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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31407-3-III

STATE OF WASHINGTON, Respondent,

v.

PAUL CAREY HARTZELL, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Paul Hartzell was arrested for making a false statement to police when he purchased a syringe from a drug store and told the officers he had a prescription for testosterone. A search incident to the arrest produced a baggie of methamphetamine. The trial court should have granted Hartzell's motion to suppress the evidence seized in the search incident to his arrest because there was no probable cause to believe Hartzell had made any material misleading or untrue statements to law enforcement. Furthermore, the statute prohibiting making false statements to police offends the First and Fourteenth Amendments to the U.S. Constitution. The conviction should be reversed and the case remanded.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in denying Hartzell's motion to suppress evidence.

ASSIGNMENT OF ERROR 2: The trial court erred in concluding that police had probable cause to arrest Hartzell for making a false statement to police.

ASSIGNMENT OF ERROR 3: Hartzell's detention for making a false statement to a police officer violates his rights under the First Amendment.

ASSIGNMENT OF ERROR 4: RCW 9A.76.175 is unconstitutionally vague and overbroad on its face and as applied to the facts of the case.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did police have grounds to arrest Hartzell when he told the officers he had a prescription for testosterone? NO.

ISSUE 2: Were Hartzell's statements to police "material" misstatements sufficient to justify his arrest and search? NO.

ISSUE 3: Does the First Amendment to the U.S. Constitution permit a person to be arrested and searched for making a false statement to a police officer? NO.

ISSUE 4: Is the "false statements" statute, RCW 9A.76.175, unconstitutionally vague and overbroad by failing to establish foreseeable standards of enforcement and by reaching a substantial amount of protected First Amendment activity? YES.

ISSUE 5: Is the constitutionality of the "false statements" statute a manifest error of constitutional magnitude that can be raised for the first time on appeal? YES.

IV. STATEMENT OF THE CASE

Paul Hartzell was charged with possession of methamphetamine and making a false statement to police. CP 5-6. Pretrial, Hartzell moved to suppress evidence seized after an illegal arrest, arguing that the arresting officer had no grounds to believe a crime had been committed. CP 12-13, 20.

According to police officer Scott Wohl, on July 10, 2012, he received a call about a suspicious person in the drug store bathroom who was not coming out. RP (11/30/12) at 23. Police opened the door, entered the restroom, and took hold of both Hartzell's hands. RP (11/30/12) at 23. The officers knew Hartzell from prior contacts. RP (11/30/12) at 23. They located the syringe in his right pocket and recovered it. RP (11/30/12) at 25. Hartzell appeared moody and his pupils were constricted, leading Wohl to believe he might be under the influence of a stimulant. RP (11/30/12) at 25-26.

Without advising Hartzell of his *Miranda* rights, Wohl then asked what he was doing in the bathroom and Hartzell explained that he took an injection of testosterone. RP (11/30/12) at 27. Another officer asked him where he got the prescription and Hartzell told them he got it from Dr. Jefferson at Tri-State ER. RP (11/30/12) at 27. The officer then became

suspicious because he knew that Dr. Jefferson did not practice at Tri-State. RP (11/30/12) at 27. Wohl then called Dr. Jefferson's office and spoke to a nurse, who advised that Hartzell had been taken off all his prescriptions in June. RP (11/30/12) at 27-28. Hartzell was then arrested, searched, and a baggie of methamphetamine was found on his person. CP 46.

In moving to suppress evidence resulting from the arrest and search, Hartzell produced a prescription for 10 doses of testosterone issued by Dr. Glenn Jefferson on May 4, 2012 and expiring on May 4, 2013. CP 27.

After the hearing on the motion, the trial court found that Hartzell went into a drug store in Clarkston, purchased a single syringe and went into the restroom. CP 45. After about twenty-five minutes, he had not left yet and employees became concerned. CP 45. Officers responded and convinced Hartzell to leave the restroom. CP 46. He denied having a syringe on his person and the officers located it while performing a *Terry* frisk. CP 46. The officers then questioned Hartzell about what he was doing in the restroom and Hartzell explained that he injected testosterone pursuant to a prescription from his physician, Dr. Glenn Jefferson. CP 46. An officer called Dr. Jefferson's office and spoke with a nurse, who told him Hartzell did not have a current prescription for testosterone and had

been taken off his prescriptions in June 2012. CP 46. Officers then arrested Hartzell for making a false statement to police and searched him incident to arrest. CP 46. They located a baggie of white powder, which tested positive for methamphetamine in a field test. CP 46.

Based on its findings, the trial court concluded that there was probable cause to believe Hartzell had made a false statement to the police based on his denial of possessing the syringe and his claim to have a valid prescription for testosterone. CP 48. Accordingly, the trial court found that the search incident to Hartzell's arrest for making a false statement to police was appropriate and denied the motion to suppress. CP 48.

A jury subsequently convicted Hartzell of both charges. CP 72. The trial court sentenced Hartzell to eighteen months' incarceration. CP 149. Hartzell now appeals. CP 154.

V. ARGUMENT

It is evident that the police in the present case lacked grounds to arrest and search Hartzell for suspected drug activity, and consequently questioned him and investigated his answers to generate probable cause to arrest and search him for a violation of RCW 9A.76.175, the "false statements" statute. Under RCW 9A.76.175, a person can be convicted if he or she makes a false or misleading material statement to a public

servant. "Material statement" is defined as a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties. *Id.*

The State's reliance upon RCW 9A.76.175 as grounds to arrest, search, and charge Hartzell is problematic in several respects. First, the facts of the case do not establish that any of Hartzell's statements were misleading, untrue, or material. But significantly, the "false statements" statute itself runs afoul of the First Amendment's guarantees of freedom of speech, as well as the Fourteenth Amendment's due process guarantee that the law must give adequate notice of what conduct is prohibited and establish clear and ascertainable standards for enforcement. An even if the statute is facially valid, as applied to the circumstances in the present case, the "false statements" statute is unconstitutionally vague in that Hartzell's statements do not fall within the constitutional core intended to be encompassed by the statute.

Application of RCW 9A.76.175 in the present case had real and identifiable consequences in the case, in that it subjected Hartzell to arrest, search and prosecution (1) for lawfully exercising his First Amendment rights; and (2) for making statements that were deemed "misleading" and "material" based on the subjective determinations of the arresting officers,

without any ascertainable objective standard. Absent the unconstitutional arrest, no search would have occurred and any evidence used to prosecute Hartzell for possession of methamphetamine would have to be suppressed. Consequently, the constitutionality of RCW 9A.76.175 is an issue of constitutional magnitude that can be raised for the first time on appeal.

A. The trial court erred in denying Hartzell's motion to suppress because the evidence was insufficient to establish that his statements were false, misleading, or material.

In reviewing the denial of a defendant's motion to suppress evidence, the Court of Appeals determines whether the factual findings are supported by substantial evidence and reviews de novo the trial court's conclusions of law. *State v. Aase*, 121 Wn. App. 558, 564, 89 P.3d 721 (2004). Here, Hartzell challenges the trial court's conclusion that there was probable cause to arrest him for making a false statement to police. Accordingly, review is de novo.

Under the Fourth Amendment to the U.S. Constitution, law enforcement officers may not seize an individual unless there is probable cause to believe the person has committed a crime. *Dunaway v. New York*, 442 U.S. 200, 207-08, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). However, under the U.S. Supreme Court's decision in *Terry v. Ohio*, an

officer may briefly detain a person whom he reasonably suspects of criminal activity for limited questioning. *State v. White*, 97 Wn.2d 95, 105, 640 P.2d 1061 (1982) ("[T]o justify the initial stop the officer must be able to point to specific and articulable facts that give rise to a reasonable suspicion that there is criminal activity afoot."); *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. King*, 89 Wn. App. 612, 618, 949 P.2d 856 (1998) ("[I]t is reasonable for an officer to detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from specific and articulable facts, that criminal activity is afoot.").

Article I, section 7 of the Washington Constitution, which prohibits the disturbance of private affairs, provides greater protection to individuals than the Fourth Amendment of the U.S. Constitution. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). A warrantless seizure of a person is per se unconstitutional unless one of the few "jealously and carefully drawn" exceptions to the warrant requirement applies. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). And officials may not ostensibly detain a person for a lawful reason as a pretext for a detention that would not be legally justified. *Id.* at 351. To be valid, the officer detaining a person to investigate must show "a substantial possibility that

criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Evidence obtained following an unconstitutional search or seizure must be suppressed as fruit of the poisonous tree under both the U.S. and Washington State constitutions. *Ladson*, 138 Wn.2d at 359. "Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence." *Id.* at 359-60.

In Washington, neither purchasing a syringe from a pharmacy nor spending a long time in a bathroom constitutes criminal activity. Moreover, ingesting a controlled substance by injecting it into the body is insufficient to establish a conviction for possessing the controlled substance. *State v. Rudd*, 70 Wn. App. 871, 872-73, 856 P.2d 699 (1993). Thus, even if police had a reasonable suspicion that Hartzell had used the syringe to inject himself with a drug, in the absence of some indication that he was still in possession of a drug not assimilated into his body, his behavior could not establish grounds to arrest him for a drug crime. Accordingly, the police, the prosecutor, and the trial court emphasized that the basis for the arrest was the making of false statements to the arresting officers.

But it is substantially less than clear that Hartzell did, in fact, make any false or misleading material statement to law enforcement. First, Wohl testified that Hartzell denied having a hypodermic needle. RP (11/30/12) at 24. Police later recovered a capped and used hypodermic needle from Hartzell's pocket after physically taking hold of him and patting him down. RP (11/30/12) at 24-25. Hartzell was not arrested or charged at this time; instead, the officers continued to question him without advising him of his *Miranda* rights.

While the statement denying possession of a hypodermic needle was false, it was not material as a reasonable police officer would not rely on a person's representations in determining whether a risk to officer safety existed. Indeed, in the present case, the officers did not rely on Hartzell's statement at all, but rather physically held him and patted him down until the hypodermic needle was located. RP (11/30/12) at 24-25. In addition, the decision by police not to arrest Hartzell but to continue questioning him without the benefit of *Miranda* warnings indicates that police did not consider Hartzell's denial of possession to be material.

Second, Hartzell advised police that he took an injection of testosterone pursuant to a prescription from Dr. Jefferson at Tri-State ER. RP (11/30/12) at 27. Renzelman knew that Dr. Jefferson did not practice

at Tri-State, and at that point the officers contacted Dr. Jefferson's office to determine if he actually had a prescription for testosterone. RP (11/30/12) at 27-28. The nurse then advised the officers that Hartzell was taken off all his medications in June. RP (11/30/12) at 28. At that point, the officers believed that the information Hartzell was providing them about his prescription was not true. RP (11/30/12) at 28. The officer acknowledged that Hartzell never claimed his prescription was current, and that Dr. Jefferson's office never ruled out the possibility that Hartzell could have possessed testosterone under his prior prescription. RP (11/30/12) at 30-31. Instead, he testified, "I was assuming he didn't have a valid prescription since it was supposed to be done by June." RP (11/30/12) at 31.

Whether Hartzell's prescription continued to be valid after June did not render his statement that he took an injection of testosterone pursuant to a prescription from Dr. Jefferson untrue or misleading. Hartzell could have perfectly well taken testosterone from previously filling the prescription from Dr. Jefferson that he produced to the court. CP 27. Nothing in the statement from Dr. Jefferson's office rendered the statement that Hartzell actually gave to the police untrue.

In light of the evidence and testimony presented at the suppression hearing, there was insufficient evidence for the trial court to find any of Hartzell's statements either material or untrue. Although the police clearly suspected Hartzell of drug use and sought to generate a reason to arrest and search him for evidence, the State is unable to establish that Hartzell was not telling the truth when he advised the police that he had taken testosterone pursuant to a prescription from Dr. Jefferson. That they did not want to believe his story does not render it false.

Accordingly, the motion to suppress should have been granted as absent a false statement, police had no lawful grounds to arrest and search Hartzell. The fruits of the search should have been suppressed. *Ladson*, 138 Wn.2d at 359.

B. RCW 9A.76.175 is unconstitutionally overbroad on its face, as it prohibits the exercise of First Amendment rights.

On its face, RCW 9A.76.175, the "false statements" statute, prohibits speech on the basis of its content. Under well-established First Amendment jurisprudence, content-based restrictions on speech are presumptively invalid unless they fall within a clearly established exception. No court has ever recognized police questioning as an exception to a person's right to speak freely. The statute thus plainly runs

afoul of the First Amendment and is overbroad in that it threatens to chill constitutionally protected speech.

"[T]he First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *U.S. v. Alvarez*, ___ U.S. ___, 132 S. Ct. 2537, 2543, 183 L. Ed. 2d 574 (2012) (*quoting Ashcroft v. A.C.L.U.*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002)). Accordingly, content-based restrictions on speech are permitted only when confined to those historic and traditional categories of expression that have been previously recognized, including incitement, obscenity, defamation, criminal conduct carried out through speech, fighting words, child pornography, fraud, true threats, and imminent danger requiring a prior restraint. *Alvarez*, 132 S. Ct. at 2544.

"Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements." *Alvarez*, 132 S. Ct. at 2544. In *Alvarez*, the U.S. Supreme Court evaluated the constitutionality of the Stolen Valor Act, 18 U.S.C. § 704, which imposed criminal sanctions upon the defendant for lying about receiving a Congressional Medal of Honor. *Id.* at 2542. The Supreme Court rejected the government's

argument that false statements receive no First Amendment protection. *Id.* at 2545. In evaluating restrictions against false speech in government proceedings and prohibitions against perjury, the *Alvarez* Court observed that unlike speech in other contexts, sworn testimony may be the basis for official government action and may affect the rights and liberties of others, distinct from lies not spoken under oath. *Id.* at 2546. Concluding that the government failed to demonstrate that false statements should constitute a new category of unprotected speech, the U.S. Supreme Court struck down Alvarez's conviction under the Stolen Valor Act. *Id.* at 2551.

Similarly here, there is no constitutional tradition that restricts all speech to public officials except speech that is uncontrovertibly true and clear. To the contrary, our jurisprudence has long recognized that false statements are endemic in the law enforcement context. For example, in recognition of the possibility that individuals could be convicted based solely upon a false confession, Washington courts have adopted the corpus delicti rule, which states that a confession or admission, standing alone without independent proof, is insufficient to sustain a conviction. *See State v. Aten*, 79 Wn. App. 79, 85, 88, 900 P.2d 579 (1995). Police interrogation procedures have been analyzed and modified in consideration of their likelihood to produce false statements. *See Miranda v. Arizona*, 384 U.S. 436, 447, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Moreover, it would be impossible to track each and every case in which a defendant denied responsibility for a crime only to be later convicted. Likewise, such a rule effectively permits police to make an end run around constitutional limitations on searches and seizures.

In *State v. Williams*, 171 Wn.2d 474, 251 P.3d 877 (2011), the Washington Supreme Court considered whether the obstructing statute, RCW 9A.76.020, permitted the criminalization of pure speech. In holding that a conviction for obstruction requires conduct beyond pure speech, the *Williams* Court stated,

> The legislature was aware that, in order to find obstruction statutes constitutional, appellate courts of this state have long required conduct. We have done so not only because of concern that criminalizing pure speech would implicate freedom of speech. We have done so because of further concerns that law enforcement officers, without probable cause or even reasonable suspicion that a crime is being committed, may engage citizens in conversation, arrest them for obstruction based upon false statements, and then search incident to the arrest. As we said in *White* of the stop and identify statute, such statutes cannot be used to make an "end run" around constitutional limitations on searches and seizures.

171 Wn. 2d at 485-86. The implications anticipated by the Washington Supreme Court in *Williams* are precisely the facts that are presented in this case – lacking probable cause to arrest Hartzell, police nevertheless questioned him, arrested him and searched him based upon his answers.

The present case illustrates precisely why the "false statements" statute, as a proscription on pure speech, must be invalidated as contrary to the defendants' constitutional rights, both as a restriction on his speech as well as to avoid encroachment into the Fourth Amendment and Article 1, Section 7 liberties against warrantless searches and seizures.

As a statute that regulates speech based upon the truthfulness and clarity of its content, RCW 9A.76.175 can only stand if it survives application of strict scrutiny. *Rickert v. State Public Disclosure Comm'n*, 161 Wn.2d 843, 848, 168 P.3d 826 (2007). To satisfy strict scrutiny, the State must demonstrate that the statute is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Id.* (*citing Burson v. Freeman*, 504 U.S. 191, 198, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992)).

It cannot be fairly disputed that the State has an interest in the quick and efficient investigation of criminal activity, which can be hindered or obstructed by the need to vet statements from witnesses and the accused. At the same time, it is the function of a criminal trial, not a law enforcement investigation, "to seek out and determine the truth or falsity of the charges brought against the defendant." *Lopez v. U.S.*, 373 U.S. 427, 440, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963). Defendants have no obligation to implicate themselves to police. Thus, even if the State

has an interest in minimizing false information given to law enforcement officers, it does not rise to the level of a compelling interest.

Moreover, RCW 9A.76.175 is not narrowly tailored to achieve the State's interest. By prohibiting false and misleading statements to public officials, the "false statements" statute imposes an untenable burden of clarity upon the speaker. In the present case, Hartzell's statement that he injected himself with testosterone pursuant to a prescription from Dr. Jefferson was considered by police to be false or misleading because Hartzell did not also tell the police that he no longer had a prescription for testosterone. But the statement was only misleading because of how the police officer chose to interpret it, not because the statement was untrue on its face. If the legality of a person's speech to a public official is evaluated based upon the degree of confusion experienced by the public official, the scope of the person's right to speak will vary with the individual to whom the speech is addressed. This does not narrowly accomplish the State's goals.

Furthermore, the "false statements" statute is limited to "material statement[s]," which the statute defines as "a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties." RCW 9A.76.175. As a practical

matter, this provision mandates absolute truthfulness in all communications with public officials short of small talk, as one must assume that any communications with public officials relating to their responsibilities as public officials can be reasonably relied upon. Again, this provision cannot be considered narrowly tailored to meet the State's interest in minimizing State confusion or reliance upon false information.

Under longstanding First Amendment jurisprudence, the "false statements" statute is a content-based restriction on speech that cannot meet the rigors of strict scrutiny. As such, it is plainly overbroad and encroaches into constitutionally protected areas. Hartzell's convictions should be reversed and the evidence resulting from the search of his person should be suppressed.

C. RCW 9A.76.175 is unconstitutionally vague on its face and as applied to the facts of this case, because it fails to provide objective, ascertainable standards for enforcement.

Under the void-for-vagueness doctrine, a criminal statute must define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

Due process principles command that adequate notice be afforded to the public of what conduct is permitted and what is proscribed. *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939). Thus, a statute that is so unclear in its terms that "men of common intelligence must necessarily guess at its meaning and differ as to its application" violates the notice requirement of due process. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

In *Kolender*, of particular concern to the U.S. Supreme Court was the possibility for the challenged statute, which required individuals to provide "credible and reliable" identification to police upon request, to potentially suppress First Amendment activity and the constitutional right to freedom of movement. 461 U.S. at 358. As written, the statute "vests virtually complete discretion in the hands of the police" to determine whether the statute has been broken. *Id.* As a result of this near-absolute discretion afforded to law enforcement, the statute necessarily placed the responding officer in the position of making law in the course of his patrol. *Id.* at 360. Consequently, the U.S. Supreme Court held that the statute was unconstitutionally void for vagueness on its face "because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Id.* at 361.

Similarly, in *Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed.2d 605 (1974), the U.S. Supreme Court invalidated as unconstitutionally vague a statute that prohibited publicly treating the flag of the United States contemptuously. The *Goguen* Court observed that the prohibition against "contemptuous" treatment was sufficiently broad as to potentially include any public deviation from formal flag etiquette, without any narrowing interpretation that limited its scope. *Id.* at 575. Thus, two people performing the same conduct – using the flag to protect oneself from a rainstorm – could be subject to selective enforcement of the law, depending on whether officials perceived the individual to be acting contemptuously or regretfully. *Id.* at 575-76. Consequently, the statute permitted police, prosecutors and juries to use the law to pursue their personal predilections rather than enforcing clear standards of criminal law established by a legislature. *Id.* at 575.

Moreover, it is long established that statutes that have the potential to encroach upon protected First Amendment activity must be drafted with greater specificity to avoid constitutional infirmity than other statutes. *Goguen*, 415 U.S. at 574; *see also Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ("[W]here a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.") (internal citations

omitted); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-91, 86 S. Ct. 211, 15 L. Ed. 2d 176 (1965) ("Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state.").

The statute at issue, RCW 9A.76.175, prohibits knowingly making "false and misleading" statements to law enforcement officers that are "reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties." On its face, the statute requires subjective interpretation of the enforcing official as to whether or not the statement is "misleading." Additionally, whether or not an official is "misled" by a statement may depend upon the official's basis of knowledge, the context of the statement, and the facts the official is attempting to elicit. For example, imagine an officer is investigating an individual's residence for purposes of determining whether the individual has a legal duty to register in the county. In response to questioning, the individual's girlfriend tells the officer that he does not live with her. He is not on the lease, but keeps some clothing and other property at the house and stays there overnight approximately four nights a week. Is the girlfriend's statement false? Is it misleading? The answer depends entirely upon the judgment and discretion of the officer.

While the statute fails to set clearly ascertainable standards on its face, the vagueness of its proscriptions is particularly evident as applied to the facts of this case. Hartzell told the police that he had injected testosterone pursuant to a prescription from a certain doctor. RP (11/30/12) at 27. He produced a prescription for testosterone from that doctor. CP 27. Nevertheless, the arresting officers deemed his statement "false" or "misleading" because his prescription was not current. Yet at no point did the arresting officers ask if his prescription was current – they simply "assumed" that he was giving them false information because his doctor's office advised that he no longer had a prescription. RP (11/30/12) at 31.

In the present case, Hartzell could not have reasonably foreseen that the truth or falsity of his statement would be evaluated based upon the currentness of his prescription when he did not claim to have a current prescription. As he demonstrated at the suppression hearing, his claim to have a prescription for testosterone from Dr. Jefferson was true. CP 27. That the officer misunderstood or did not believe him is a factor of the officer's assumptions, not the words that Hartzell used. To criminalize Hartzell's statements in the present case is to require that his speech anticipate and respond to the officer's admitted assumptions. This is

precisely the kind of unclear and unforeseeable standard of conduct that the void for vagueness doctrine forbids.

D. The unconstitutionality of RCW 9A.76.175 is a manifest constitutional error affecting Hartzell's rights that can be raised for the first time on appeal.

Hartzell did not challenge the constitutionality of RCW 9A.76.175 before the trial court. Ordinarily, errors not raised below cannot be raised for the first time on appeal. *See* RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). However, an exception exists for manifest errors affecting a constitutional right. RAP 2.5(a). To establish a manifest error affecting a constitutional right, an appellant must demonstrate that the error is of constitutional magnitude, and actually affected the appellant's rights at trial. *O'Hara*, 167 Wn.2d at 98 (citing *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)).

In the present case, the error implicates Hartzell's First, Fourth and Fourteenth Amendment rights. Thus, there is no question that the error has constitutional significance. Moreover, but for the unlawful arrest based upon the officer's interpretation of Hartzell's speech, there were no grounds to search him. Consequently, the fruits of the search would not have been admissible in any trial, and Hartzell would not have been

convicted for possession of methamphetamine or the "false statements" charge. Accordingly, the error had real and practical effects on Hartzell because had his First, Fourth and Fourteenth amendment rights been scrupulously honored, he would not have suffered the consequences of conviction.

VI. CONCLUSION

Lacking grounds to confirm their suspicion that Hartzell was using methamphetamine in the bathroom of a pharmacy, the responding officers engaged Hartzell in conversation and, based upon their interpretation of his responses, arrested him for making a false or misleading statement to a public official and searched him incident to arrest. But Hartzell's claim to have a prescription for testosterone from a named physician was, on its face, true; the officers simply assumed from the information they received from his doctor's office that Hartzell was untruthful.

In the present case, there was no probable cause supporting Hartzell's arrest for making a false or misleading statement to a public official. Consequently, the trial court erred in denying Hartzell's motion to suppress evidence resulting from the search incident to his arrest. Moreover, penalizing Hartzell for pure speech activity raises substantial First Amendment implications. As a content-based restriction on speech,

the "false statements" statute cannot survive strict scrutiny and is impermissibly overbroad. Moreover, the "false statements" statute is void for vagueness on its face and as applied to the facts of this case, because the statute places an unreasonable burden upon the speaker to anticipate how the listener will interpret the statement. This effectively allows the speech to be criminalized or not depending on the officer's interpretation. As in this case, when the officer interprets the words incorrectly or makes assumptions about the words, the "false statements" statute fails to establish clear standards of conduct and guidelines for law enforcement conduct. This allows law enforcement to encroach upon protected Fourth Amendment areas by depriving individuals of their autonomy and privacy by initiating a conversation and interpreting the words to be misleading, precisely as anticipated by the Washington Supreme Court in *Williams*.

The error in this case is manifestly constitutional, in that it penalized Hartzell for pure speech that is not subject to an exception for First Amendment activity, and subjected him to an arrest and search under the Fourth Amendment based upon his exercise of Fourth Amendment rights. Further, the lack of notice of what speech will be prohibited in speaking with any particular law enforcement officer is contrary to the Fourteenth Amendment's due process guarantees. And the error had real and identifiable consequences in the trial because it directly resulted in the

discovery of evidence used against Hartzell to subject him to conviction and sanctions for making false or misleading statements and for possession of methamphetamine.

Simply put, law enforcement used the conversation with Hartzell as a pretext to arrest him, search him, and subject him to criminal process. First, Fourth, and Fourteenth Amendment principles cannot sustain the prosecution in this case. Accordingly, Hartzell's convictions for making a false or misleading statement to a public official and possession of methamphetamine should be reversed, and the evidence obtained as a result of the search incident to Hartzell's arrest for making a false or misleading statement should be suppressed.

RESPECTFULLY SUBMITTED this 11th day of June, 2013.

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 11th day of June, 2013 in Walla Walla, Washington.

Andrea Burkhart