 of its "Brief of Respondent," the State of Washington, baldly claims that it cannot properly "determine, with certainty, exactly what issues the defendant, Mr. Scott Shupe, is trying to raise in every instance" in his opening brief because of the lack of assignment of error as provided under Rule 10.3(a)(4) of the Washington Rules of Appellate Procedure. As a result, the respondent asks that appellant's brief "be returned to the defendant for the addition of the required [a]ssignments of [e]rror . . . [or,] [i]n the alternative, . . . the court restrict the defendant's normally unfettered right to file responsive

briefs."

The alternative proposal of the State makes no sense. Under RAP 10.3(c), an appellant is limited to a single brief in reply and such brief must "be limited to a response to the issues in the brief to which the reply is directed;" in this case, the "Brief of Respondent," State of Washington. Likewise, as to the initial proposal of respondent, a simple review of Mr. Shupe's "Statement of issues" on pages 2 and 3 of his opening brief makes clear that this appeal can easily proceed on the merits without the requested addition of assignments of error.

Contrary to any arguable claim of the State on page 2 of its "Responsive Brief," the issues as framed by Mr. Shupe's opening brief are not only reasonably, *but abundantly*, clear so that neither the State nor the appellate court is required in this case to guess as to the matter for which review is being sought. The statement that "[t]he State did not satisfy their burden of proving Mr. Shupe was guilty of the crimes against him," can be considered vague by no reasonably intellectual mind. Opening Brief of Mr. Shupe, p. 36. The State cannot reasonably argue that Mr. Shupe's assertion that "[t]here was no nexus between 904 E. 11th and a crime occurring," is unclear. *Id.*

If the State had read pages 17, 20, 22, 27, 28, 30, and 34, the State

would have seen the arguments of Mr. Shupe that the State had no probable cause to search addresses referenced therein, and failed to satisfy their burden of proof to convict Mr. Shupe of any of the three charges against Mr. Shupe. Instead, however, the State chose to ignore Mr. Shupe's issues raised. Even if the State ignored those issues, if the State would have read Mr. Shupe's brief with even a modicum of care, the State would have seen the 23 pages of supporting argument and explanation to those issues. Pages 13 through 36 of the opening brief makes clear the nature of the challenges and the precise issues which are being raised on this appeal. "Whether or not a party sets forth assignments of error for each issue on appeal, [the] court will reach the merits if the issues are reasonably clear from the brief, the opposing party has not been prejudiced and [the] court has not been overly inconvenienced." *State v. Grimes*, 92 Wn.App. 973, 978, 966 P.2d 394 (1998), *see also State v. Olsen*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

It is clear that the State knew the issues and contentions presented by Mr. Shupe in his opening brief, but chose not to address them, and instead feigned a prejudicial disadvantage. On page 3 of the State's brief the State clearly singles out Mr. Shupe's argument that RCW 69.51A.010 is vague, correlating to Mr. Shupe's issues F and G. On page 7 of the

State's brief, the State acknowledges that Mr. Shupe is "[attacking] the searches of various addresses," correlating to Mr. Shupe's issues A and B. Also on page 7, the State's brief erroneously argues that Mr. Shupe's "admittance" to the crimes charged releases the State from the requisition to respond to the search issue claims. The State's wording implies that Mr. Shupe's affirmative defense precludes the State from having to respond to Mr. Shupe's issues C, D, and E, which argue the State did not meet their burden of proof in the three charges against Mr. Shupe. This is incorrect.

Under these circumstances, it is well established that the reviewing court will go forward and address and decide the merits of the issues presented on appeal, notwithstanding a technical violation of the requirements of RAP 10.3(a)(4). *See Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn.App. 609, 613-14, 1 P.3d 579, review denied, 142 Wn.2d 1010 (2000); *see also State v. Grimes*, 92 Wn.App. 973, 978, 966 P.2d 394 (1998); *Viereck v. Fibreboard Corp.*, 81 Wn.App. 579, 582-83, 915 P.2d 581, review denied, 130 Wn.2d 1009 (1996).

B. Contrary to the State's spurious assertions on pages 7 and 8 of its responsive brief, Mr. Shupe has not waived or prevented the court from reviewing those issues governing the illegality of the search warrants in this case insofar as the defendant was required to acknowledge those issues in order to raise an affirmative defense under the medical marijuana statutes, RCW Chapter 69.51A. (Respondent's Second Issue).

On pages 7 and 8 of the "Brief of Respondent," the State of Washington argues, without any legal authority or citation whatsoever, that the defendant is barred on appeal from challenging the illegality of certain underlying search warrants on the grounds he was required as a prerequisite at trial, and so as to enable him to invoke an affirmative defense under the provisions of the medical marijuana statute, to admit facts which might otherwise constitute a crime.

This ill-conceived claim of the State fails for a number of reasons. First, it is also longstanding practice in Washington that a criminal defendant having failed to prevail at the trial court level on an issue of suppression under Rule 3.6 of the Washington Criminal Rules for Superior Court [CrR 3.6] is customarily allowed to stipulate to facts associated with guilt leading to a conviction, judgment and sentence, so as to enable him

to seek immediate appellate review of any and all issues pertaining to CrR

3.6. In this regard, any admission of guilt is limited to those issues associated with the propriety of any search and seizure conducted by law enforcement.

Here, it is clear that any admission or stipulation of guilt was strictly limited to effectuate the defendant's right to raise an affirmative defense. As in the case of an appeal based upon stipulated facts, Mr. Shupe should not be prevented from challenging the legality of the searches and seizures in his case.

Second, the argument of the respondent is not supported by any legal authority or citation as required under RAP 10.3(a)(6). It is a long settled rule of appellate practice in Washington that an argument unsupported by any legal authority will not be considered by the appellate court on review. *See Hollis v. Garwall, Inc.* 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999); *see also Beal v. City of Seattle*, 134 Wn.2d 769, 777 n.2, 954 P.2d 237 (1998); *Mattingly v. Palmer Ridge Homes LLC*, 157 Wn. App. 376, at 393 n.13, 238 P.3d 505, at 516 n.13 (2010); *Saviano v. Westport Amusements, Inc., Et Al.*, 144 Wn. App. 72, at 84, 180 P.3d 874, at 879 (2008).

Third, Mr. Shupe is aware of no caselaw supporting the State's

novel position on this issue. In fact, after a diligent search for caselaw in support of the State's position, the defendant is convinced no such caselaw exists. Otherwise, the State would not have failed to cite *any* authority in its responsive brief.

Finally, the State, in raising the issue of waiver on page 7, forgets, or chooses to overlook, the fact that in this context any admission of guilt in this particular instance is once more the "fruit of the poisonous tree" if Mr. Shupe prevails on appeal as to the issue of legality associated with the subject search warrants. Under that doctrine, such violation of the Fourth Amendment requires exclusion of all evidence obtained either directly or indirectly, as a proximate result of the violation of this defendant's rights. *See Wong Sun v. United States*, 371 U.S. 471, 487-88, 92 L.E.2d 441, 83 S.Ct. 407 (1963), *see also Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914); *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010). Any putative confession or admission of guilt on Mr. Shupe's part serves as "poisonous fruit" and, in the event of reversal, is subject to suppression under the Fourth Amendment as well as Article I, section 7, of the Washington State Constitution. Had the suppression motion been granted, Mr. Shupe would never have had to go to trial, and never had to assert an affirmative defense.

C. Contrary to the apparent assertions of the STATE on pages 3 through 7 of its responsive brief, the provisions of RCW 69.51A.010(1) are vague and the jury should not have been given jury instruction no. 23 without explanation of the governing phraseology. (Appellant's Issues F and G).

On pages 3 through 7 of the "Brief of Respondent," the State of Washington responds to issues F and G and the corresponding argument on pages 30 through 36 of Mr. Shupe's opening brief. In this regard, the malapert arguments of the State are not well taken.

Before replying to the State's contentions, it is noted that the State, on page 5 of the State's brief, inaccurately references the recent case of *State v. Brown*, No. 40624-1-II, 2012 Wash. App. LEXIS 97 (Div. 2, January 24, 2012), by stating the case centers on the "question of fact as to whether the defendant supplied marijuana to only one person." In *Brown*, the Court agreed with the defendant that "a factual issue exists regarding whether Brown was a designated provider to *only one patient at a time* under the 2007 Act." *Id.* at **(emphasis added)*. Similarly to Mr. Shupe's argument, in *Brown* the defendant argues that the statute is ambiguous and must be resolved in the defendant's favor, but the Court does not address this argument, or the specifics of what *one person at any one time* means,

only that the defendant “established a prima facia case to support the medical marijuana affirmative defense.” *Id.* at *2-3, *6.

Mr. Shupe stands by the argument in the opening brief pertaining to issue F and G. The 2007 statute is vague. This is evidenced by changes made recently. “Under the 2011 amendments, law enforcement must have evidence that the designated provider has *served* more than one qualifying patient within a *15-day period*.” *Brown* at *4 (*emphasis in original*). At the time that Mr. Shupe began operating “Change,” prior to the 2011 Amendments, there was no requirement that a provider only serve one person within a legislated time frame. There is no case law, no statute, no indication what, prior to the 2011 Amendments, *one person at any one time* meant. It could have meant one person per hour, day, month, or year, but there was no way for Mr. Shupe, law enforcement, or judicial officers, to know.

The State provides no legislative note or intent for the timeframe for when a designated provider may begin to provide for a medical marijuana patient after the conclusion of service to another. On page 5 of the State’s brief, the State only assumes that Mr. Shupe argues that the legislature was “clueless.” But the State is mistaken. Mr. Shupe contends that the law was vague, and the purpose and intent of the legislature was

not adequately reflected in the wording of RCW 69.51A.010, which is evidenced in the subsequent revision of the Chapter in 2011.

The State also provides no governing case law on what “one person at any one time” means under the pre-2011 law. *Brown* does not apply, because the issue in *Brown* was whether the defendant was *even allowed to raise* the affirmative defense of a designated provider, not whether the Court had erred in determining what *one person at any one time* means. Mr. Shupe’s argument is that the pre-2011 law could not allow propriety, justice, or fairness, for any defendant, prosecution, or Court because of the ambiguity. Because of the ambiguity, there is, as the State argues on page 6 of their brief, no method of enforcement.

Mr. Shupe urges this Court to give strong consideration to the concerns of the Honorable Superior Court Judge Eitzen on April 12th, 2011, where she stated *she* believed “the law was unclear, the defendant didn’t mean to break the law, and it’s particularly disturbing because...the rule of law...should...be clear about what the law means and is...” RP, vol. IV, 583-584, April 12th, 2011.

D. Insofar as the respondent, State of Washington, has failed to address and respond to the remainder of the appellants' issue A through E, such failure should be taken as a concession by the State as to the merits of the same on this appeal. (Appellant's Issues A through E).

Curiously enough, the respondent, State of Washington, has only responded to the foregoing issues F and G as raised in Mr. Shupe's opening brief. The State has chosen not to address and respond to the remainder of the appellants' issue A through E as contemplated by RAP 10.3(b). Under accepted practice, such apparent failure on the State should now be taken by this reviewing court as a concession by the respondent as to the merits of those issues on this appeal. *See State v. Ward*, 125 Wn.App. 138, 143-44, 104 P.3d 61 (2005). This is particularly true since such concession is entirely consistent with the governing law as set forth in appellant's opening brief, at pages 13 through 30, concerning those issues unaddressed by the State in its responsive brief. *See State v. Steen*, 164 Wn.App. 789, 804 n.10, 265 P.3d 901 (2011).

II. CONCLUSION

Based upon the foregoing points and authorities, the appellant, Mr. Scott Q. Shupe, once more respectfully requests that the subject criminal conviction, judgment and sentence be reversed, RCW 69.51A.010 be void for vagueness, and the subject charges against him be dismissed with prejudice.

DATED this 6th day of March, 2012.

Respectfully submitted:

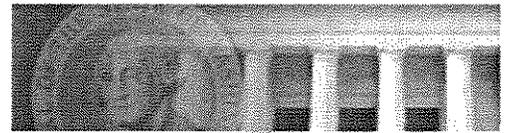
A handwritten signature in black ink, appearing to read 'Frank L. Cikutovich', written over a horizontal line.

Frank L. Cikutovich, WSBA #25243
Attorney for Mr. Scott Q. Shupe

APPENDICES



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RULE 3.6
SUPPRESSION HEARINGS--DUTY OF COURT

(a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

Adopted 82 Wn.2d 1114 effective July 1, 1973

Amended 89 Wn.2d 1107 effective May 15, 1978

Amended 130 Wn.2d 1102 effective January 2, 1997

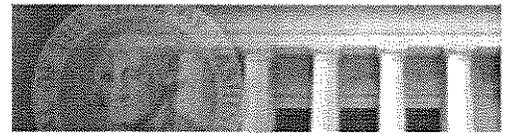
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RULE 10.3
CONTENT OF BRIEF

(a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:

(1) Title Page. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where cited.

(3) Introduction. A concise introduction. This section is optional. The introduction need not contain citations to the record of authority.

(4) Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

(6) Argument. The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

(7) Conclusion. A short conclusion stating the precise relief sought.

(8) Appendix. An appendix to the brief if deemed appropriate by the party submitting the brief. An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).

(b) Brief of Respondent. The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner. If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.

(c) Reply Brief. A reply brief should conform with subsections (1), (2), (6), (7), and (8) of section (a) and be limited to a response to the issues in the brief to which the reply brief is directed.

(d) [Reserved; see rule 10.10]

(e) Amicus Curiae Brief. The brief of amicus curiae should conform to section (a), except assignments of error are not required and the brief should set forth a separate section regarding the identity and interest of amicus and be limited to the issues of concern to amicus. Amicus must review all briefs on file and avoid repetition of matters in other briefs.

(f) Answer to Brief of Amicus Curiae. The brief in answer to a brief of amicus curiae should be limited solely to the new matters raised in the brief of amicus curiae.

(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

(h) Assignments of Error on Review of Certain Administrative Orders. In addition to the assignments of error required by rule 10.3(a)(3) and 10.3(g), the brief of an appellant or respondent who is challenging an administrative adjudicative order under RCW 34.05 or a final order under RCW 41.64 shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error.

[Amended December 5, 2002; September 1, 2006; amended effective September 1, 2010]

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