

No. 317943

FILED
March 21, 2014
Court of Appeals
Division III
State of Washington

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

LARRY G. MARQUETTE, Appellant

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

THE HONORABLE ANNETTE PLESE

THE HONORABLE KATHLEEN O'CONNOR (suppression hearing)

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
509.939.3038

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. STATEMENT OF FACTS 2

III. ARGUMENT

 A. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 6.1(d). 11

 B. THE TRIAL COURT FAILED TO MAKE A WRITTEN RECORD AFTER HEARING THE MOTION TO SUPPRESS STATEMENTS AS REQUIRED BY CrR 3.5(c). 13

 C. THE TRIAL COURT ERRED BY DENYING MR. MARQUETTE’S MOTION TO SUPPRESS THE ITEMS RECOVERED FROM HIS CAR BECAUSE POLICE UNLAWFULLY SEARCHED AND SEIZED THE ITEMS WITHOUT A WARRANT AND THE CONSENT WAS THE PRODUCT OF COERCION. 14

 D. THE DRUG EVIDENCE ADMITTED AT TRIAL WAS SUBSTANTIALLY DIFFERENT IN WEIGHT MEASURE THAN REPORTED BY THE ARRESTING OFFICER, THERE WAS A GAP IN THE CHAIN OF CUSTODY: THE EXHIBITS SHOULD NOT HAVE BEEN ADMITTED..... 19

 E. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION FOR POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE..... 22

IV. CONCLUSION..... 25

TABLE OF AUTHORITIES

Washington Cases

<i>In re Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998)	16
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997)	22
<i>State v. Agee</i> , 89 Wn.2d 416, 573 P.2d 355 (1977)	12
<i>State v. Banks</i> , 149 Wn.2d 38, 65 P.3d 1198 (2003)	12
<i>State v. Broadaway</i> , 133 Wn.2d 118, 942 P.2d 363 (1997)	13
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984)	19
<i>State v. Cobelli</i> , 56 Wn.App. 921, 788 P.2d 1081 (1989)	24
<i>State v. Dancer</i> , 174 Wn.App. 666, 300 P.3d 475 (2013)	16
<i>State v. DeCuir</i> , 19 Wn.App. 130, 574 P.2d 397 (1978)	22
<i>State v. Dickamore</i> , 22 Wn.App. 851, 592 P.2d 681 (1979)	20
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002)	15
<i>State v. Ferro</i> , 64 Wn.App. 181, 824 P.2d 500 (1992), <i>rev. denied</i> 119 Wn.2d 1005 (1992)	18
<i>State v. Flowers</i> , 57 Wn.App. 636, 789 P.2d 333 (1990)	16
<i>State v. Garvin</i> , 166 Wn.2d 252, 207 P.3d 1266 (2009)	14
<i>State v. George</i> , 146 Wn.App. 906, 193 P.3d 693 (2008)	23
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	23
<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	11
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	13
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986)	15

<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007)	22
<i>State v. McGinley</i> , 18 Wn.App. 862, 573 P.2d 30 (1977)	20
<i>State v. Nedergard</i> , 51 Wn.App. 305, 753 P.2d 526 (1988).....	16
<i>State v. O’Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003)	16
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	21
<i>State v. Pruitt</i> , 145 Wn.App. 784, 187 P.3d 326 (2008)	14
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	16
<i>State v. Robbins</i> , 68 Wn.App. 873, 846 P.2d 585 (1993)	23
<i>State v. Roche (in re Sweeney)</i> , 114 Wn.App. 424, 59 P.3d 682 (2002)...	20
<i>State v. Seagull</i> , 95 Wn.2d 898, 632 P.2d 44 (1981).....	15
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	19
<i>State v. Thompson</i> , 151 Wn.2d 793, 92 P.3d 228 (2004).....	15
Statutes	
RCW 69.50.401	23
Rules	
CrR 6.1(d)	11
CrR 3.5(c).....	13
Constitutional Provisions	
Const. art. 1 §§ 3,22.....	23
U.S. Const. Amends. VI, XIV.....	23

I. ASSIGNMENTS OF ERROR

- A. The trial court violated CrR 6.1(d) by failing to enter written findings of fact and conclusions of law in support of its finding of guilt.
- B. The court erred when it failed to enter written findings of fact and conclusions of law required by CrR 3.5(c) following a suppression hearing..
- C. The court erred when it entered CrR 3.6 Conclusion of Law 4:
”Deputy Thurman advised the defendant of his Miranda and Ferrier warnings. The defendant consented to the search of the car. The evidence was seized after the defendant gave consent to search. There was no violation of *Arizona v. Gant*.” CP 131.
- D. The court erred when it denied Mr. Marquette’s motion to suppress evidence removed from his vehicle.
- E. The evidence was insufficient to sustain a conviction for possession of a controlled substance with intent to deliver.

Issues Pertaining To Assignments of Error

1. Should this matter be remanded for entry of written findings of fact and conclusions of law to comply with CrR 6.1(d)?
2. Should this matter be remanded for entry of written findings of fact and conclusions of law to comply with CrR 3.5(c)?

3. Is a consent voluntarily and freely given where a suspect has repeatedly told officers not to search his car and there is evidence the deputy said he would have the car towed and get a search warrant and then offered to “see what he could do” if the suspect agreed to let him search?
4. Where the forensic scientist testifies as to the weight of submitted drug evidence and it is at substantial variance with the weight testified to by the confiscating officer, is the evidence so contaminated or unaccounted for that it should not be admitted at trial?
5. Was the evidence insufficient to sustain a conviction for intent to deliver a controlled substance where the State presented no evidence that Mr. Marquette intended to sell the drugs found in his vehicle ?

II. STATEMENT OF FACTS

The Spokane County Prosecutor’s Office charged Larry Marquette with one count of possession of a controlled substance with intent to deliver, based on events that occurred on April 4, 2012. CP 9.

CrR 3.6 Hearing

Deputy Sheriff Jeff Thurman testified that around 1:30 pm on April 4, 2012, he was saw Mr. Marquette traveling eastbound on I-90. (10/18/12 RP 56). He reportedly saw Mr. Marquette exit the freeway

ramp from the fourth lane without signaling. (10/18/12 RP 57). The fourth lane gives the option to exit the freeway and the fifth lane is an exit only lane. *Id.* He followed him off the freeway, through the Mullan Road stoplight, over the I-90 bridge and to the intersection of Knox and Argonne before he activated his emergency lights. (10/18/12 RP 71). According to Deputy Thurman, when he activated the emergency lights, he observed Mr. Marquette, “Immediately start to make furtive movement, which is reaching towards his seat.” (10/18/12 RP 61). The deputy requested back up. (10/18/12 RP 61). He activated his siren and followed Mr. Marquette’s car to a stop in a dirt lot. (10/18/12 RP 61-62).

The deputy reported he quickly “exited my vehicle to try to get control of the driver to have him show me his hands, because I don’t know if he’s trying to retrieve or conceal a weapon.” (10/18/12 RP 61). He approached the driver’s door of the vehicle and told Mr. Marquette to show his hands. (10/18/12 RP 63). The deputy opened the car door, grabbed Mr. Marquette’s arm and pulled it behind his back in an arm hold or “arm bar” and walked him back to the patrol car. (10/18/12 RP 63).

When he got Mr. Marquette out of the car, he asked him what he reached for under the seat. (10/18/12 RP 76). Mr. Marquette told him he was reaching for a cell phone. One cell phone was later found in the passenger seat and another in Mr. Marquette’s pocket. (10/18/12 RP 77).

Trooper Stone by chance had seen the patrol car's emergency lights arrived on the scene just as the deputy removed Mr. Marquette from his car. (10/18/12 RP 37). The deputy instructed the Trooper to "conduct a safety frisk underneath the driver's seat for weapons." (10/18/12 RP 63). The Trooper looked through the door left open by Deputy Thurman and observed what appeared to be a baggy of methamphetamine on the floorboard of the car on the driver's side. (10/18/12 RP 64). The deputy then arrested, handcuffed, and placed Mr. Marquette in the patrol car. (10/18/12 RP 64).

The deputy testified he obtained consent to search the vehicle, unhandcuffing Mr. Marquette long enough for him to sign a consent to search card. (10/18/12 RP 65;79). He found a small baggy of methamphetamine on the floorboard of the car, a baggy behind the stereo system, and other items of evidence. (10/18/12 RP 65-66).

In contrast, Mr. Marquette testified he drove his car in the far right hand lane for about a mile and half before the Argonne exit. (10/18/12 RP 15-16). He observed a white patrol car pull alongside of him on the freeway, and noticed a sheriff's car parked at an angle the shoulder of the road near the Park overpass intersection. (10/18/12 RP 17-18). He used the turn signal as he exited the freeway off-ramp. (10/18/12 RP 17). At the next stoplight, Mr. Marquette noticed a Spokane County sheriff

vehicle a few cars behind him and a few lanes over; that vehicle followed him through three stoplights. (10/18/12 RP 19). About a half of a mile after the freeway exit the deputy turned on his emergency lights. (10/18/12 RP 19-21). Mr. Marquette rolled down his window and pointed to a dirt lot, signaling he would pull in there. (10/18/12 RP 22). As he came to a stop, the deputy pulled up behind him and a WSP car pulled up alongside of him. (10/18/12 RP 23).

Mr. Marquette said the deputy came up to the driver's side, opened the car door and said, "Get the F out of that car." (10/18/12 RP 24). He held up his hands and said, "Easy tough guy, it ain't that serious." (10/18/12 RP 25). In response, the deputy grabbed him by the wrist, pulled him out of the car, grabbed both of his arms behind his back and bent him over the front of the patrol car, face down. (10/18/12 RP 25-26). He reportedly said, "Man, there's no need to get violent"; the deputy answered, "If I was getting violent you'd be on the ground." (10/18/12 RP 25). He was immediately handcuffed. (10/18/12 RP 28).

When asked, Mr. Marquette said his movements while driving occurred because he was searching for his cell phone; he knew he was getting pulled over and wanted to tell someone to know what was happening to him. He also testified the car had a five-speed gearshift. (10/18/12 24; 26-27;34). When he heard the deputy direct the WSP

trooper to look under the front seat of the car, Mr. Marquette protested, saying, “Under *Arizona v. Gant* you can’t search my car, I’ve been removed.” (10/18/12 RP 26). Also, in contrast to Deputy Thurman’s testimony, Mr. Marquette said the officer never issued a citation for failure to signal. (10/18/12 RP 84).

The court orally denied the motion to suppress evidence: finding it was not a pretextual stop and whether deputy Thurman opened or left the car door open was irrelevant because the baggy on the floorboard was in open view. Further, Mr. Marquette signed a consent card that complied with *Ferrier* after officers looked into the car. (10/18/12 RP 100-110). The court issued its written findings of fact and conclusions of law shortly thereafter. (CP 129-132).

1. CrR 3.5 Hearing

Deputy Thurman testified he read Mr. Marquette his Miranda rights and Mr. Marquette signed a card saying he understood those rights. (4/15/13 RP 20-21). He told the deputy he had used meth that morning and the deputy would find a little baggie of meth on the driver’s floor board. (4/15/13 RP 24). He explained he was on probation, and had been selling meth “here and there” to make ends meet. (4/15/13 RP 26-27).

The deputy testified he decided to have the vehicle towed when Mr. Marquette asked if the officer could “cut him a break” and let him call

one of his friends to come and get the car as it was his only means to get back and forth to his mother's home. (4/15/13 RP 27-28). The deputy stated that because Mr. Marquette had been cooperative he allowed it. (4/15/13 RP 28).

By contrast, Mr. Marquette testified he told the deputy three or four times that he did not want him to search the car and, and under *Gant*, the deputy could not search it. (4/15/13 RP 46). He said the deputy remarked he was not used to having suspects "throw case law" at him. (4/15/13 RP 46). The deputy said he was "going to get the car impounded and would search it anyway, get a search warrant anyway." (4/15/13 RP 45-46). Mr. Marquette could not afford to get the car out of impound as it was his only way to see his mother, who was very ill. He testified the officer said, "...you let me search it. I will see what I can do for you." (4/15/13 RP 47).

After the officer searched the car, he told Mr. Marquette he had found his "stash" behind the stereo. The officer told him if he would talk about the drugs found behind the stereo he would see what he could do with charging him with just being in possession rather than possession with intent to deliver. (4/15/13 RP 47-48).

The court orally ruled Mr. Marquette knowingly and voluntarily waived his rights. (4/15/13 RP 71). No written findings of fact or conclusions of law were entered.

2. Trial Evidence

The matter proceeded to trial. Deputy Thurman and Trooper Stone repeated their pretrial testimony of the events leading up to the discovery of the drugs in Mr. Marquette's car. The State introduced evidence that methamphetamine was found in a baggie on the floorboard, two more baggies from behind the car stereo with a similar substance, and a small scale with white residue was also found behind the stereo. (4/15/13 RP 80-82). A black nylon bag that contained empty small baggies with little green skulls was also found in the search. (4/15/13 RP 93). Mr. Marquette told the deputy he had approximately 1/8 of an ounce of methamphetamine in the car. (4/15/13 RP 97-98). The cell phone found on the passenger seat and the other one found in Mr. Marquette's coat, as well as the \$612 found on Mr. Marquette were booked into evidence. (4/15/13 RP 92-93;112).

When booking the evidence, the deputy weighed the crystalline substance found in the baggie on the floor and determined it weighed 0.2 grams. The weight of the baggies found behind the stereo was 1.6 grams, for a total weight of 1.8 grams. (4/15/13 RP 100-101). Detective Hixson,

assigned to the Spokane County Sheriff's Office drug unit transported the drug evidence to the crime lab. (4/15/13 123-124). Alex Seaboalt, of the Washington State Crime lab accepted the items, and signed the lab request form. (4/15/13 RP 290-91). Seaboalt did not testify.

The State called Trevor Allen, from the Washington State Patrol crime lab, to testify about the drug evidence. (4/15/13 RP 138; 144-148). He testified two separate packages of evidence were delivered to the lab. (4/15/13 RP 143). The first package had two bags of a crystalline substance. The weight of the first bag in the package, a combination of methamphetamine and dimethyl sulfone¹ was 5.81 grams; the weight of a second was 0.21 grams. (4/15/13 RP 143;151-52). A second package had a single baggie: the weight of the contents was .02 grams and it also contained methamphetamine and dimethyl sulfone. (4/15/13 RP 156-57). The collective weights of the evidence packages exceeded 6 grams, over 4 grams more than the deputy's report showed he submitted. (4/15/13 RP 183).

Defense counsel objected to the admission of the drug evidence exhibits on foundational grounds. (4/15/13 RP 193). First, the deputy who tagged and weighed the items testified the total weight was 1.8

¹ Dimethyl sulfone is a dietary supplement, not a controlled substance. (4/15/13 RP 152).

grams. Second, the State did not produce the person who signed for and accepted the items from the crime label, raising a chain of custody and a confrontation issue. (4/15/13 RP 193). Lastly, counsel objected because while the deputy testified he wiped down the scale he used, he did not perform a pretest to insure there was no chemical residue on the scale that could have accounted for a positive test result. (4/15/13 RP 194). The court overruled the defense objections, ruling that minor gaps in the chain of custody went to weight and not to admissibility. (4/15/13 RP 201).

Defense counsel also made a motion to dismiss at the end of the State's case, citing insufficient evidence based on unreliability and contamination. There were no corroborating circumstances to show possession with intent and the disparity in weight between what Deputy Thurman testified the samples weighed and the lab weight result: as well as deputy Thurman's testimony there were two baggies found on the floorboard of the car, when the photograph of the vehicle showed a single small plastic baggie on the floorboard. (4/15/13 RP 205-06). The court denied the motion to dismiss. (4/15/13 RP 210). Mr. Marquette was found guilty. (4/18/13 RP 229). The court's oral ruling is as follows:

"The issue then comes down to did he possess it with an intent to deliver. The Court looks at the evidence that Deputy Thurman testified to. He stated Mr. Marquette told him he had no job, but

he had bought a car for \$500. He had \$612 in cash on him, two cell phones with one continuously ringing, the address book, the scale with residue, the bindles and the baggies, the additional baggies. Based on all of that, the Court would find without a reasonable doubt Mr. Marquette possess (sic) a controlled substance. With the admission of selling the meth and made the \$2,000 in the last two months, the Court would have to find that Mr. Marquette is guilty of the crime as charged. (4/18/13 RP 227-228)

Findings of fact and conclusions of law, as required by CrR 6.1, as of the date of this brief, have not been filed. Mr. Marquette makes this timely appeal. (CP 234-249).

III. ARGUMENT

A. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 6.1(d).

A trial court, sitting as trier of fact, must enter written findings of fact and conclusions of law at the conclusion of a bench trial. CrR 6.1(d); *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).² The purpose of the mandatory requirement is two-fold: first, to ensure the trial judge has fully and properly dealt with all the issues in the case before he decides it; and secondly, to enable an appellate court to review the

² CrR 6.1(d) provides: In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

questions raised on appeal and know the basis of the trial court's judgment. *State v. Agee*, 89 Wn.2d 416, 421, 573 P.2d 355 (1977); *Head*, 136 Wn.2d at 622. A court's oral opinion is not a finding of fact; rather, it is merely an expression of the court's informal opinion when rendered. *Id.* An oral opinion has no final or binding effect unless formally incorporated into the findings conclusions and judgment." *Id.* (internal citations omitted).

As of the date of appellant's opening brief, no findings of fact and conclusions of law were submitted by the prevailing party or entered by the court. Where there is a complete failure to comply with CrR 6.1(d) the proper remedy is to vacate the judgment and sentence and remand to the trial court for entry of the required findings and conclusions. *Head*, 136 Wn.2d 624-25. In its written findings and conclusions, the trial court must tie the facts to each separate element of the charged crime. *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). Each element must be addressed separately, with the factual basis set out for each conclusion of law. *Id.* Further, the findings may not be tailored based on appellant's opening brief, and no additional evidence may be taken. *Head*, at 624-626. Mr. Marquette maintains the right to appeal all findings and conclusions, as in the usual course of things. *Id.*

B. THE TRIAL COURT FAILED TO MAKE A WRITTEN RECORD AFTER HEARING THE MOTION TO SUPPRESS STATEMENTS AS REQUIRED BY CrR 3.5(c).

In a pretrial ruling, the court held that Mr. Marquette's statements to Deputy Thurman were made after he had been advised of his rights under *Miranda* and his statements were voluntarily and intelligently made. (4/15/13 RP 71). As of the date of this brief, written findings of fact and conclusions of law have not been entered, as required by CrR 3.5(c)³

Entry of written findings and conclusions is a significant event. On review, the appellate court will only consider those facts to which error has been assigned. Where there is substantial evidence in the record supporting the challenged findings, those facts are binding on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). In *Broadaway*, the Court stated: "We hold that the rule to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and if challenged, they are verities if supported by substantial evidence in the record. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

Without written findings and conclusions, Mr. Marquette is at a substantial disadvantage in making his appeal. He is forced to not only

³ CrR 3.5 provides: Duty of Court To Make Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore

comb through, but also interpret the court's oral rulings, which are not binding and cannot replace written findings and conclusions. *Head*, 136 Wn.2d at 624.

The proper remedy is remand for entry of written findings of fact and conclusions of law. *Head*, 136 Wn.2d 623-25. Mr. Marquette maintains the right to assign error to any written findings of fact and conclusions of law. *Id.* Reversal is warranted if Mr. Marquette can show prejudice by establishing that the belated findings were tailored to meet the issues raised in the appellant's opening brief. *State v. Pruitt*, 145 Wn.App. 784, 794, 187 P.3d 326 (2008).

C. THE TRIAL COURT ERRED BY DENYING MR. MARQUETTE'S MOTION TO SUPPRESS THE ITEMS RECOVERED FROM HIS CAR BECAUSE POLICE UNLAWFULLY SEARCHED AND SEIZED THE ITEMS WITHOUT A WARRANT AND THE CONSENT WAS THE PRODUCT OF COERCION.

The trial court erred by concluding that Mr. Marquette consented to the search of the car⁴. A trial court's denial of a motion to suppress is reviewed to determine whether substantial evidence supports the factual findings, and if so, whether the findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 252, 249, 207 P.3d 1266 (2009). The

⁴ The court entered Conclusion of Law 4: "Deputy Thurman advised the defendant of his Miranda and Ferrier warnings. The defendant consented to the search of the car. The evidence was seized after the defendant gave consent to search. There was no violation of *Arizona v. Gant*." CP 131.

appellate court reviews conclusions of law from an order pertaining to the suppression of evidence *de novo*. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

Under Article I, § 7, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” A privacy interest in vehicles and their contents is recognized in Washington under Article 1, § 7. *State v. Afana*, 169 Wn.2d 169, 176, 233 P.3d 879 (2010).

Under the “open view” doctrine, an officer’s observation of evidence from a lawful vantage point is not, standing alone, a search subject to constitutional restrictions. *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). While such an observation may provide the basis for a search warrant, if the items are in a constitutionally protected place, such as a car, seizure of the contraband must be justified by a warrant or a valid exception to the warrant requirement. *State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986). Evidence seized as a result of an illegal search must be suppressed under the exclusionary rule as “fruit of the poisonous tree.” *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

One exception to the warrant requirement is consent to search. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). It is the State’s burden to establish that consent was lawfully given. To meet that burden the State must prove (1) it was voluntary, (2) the person consenting

had authority to consent, and (3) the search did not exceed the scope of consent. *State v. Nedergard*, 51 Wn.App. 305, 308, 753 P.2d 526 (1988). Mr. Marquette argues the court erred when it concluded his consent was voluntary, because it was not freely and voluntarily given but rather, the result of implied promises and threats made by the officer.

A court determines if consent is free and voluntary as a question of fact based upon the totality of the circumstances. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004); *In re Ferrier*, 136 Wn.2d 103, 118-119, 960 P.2d 927 (1998). The reviewing court may consider whether the officer advised the defendant that, in the absence of his consent, he would be required to obtain a search warrant, thus merely advising the defendant of the consequences of refusal; or whether the defendant was pressured into consenting by repeatedly asserting that his refusal to consent was futile. *State v. O'Neill*, 148 Wn.2d 564, 588-89, 62 P.3d 489 (2003). The court may also consider whether the person initially refused consent, if law enforcement had to request consent repeatedly and if the defendant was restrained. *State v. Flowers*, 57 Wn.App. 636, 645, 789 P.2d 333 (1990); *State v. Dancer*, 174 Wn.App. 666, 676, 300 P.3d 475 (2013).

In *O'Neill*, the defendant was sitting in a parked car in a parking lot. *State v. O'Neill*, 148 Wn.2d at 578. The officer shined his light in

O'Neill's car and asked what he was doing there. Eventually the officer told O'Neill to get out of the car and as he did, the officer saw a "cook spoon" on the floorboard. *Id.* at 583. The Court found the spoon admissible as evidence under the plain view exception. O'Neill denied consent for a further search of the vehicle and stated the officer would need to have a warrant. The officer announced he did not need a warrant, that he could simply arrest O'Neill for the drug paraphernalia and search incident to that arrest. O'Neill refused consent.

They discussed the matter and only after the officer pressed the issue did O'Neill relent and give consent. The Court concluded that the officer showed he had no intention of arresting O'Neill and searching incident to arrest. He simply claimed he could do so. Had he actually done so, he would not have needed O'Neill's consent to search. The only reason for the representations that he could and would arrest him and search incident to arrest was to obtain consent. *Id.* at 589.

In Mr. Marquette's case, the deputy initiated a vehicle stop based on a traffic infraction. The deputy admitted he physically opened the car door, pulled Mr. Marquette out, and put him in an arm-bar as he marched him toward and up against the patrol car. Mr. Marquette's liberty was restrained. After Trooper Stone observed the baggy on the floorboard of

the car Mr. Marquette was further restrained in handcuffs and placed in the backseat of the patrol car.

Similar to *O'Neill*, Mr. Marquette testified he told the officer numerous times that under *Gant* the officer could not search his vehicle. The officer's response was to say that he could impound the car and "would search it anyway, get a search warrant anyway." (4/15/13 RP 46-47, 53). Aware that Mr. Marquette was struggling financially and concerned about his mother, the officer was not merely advising Mr. Marquette of the consequences of refusal, he used the claim to pressure Mr. Marquette to consent. Mr. Marquette further testified the deputy told him if he would consent to the search he would "see what he could do for him". (4/15/13 RP 47). The consent was not voluntary, but rather the product of coercion.

Absent a warrant, the observation of contraband is insufficient to justify intrusion into a constitutionally protected area for the purpose of examining or seizing evidence that has been observed. *State v. Ferro*, 64 Wn.App. 181, 182, 824 P.2d 500 (1992), *rev. denied* 119 Wn.2d 1005 (1992). Here, because the consent was not voluntarily given, all the evidence from the vehicle should have been suppressed. Without the evidence, the State cannot prove possession with intent to deliver beyond a reasonable doubt.

D. THE DRUG EVIDENCE ADMITTED AT TRIAL WAS SUBSTANTIALLY DIFFERENT IN WEIGHT MEASURE THAN REPORTED BY THE ARRESTING OFFICER, THERE WAS A GAP IN THE CHAIN OF CUSTODY: THE EXHIBITS SHOULD NOT HAVE BEEN ADMITTED.

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Here, over defense objection based on lack of foundation, the State sought admission of two exhibits consisting of baggies of methamphetamine found in Mr. Marquette's car. Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime occurred. *Campbell*, 103 Wn.2d at 21. Factors to be considered "include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." *Id.* (internal citations omitted).

The chain of custody rule provides that an exhibit is sufficiently identified when it is declared to be in the same condition as at the time of its initial acquisition. *State v. Dickamore*, 22 Wn.App. 851, 857, 592 P.2d

681 (1979). Testimony from each custodian is unnecessary where one with first-hand knowledge testifies that the exhibit is the identical object about which testimony is given, and it is in the same condition as it was at the relevant time. *State v. McGinley*, 18 Wn.App. 862, 573 P.2d 30 (1977). However, evidence that is not readily identifiable and is susceptible to alteration by tampering or contamination is, typically identified “by the testimony of each custodian in the chain of custody from the time the evidence was acquired.” *State v. Roche (in re Sweeney)*, 114 Wn.App. 424, 436, 59 P.3d 682 (2002). This more stringent test requires the proponent to establish a chain of custody “with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.” *Roche*, at 436 (internal citations omitted).

Here, the deputy testified he weighed the packages containing the substances, recorded the weights, sealed the bags and transferred them to the property room. The scale weight of the bags totaled 1.8 grams. Another officer transferred the bags to the Washington State Patrol crime lab. Technician Alex Seabolt, who did not testify at trial, signed for the evidence. Crime lab forensic scientist Trevor Allen testified he weighed the bags as part of his investigatory process. The scale weights of the bags were 5.8 grams, .21 grams and .02 grams. The weight recorded by Deputy

Thurman differed by over 4 grams from the weight recorded by the forensic scientist. Somehow, the weight changed between the time Deputy Thurman weighed the baggies and when forensic specialist Trevor Allen weighed them. The failure of the State to produce Alex Seabolt as a witness created a hole in the chain of custody and a serious concern that the tested items were not the same items confiscated from the vehicle.

The trial court relied on a guess that Deputy Thurman did not use a scale that was certified as accurate or possibly that Deputy Thurman transposed the numbers 6.2 with 1.8 or simply misread the scale. Relying on *Campbell*, the court ruled the State only needed to show substantial, not literal compliance with the requirements of chain of custody.

Over 4 grams is not a minor discrepancy. The difference in weight is critical and too significant in amount to overlook the chain of custody on evidence that is not readily identifiable. The failure of the State to establish a chain of custody with sufficient completeness to render it improbable that the original items taken from the car had been exchanged with another or been contaminated or tampered with made the evidence inadmissible.

A trial court abuses its discretion when its decision is based on an untenable reason or untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). If the factual findings are unsupported by the

record, the decision is made on untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). In this case, the court's ruling on admissibility was based on guess and speculation. There was no evidence the scale was accurate or inaccurate, no evidence to support a guess by Deputy Thurman that he misread the scale, or to substantiate his guess that he transposed the numbers.

A trial court's decision to admit or exclude evidence will be reversed only where it has abused its discretion. *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). Here, because there was such a significant discrepancy in weight the State could not show the exhibits were the same objects and in the same condition as when initially acquired by Deputy Thurman. *See State v. DeCuir*, 19 Wn.App. 130, 135, 574 P.2d 397 (1978). Guessing why there was a discrepancy was unreasonable and the evidence should have been excluded.

E. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A
CONVICTION FOR POSSESSION WITH INTENT TO
DELIVER A CONTROLLED SUBSTANCE.

Without conceding that police lawfully obtained the incriminating items, or that they were properly admitted at trial, or that the court's judgment is merely informal at this time, Mr. Marquette contends there was insufficient evidence to support the element of intent to deliver.

The Due Process Clauses of the federal and state constitutions require the State to prove every element of the crime beyond a reasonable doubt. U.S. Const. Amends. VI, XIV; Const. art. 1 §§ 3,22. In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216,220-22, 616 P.2d 628 (1980). All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant. *State v. George*, 146 Wn.App. 906, 919, 193 P.3d 693 (2008).

The statutory elements of possession of a controlled substance with intent to deliver are (1) unlawful possession (2) a controlled substance and (3) intent to deliver. RCW 69.50.401. In *Robbins*, the court clarified the plain meaning of RCW 69.50.401(a) is that possession and intent to deliver refer to the *same quantity* of controlled substance. *State v. Robbins*, 68 Wn.App. 873, 876, 846 P.2d 585 (1993) (Emphasis added). In other words, the controlled substance that is found in the defendant's possession must be the same quantity of substance the defendant is alleged to have had intent to deliver. *Id.*

As noted above, the trial court here did not enter written findings of fact and conclusions of law. The court's oral ruling shows the court

appeared to rely on Mr. Marquette's statements that he had sold drugs in the recent past, had cash on his person, empty baggies, and a scale to conclude he possessed the current controlled substance with the intent to deliver.

There was evidence that Mr. Marquette had recently sold drugs. However, because Washington law requires possession and intent to deliver refer to the same quantity of controlled substance, the small quantity recovered (1.8 grams according to Deputy Thurman), and Mr. Marquette's admission that he had used his drugs earlier in the day warrants only an inference that Mr. Marquette possessed the drugs for his personal use. The scales and ringing cell phone could warrant an inference that he intended to deliver a controlled substance not yet possessed, but that is insufficient to support a conviction for possession with intent to deliver. *Robbins*, 68 Wn.App. at 877.

An appellate court may reverse a conviction for possession with intent to deliver on grounds of insufficiency of the evidence and may remand for entry of amended judgment on the lesser-included offense of possession. *See State v. Cobelli*, 56 Wn.App. 921, 925-26, 788 P.2d 1081 (1989).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Marquette respectfully asks this Court to remand for entry of written findings of fact and conclusions of law, with leave for Mr. Marquette to challenge any written findings. Alternatively, he respectfully asks this Court to dismiss with prejudice the conviction based on insufficient evidence.

Submitted this 21st day of March, 2014.

s/ Marie Trombley, WSBA 41410
Attorney for Appellant
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Larry G. Marquette, do hereby certify under penalty of perjury that on March 21, 2014, I emailed per agreement between the parties, a true and correct copy of the Appellant's Brief, or mailed by USPS, first class, prepaid postage to the following:

Email: kowens@spokanecounty.org
Mark E. Lindsey
Spokane County Prosecutor

Larry G. Marquette, DOC 935731
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

s/ Marie Trombley, WSBA 41410
Attorney for Appellant
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net