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Court of Appeals
Division III
State of Washington

No. 96069-1

NO. 34496-7-III

In the Court of Appeals of the State of Washington
Division 3

STATE OF WASHINGTON, Respondent

v.

MICHAEL N. PECK, Appellant

APPELLANT'S BRIEF

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A) ASSIGNMENTS OF ERROR

1. Trial court abused its discretion in denying authorization for defense forensic media expert services.

2. Trial court erred by failing to enter written findings of fact and conclusions of law after conducting an evidentiary hearing on a motion to suppress physical evidence.

3. Trial court erred in denying a motion to suppress physical evidence.

B) ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the trial court's denial of authorization of forensic media expert services require reversal and remand for a new trial?

a. Did the trial court abuse its discretion in denying authorization of forensic media expert services?

b. Was the trial court's denial of Mr. Peck's CrR 3.1(f) motion of constitutional magnitude, and if so will the State be able to establish harmlessness beyond a reasonable doubt?

i. Did the admission of Exhibit PLA 30 contribute to the verdict? Can the State show beyond a reasonable doubt Exhibit PLA 30 would have been admitted but for the erroneous denial of authorization for forensic media expert services?

ii. Did the weight of Exhibit PLA 30 contribute the verdict? Can the State show beyond a reasonable doubt Exhibit PLA 30 would

have been sufficiently probative to result in a conviction but for the erroneous denial of authorization for forensic media expert services?

2. Did the trial court violate CrR 3.6(b) by failing to enter written findings of fact and conclusions of law after conducting an evidentiary hearing on a motion to suppress physical evidence? If so, is remand for entry of written findings and conclusions required?

3. Did the trial court err in denying Mr. Peck's motion to suppress? If so, is reversal and dismissal of Count 3 (Unlawful Possession of a Controlled Substance with Intent to Deliver) required?

a. Was the warrantless search of the pickup partially investigatory? If so, can the inventory search exception to the warrant requirement apply? If not, should all evidence seized from the pickup be suppressed?

b. Was the warrantless search of the CD case outside the scope of a valid inventory search? If so, should all evidence seized from the CD case be suppressed?

C) STATEMENT OF THE CASE

Clark Tellvik drove a pickup, with Michael Peck as a passenger, down the driveway of a residence belonging to Laura Poulter that was located at 6540 Cove Road in Ellensburg, Washington at “almost 1:00” AM on January 23, 2016. RP 228, 235, 500, 595. The pickup got stuck in

the snow. RP 471-72. At the time Mr. Tellvik and Mr. Peck arrived, Ms. Poulter was at a restaurant in Cle Elum, and was not at home. RP 234-35.

Ms. Poulter had recently had a video surveillance system installed at her residence. RP 230-31, 288-89. The surveillance system allowed Ms. Poulter to view the video footage from her phone in real time. RP 235. Using her phone, Ms. Poulter observed the pickup and "two people" at her residence. RP 235-37. Not recognizing either Mr. Tellvik or Mr. Peck, and knowing she had given no one "permission" to be "on [her] property that night," Ms. Poulter "report[ed]" her observations to "9-1-1." RP 236. Ms. Poulter stopped watching the video after a short while and "headed home." RP 237-38.

As a result of Ms. Poulter's report, several Kittitas County Sheriff's Office Deputies went to Ms. Poulter's residence. RP 303-05. When Deputy Kivi, the first law enforcement officer on the scene, arrived, the pickup was "stuck in the snow," Mr. Peck was located "outside the passenger side of the" pickup, and Mr. Tellvik was located outside the driver's side of the pickup. RP 306. Shortly thereafter, Mr. Tellvik and Mr. Peck were detained. RP 410-11.

The pickup was later determined to have been recently stolen in Yakima. RP 315. The vehicle was impounded. RP 413; *see also* RP 41. Deputy McKean, assisted by Deputy Kivi, searched the vehicle. *Id*; *see*

also RP 41, 43, 100-01. As a result of that search, Deputy McKean found a "black zippered...CD case" in the vehicle. RP 418; *see also* RP 108. Deputy McKean "opened" the CD case. *Id.* Deputy McKean observed a "[s]ubstantial amount of crystalline substance" which "appeared to be crystal methamphetamine", individually packaged" "[a] digital scale," and "[a] glass smoking pipe" inside the CD case. RP 109, 421-22. Deputy McKean did not seek a search warrant for the vehicle in general, or the CD case in particular.

At some point within the "next few days," Ms. Poulter attempted to "retrieve" the video "for the police." RP 273-74. Ms. Poulter "had to call" her "surveillance guy," Troy Schlaitzer, to be "walk[ed] through how to" do that retrieval. RP 274, 290. Ms. Poulter also reviewed the video herself. RP 274. In reviewing the video, Ms. Poulter observed something she "kn[e]w for sure...was a gun." *Id.* Ms. Poulter informed the Sheriff's Office "there's probably a gun in the ground." RP 275.

The morning after Mr. Tellvik and Mr. Peck were arrested, Ms. Poulter's "next door neighbor" "plowed [her] driveway." RP 276. Ms. Poulter looked for a gun, and couldn't find one. *Id.* Deputy Kivi looked for a gun, and couldn't find one. *Id.* However, the next day, Deputy Vraves came with a metal detector, and located a firearm. RP 276-77, 543-49.

Mr. Tellvik and Mr. Peck were both charged with Burglary in the First Degree, Possession of a Stolen Vehicle, Possession with Intent to Deliver a Controlled Substance, Theft in the Third Degree, and Making or Having Burglary Tools. CP 212-14. As to Counts 1, 2, and 3—the alleged felonies—the State specifically alleged either Mr. Tellvik or Mr. Peck or both were "armed with a firearm" "at the time of the commission" of those crimes. *Id.*

Before trial, Mr. Peck moved to suppress "all evidence obtained as a result of an unlawful search and seizure, which includes but [is] not limited to drugs found in an automobile occupied by [Mr. Peck] just prior to [his] arrest." CP 19. The written motion focused on the search of the pickup truck in general, and the "black zippered bag in the vehicle" in particular. CP 24. The State responded in writing to that motion. CP 47-53.

The trial court conducted an evidentiary hearing on that motion. RP 20-136, 159-69. The trial court heard argument of the parties. CP 180-90. The trial court issued an oral ruling, denying the motion. CP 190-92. However, the trial court did not enter written findings of fact and conclusions of law.

Before trial, Mr. Peck also "move[d]...for an order appointing the expert services of[] Combs Forensic Services[] to assist with [Mr. Peck's] defense." CP 11. Specifically, Mr. Peck indicated Combs Forensic

Services was "necessary" to "examine[] for any possible alteration or tampering" and conduct "image[]....enhance[ments]" of a "video tape from private surveillance cameras" which was "missing at least 7 minutes of coverage." CP 12.

Mr. Peck requested authorization of expenditure of "$7164.00," billed at a "public defense rate of [$]199.00 per hour" for an estimated "36 hours." *Id.* Mr. Peck also provided a copy of the "curriculum vitae" of the "forensic media expert" "Allen Combs" of Combs Forensic Services. CP 12-15. Mr. Peck also incorporated by reference the court's earlier finding that Mr. Peck was "financially unable to obtain counsel without causing substantial hardship to himself." *See* CP 11, CP ___ (Order Withdrawing Counsel and Appointing Counsel, sub. 15.1)[1].

The trial court denied the motion. RP 11.

Mr. Peck was convicted of all counts with the exception of the misdemeanor theft charge, and the jury returned special verdicts indicating Mr. Peck was "armed with a firearm" as to each of the felony convictions. CP 215, 217-23, 228-241.

Mr. Peck timely filed a notice of appeal. CP 242.

[1] A Designation of Clerk's Papers, Second Supplemental was filed on March 24, 2017. Given the timing, the Kittitas County Clerk has not yet prepared a second supplemental Index to the Clerk's Papers.

D) ARGUMENT

1. Trial Court's Denial of Authorization of Defense Forensic Media Expert Services Requires Reversal and Remand for New Trial.

a. Trial Court Abused its Discretion in Denying Authorization of Defense Forensic Media Expert Services.

"A lawyer for a defendant who is financially unable to obtain...expert...services necessary to an adequate defense in the case may request them by motion to the court." CrR 3.1(f)(1). "Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court...*shall* authorize such services." CrR 3.1(f)(2) (emphasis added). In other words, if the court makes findings that expert services are necessary and that the defendant is unable to afford those services, an authorization for the expenditure of public funds is *required* by the court rule.

"Whether expert services are necessary for an indigent defendant's adequate defense is within the discretion of the trial court and its decision will not be overturned absent an abuse of discretion." *State v. French*, 157 Wn.2d 593, 607 (2006). A trial court abuses its discretion when its decision "is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Rohrich*, 149 Wn.2d 647, 654 (2003) (internal quotation omitted). "A decision is based on untenable grounds or

made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Id.* (internal quotations omitted). "A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take and arrives at a decision outside the range of acceptable choices." *Id.* (internal quotations omitted).

Here, Mr. Peck was charged by with Burglary in the First Degree, Possession of a Stolen Vehicle, Possession with Intent to Deliver a Controlled Substance, Theft in the Third Degree, and Making or Having Burglary Tools. CP 212-14. Specifically, the State alleged, as to the Burglary charge, that either Mr. Peck or Mr. Tellvik—his co-defendant—or both were "armed with a deadly weapon" "while entering or while in the building or in immediate flight therefrom." *Id.* Moreover, the State alleged, as to the three felony charges, that Mr. Peck or Mr. Tellvik or both were "armed with a firearm" "at the time of the commission" of the felonies. CP 212-13.

Before trial, Mr. Peck "move[d]...for an order appointing the expert services of[] Combs Forensic Services[] to assist with [Mr. Peck's] defense." CP 11. Specifically, Mr. Peck indicated Combs Forensic Services was "necessary" to "examine[] for any possible alteration or tampering" and conduct "image[]....enhance[ments]" of a "video tape from

private surveillance cameras" which was "missing at least 7 minutes of coverage." CP 12.

Mr. Peck requested authorization of expenditure of "$7164.00," billed at a "public defense rate of [$]199.00 per hour" for an estimated "36 hours." *Id.* Mr. Peck also provided a copy of the "curriculum vitae" of the "forensic media expert" "Allen Combs" of Combs Forensic Services. CP 12-15. Mr. Peck also incorporated by reference the court's earlier finding that Mr. Peck was "financially unable to obtain counsel without causing substantial hardship to himself." *See* CP 11, CP ___ (Order Withdrawing Counsel and Appointing Counsel, sub. 15.1).

Initially, the trial court questioned the parties about the significance of the video evidence, specifically focusing on the "materiality [or] relevance" of the "gap" in the video. RP 8-9. The State responded to part of the trial court's concern by indicating the video was "[a]bsolutely relevant," indicating its belief video showed "Mr. Tellvik dropping a gun right in the snow there" and "Mr. Tellvik using a crowbar to go into a garage." RP 9-10. Mr. Peck responded to part of the trial court's concern by indicating the individual who recently installed the surveillance system "extracted the video and then gave it to the police...a number of days" after the incident took place, rather than having the Sheriff's Office extract the video themselves immediately. CP 7. Mr. Peck argued because of way

in which the video was "extracted," he needed an expert to develop a motion to exclude the video due to "authentication problems." *Id.* Mr. Peck also argued he needed an expert to discern why the video was appeared to be missing footage, which may undermine the weight of the video if it was admitted. *Id.* at 7, 9. Mr. Peck also argued he needed an expert to "enhance[]" the video to rebut the "allegations of a gun." RP 9; *see also id.* (Mr. Tellvik: "that's not what the video shows").

The trial court denied the motion. RP 11. However, after receiving offers of proof from the parties, the trial court did not find the video was irrelevant or of de minimis significance to the case. *See* RP 10-11. More importantly, the trial court did not find the forensic media expert was unnecessary to Mr. Peck's defense. *See id.* Moreover, the trial court did not find Mr. Peck was financially able to pay $7164.00 for those expert services. *See id.*

Rather, the trial court denied the motion on the basis that the dollar amount requested was large. Specifically, the trial court focused the idea that granting the motion would require the County to "pay $7,000 to an investigator." RP 10. And the trial court commented that the expert's "public defense discount[ed rate of] $199" per hour from the usual rate of "$500 an hour" "[s]ounded like a marketing ploy." RP 8.

A plain reading of court rule allows a trial court to deny a request for expenditure of public funds for defense services on only two grounds: either (1) that "the services are [un]necessary;" or (2) "that the defendant is financially []able to obtain them." CrR 3.1(f)(2). No published Washington opinion has ever found the dollar value of the request can support a finding the services are unnecessary. However, at least one Supreme Court opinion separated out the issues of whether services were "unnecessary under CrR 3.1(f)" and whether the "cost [of the services] was prohibitive," and affirmed only on the necessity issue, not the cost issue. *State v. French*, 157 Wn.2d 593, 606 (2006). Furthermore, the court rule itself contemplates treating the cost issue as distinct from the necessity issue. *See* CrR 3.1(f)(3) (trial court has discretion to "determine[]" what constitutes "[r]easonable compensation for the services").

Here, because the trial court denied Mr. Peck's motion to authorize the forensic media expert services at public expense without finding the services unnecessary or finding Mr. Peck was financially able to obtain them, and because the trial court denied the motion due to the amount of money requested, the trial court abused its discretion.

b. Trial Court's Denial of CrR 3.1(f) Motion of Constitutional Magnitude; State Will Be Unable to Establish Harmlessness Beyond a Reasonable Doubt.

Authorization of public funds for expert services necessary to the defense is not only required under CrR 3.1(f), but also required by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution where the expert services are "necessary to address what is 'likely to be a significant factor at trial' – that is, when the accused needs assistance on an issue related to guilt." *State v. Cuthbert*, 154 Wn. App. 318, 329-30, 334 (2010) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985)).

"[I]f trial error is of constitutional magnitude, prejudice is presumed, and the [government] bears the burden of proving it was harmless beyond a reasonable doubt." *State v. Coristine*, 177 Wn.2d 370, 380 (2013) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The "test for determining whether a constitutional error is harmless [is 'w]hether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'." *State v. Brown*, 147 Wn.2d 330, 341 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). That is, an appellate court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.*

i. Admission of Exhibit PLA 30 Contributed to Verdicts; State Cannot Show Beyond Reasonable Doubt Would Have Been Admitted But For Erroneous Denial of Forensic Media Expert.

Here, the video was admitted into evidence. RP 350-51; CP 104; Ex. PLA 30. Portions of the video were published to the jury. *See e.g.* RP 351-64. Derivative screen shots from the video were admitted into evidence. *See e.g.* RP 362-63, 444, 454-55; CP 103-04; Exs. PLA 6, PLA 7, PLA 40, PLA 41, DEF 502, DEF 503.

At the outset of trial, Mr. Peck moved to "preclude introduction of any video or pictures obtained through Laura Poulter's surveillance cameras which were retrieved off a thumb drive given to the Sheriff's department by Ms. Poulter." CP 58-59. However, Mr. Peck withdrew that motion, presumably because without having a defense forensic media expert, he was unable to effectively argue the authentication issue. *See* RP 158.

Absent the video and screen shots therefrom, the State introduced no evidence that Mr. Tellvik possessed or was armed with a firearm. Absent the video and Deputy Vraves review thereof, Deputy Vraves' testimony regarding using a "metal detector" to locate "Kel Tec 9 mm" buried in "pretty compact" "snow" days after Mr. Peck's arrest would have been irrelevant. *See* RP 542-50. Therefore, the admission of the video

contributed to the jury verdicts, at least regarding the Burglary and firearm enhancement verdicts.

Thus, if the trial court had excluded the video and screen shots therefrom based in part upon expert testimony that would have been provided by Mr. Combs, the outcome of the trial would have been different. Because the State cannot show beyond a reasonable doubt the video and screen shots would have been admitted had the trial court authorized funds for a defense forensic media expert, the trial court's erroneous denial is not harmless.

ii. Weight of Exhibit PLA 30 Contributed to Verdicts; State Cannot Show Beyond Reasonable Doubt Would Have Been as Probative But For Erroneous Denial of Forensic Media Expert.

Here, the State had two witnesses that provided expert opinion testimony on the subject of the video.

First, Troy Schlaitzer testified he assisted in "put[ting] onto a thumb drive" the video" data" which was "handed over to the police," and opined the data "was not corrupted." RP 290, 295. Mr. Schlaitzer also opined the video "would...have truly and accurately depicted what it was showing that night," despite his lack of personal knowledge about the incident. RP 292. However, Mr. Schlaitzer also testified about the limitations of his expertise in rendering expert opinions on this topic,

suggesting if a “forensic video analyst” were to “look at” the video, he would be able to determine “if pixels were modified or changed.” RP 301.

Second, Kittitas County Sheriff's Deputy Matt Martin testified he had “over 300 hours of specialized training in computer forensics, cell phone forensics and video.” RP 346. Part of his job duties include “analyz[ing]...video” that “comes in.” RP 347. Deputy Martin opined “[t]he content of the video itself [was] not altered in any way.” RP 348; *see also* RP 135.

Both Mr. Schlaitzer and Deputy Martin provided innocent explanations for any missing frames of video. Specifically Mr. Schlaitzer opined the missing frames were due to a lack of motion in front of any camera, causing it to stop recording after “30 seconds to one minute.” RP 297. Deputy Martin opined the missing frames may be because the frames were “corrupted” due to “[t]oo much information being funneled through a very small funnel coming into [Ms. Poulter's] computer.” RP 355, 465.

By not having the video forensically analyzed by his own expert, Mr. Peck was unable to effectively argue from evidence to the jury alternate, non-innocent explanations for the missing video frames, the accuracy of the video, or whether the video was corrupted or altered. Because the State cannot show beyond a reasonable doubt the jury verdict was not affected by the absence of expert defense testimony that would

have supported such arguments, the State will be unable to establish the trial court's erroneous denial of authorization for funds for a defense forensic media expert was harmless.

2. Trial Court Violated CrR 3.6(b) by Failing to Enter Written Findings of Fact and Conclusions of Law after Conducting an Evidentiary Hearing on a Motion to Suppress Physical Evidence; Remand for Entry of Written Findings and Conclusions Required.

"If an evidentiary hearing is conducted" regarding a "[m]otion[] to suppress physical...evidence," "at its conclusion the court shall enter written findings of fact and conclusions of law." CrR 3.6. "[T]he language of the rule plainly mandates the entry of formal findings and conclusions." *State v. Cruz*, 88 Wn. App. 905, 907 (1997). "The purpose of [a court rule]'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal." *State v. Head*, 136 Wn.2d 619, 621 (1998).[2]

Generally, "the failure to enter written findings of fact and conclusions of law...requires remand for entry of written findings and conclusion." *Id.* at 624. However, if an appellate court has "a clear and comprehensive oral opinion so that it is left with no doubt as to the trial

[2] *Head* dealt with CrR 6.1(d), not CrR 3.6(b). However, both rules require written findings and conclusions, so require for identical policy reasons, and require similar remedies when the rule is violated.

court's findings and the basis for its decision," the appellate court may "overlook [the] absence" of the required written findings and conclusions. *Cruz*, 88 Wn. App. at 907-08. Alternatively, if "a defendant can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same," "reversal may be appropriate." *Head*, 136 Wn.2d at 624. "For example, a defendant might be able to show prejudice resulting from the lack of written findings and conclusions where there is a strong indication that findings ultimately entered have been 'tailored' to meet issues raised on appeal." *Id.* at 624-25. However, "delay in entry of written findings of fact and conclusions" does not, in and of itself, establish prejudice. *Id.* at 625.

Here, Mr. Peck moved to suppress "all evidence obtained as a result of an unlawful search and seizure, which includes but [is] not limited to drugs found in an automobile occupied by [Mr. Peck] just prior to [his] arrest." CP 19. The written motion focused on the search of the pickup truck in general, and the "black zippered bag in the vehicle" in particular. CP 24. The State responded in writing to that motion. CP 47-53.

The trial court conducted an evidentiary hearing on that motion. RP 20-136, 159-69. The trial court heard argument of the parties. CP 180-90. The trial court issued an oral ruling, denying the motion. CP 190-92.

However, the trial court declined to issue written findings and conclusions at the time of the hearing. RP 192. Specifically, the trial court stated,

> We'll have to make more detailed findings later on if it's necessary. We don't know what's going to happen with the trial so I always – there's no reason for me to go and spend five hours writing up a document, and then if there's a not guilty finding, 'Well, that was a waste of time, Judge.' You know, maybe the Court of Appeals would like me to do it in that order but that doesn't make any sense. So we're going to do it in the order of – if there's a conviction we'll – we'll prepare the written findings and conclusions and sign them.

Id. The trial court never did enter written findings of fact and conclusions of law. As such, the trial court violated CrR 3.6(b).

Although it has been almost a year since the trial court's orally denied Mr. Peck's motion to suppress, Mr. Peck cannot at this time establish actual prejudice resulting from the trial court's violation of CrR 3.6(b). Therefore, Mr. Peck requests this Court remand to the trial court for entry of written findings and conclusions.

3. Trial Court Erred in Denying Motion to Suppress; Reversal and Dismissal of Count 3 (Unlawful Possession of a Controlled Substance with Intent to Deliver) Required.

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art I § 7. "Under the

Washington Constitution, the relevant inquiry is whether the State unreasonably intruded into the Defendant's private affairs." *State v. White*, 135 Wn.2d 761, 768 (1998). "The analysis under article I, section 7 focuses, not on a defendant's actual or subjective expectation of privacy, but...on those privacy interests Washington citizens held in the past and are entitled to hold in the future." *Id.* "Any analysis of article I, section 7 in Washington begins with the proposition that warrantless searches are unreasonable per se." *Id.* at 769. "Despite this strict rule, there are jealously and carefully drawn exceptions to the warrant requirement." *Id.* (internal quotations omitted). "An inventory search of an automobile" is one such exception to the warrant requirement. *Id.*

"Inventory searches, unlike other searches, are not conducted to discover evidence of crime." *State v. Houser*, 95 Wn.2d 143, 153 (1980). "Accordingly, a routine inventory search does not require a warrant." *Id.* However, to be valid, an inventory search "must be restricted" in "direction and extent" "to effectuating the purposes" of justify an inventory search's exception to the warrant requirement. *Id.* "[A] noninvestigatory inventory search of an automobile is proper when conducted in good faith for the purposes of (1) finding, listing, and securing from loss during detention property belonging to a detained person; [and] (2) protecting police and temporary storage bailees from

liability due to dishonest claims of theft." *Id.* at 154. An inventory search is not "conducted in good faith" if it "a pretext for an investigatory search." *Id.* at 155. Furthermore, "the scope of the search should be limited to those areas necessary to fulfill its purpose[s]." *Id.*

Generally, an appellate court "review[s] a trial court's denial of a motion to suppress evidence [by] determin[ing] whether substantial evidence supports the trial court's findings of fact and whether those findings of fact support the trial court's conclusions of law, which [are] review[ed] de novo." *State v. Rooney*, 190 Wn. App. 653, 658 (2015). However, "a trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered." *Head*, 136 Wn.2d at 622. "An oral opinion has no formal or binding effect unless formally incorporated into the findings [and] conclusions." *Id.* Essentially, because the trial court violated CrR 3.6(b)'s written findings and conclusions requirement—*see supra* § 2—the trial court effectively did not make any findings of fact. Furthermore, upon remand, because of the passage of time, the trial court would not be in a markedly different situation than this Court in being able to make factual determinations. *See* RP 192 ("'Cause the record's clear. We've got the record on evidence, on tape here"). As such, if this Court declines to

remand for entry of written findings and conclusions, it should review both the conclusions of law *and* the factual basis therefor *de novo*.

a. Search of Pickup Partially Investigatory; Therefore, Inventory Search Exception Does Not Apply, and All Evidence Seized from the Pickup Should Have Been Suppressed.

A valid inventory search must be "conducted in good faith and not as a pretext for an investigatory search." *State v. Wisdom*, 187 Wn. App. 652*,* 674 (2015). Here, the search of the pickup was, at least in part, a pretext for an investigatory search.

After "confirm[ing] with the [law enforcement] agency that took the stolen vehicle report," Kittitas County Sheriff's Corporal Zach Green decided to "impound[]" the pickup truck. RP 41. After making the decision to impound the pickup, "[t]he vehicle was searched" by "Dep. McKean...assisted by Dep. Kivi" at the direction of Corporal Green. RP 41, 43; *see also* RP 100-01. Corporal Green testified vehicle was searched "to see what all was inside" "[f]or the purpose of looking for evidence or anything else that was left in the vehicle." RP 41. Another purpose of the search Corporal Green ordered was to remove "anything in the truck that shouldn't have been in the truck [that the pickup owner] didn't want the truck back with it still in there." RP 44; *see also* RP 104. Another purpose of the search Corporal Green ordered was to "show a list of what was in

the vehicle...[j]ust in case someone claims that their diamond ring was left in the car and now it's gone" to "protect" the "Sheriff's office, the registered owner, the other folks who have property inside that vehicle... [and] the tow company." RP 104-05. Corporal Green believed he did not need a warrant to search the vehicle because "the vehicle [did] not belong to anyone who was there," and "the two subjects [including Mr. Peck]... [didn't] have any right to the vehicle or have any expectation of privacy to the vehicle." RP 42, 49.

As a result of that search, Deputy McKean found a "black zippered...CD case" in the vehicle. RP 108. Deputy McKean "opened" the CD case. *Id.* Deputy McKean observed a "[s]ubstantial amount of crystalline substance, individually packaged" "[a] digital scale," and "[a] glass smoking pipe" inside the CD case. RP 109. Deputy McKean did not seek a search warrant to open the CD case because he "[d]idn't think there was a reasonable expectation of privacy in the stolen vehicle," although he acknowledged he could have sought a search warrant. RP 115, 117-18. Deputy McKean testified he was, at least in part, "looking for evidence" when he was searching the vehicle. RP 116-17.

Because Deputy McKean, in searching the vehicle at Corporal Green's direction, was in part searching for evidence, his search was not a *noninvestigatory* inventory search. The search was, at least in part,

pretextual. Therefore, the search could not be justified as a valid investigatory search. Because the State cannot establish any other exception to the warrant requirement applies, the search of the vehicle by Deputy McKean and Deputy Kivi was illegal, and all evidence obtained therefrom should have been suppressed.

Because the only evidence that Mr. Peck possessed a controlled substance came from the illegal vehicle search, this Court should reverse Mr. Peck's conviction under Count 3, Unlawful Possession of a Controlled Substance with Intent to Deliver, and remand for entry of an order dismissing the same.

b. Search of the CD Case Outside Scope of Valid Inventory Search; Therefore, All Evidence Seized from the CD Case Should Have Been Suppressed.

Even if the search of the vehicle in general constituted a valid inventory search, the search of the CD case in particular was outside the scope of a valid inventory search.

"Courts treat 'luggage and other closed packages, bags and containers' as unique for purposes of police searches." *State v. Wisdom*, 187 Wn. App. 652, 670 (2015) (citing *California v. Acevedo*, 500 U.S. 565, 571 (1991)). "Washington courts recognize an individual's privacy

interest in his closed luggage, whether locked or unlocked." *Id.* (citing *Houser*, 95 Wn.2d 143, 157 (1980).

"The inventory search is a recognized exception because, unlike a probable cause search and a search incident to arrest, the purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function." *Id.* at 674. An officer conducting an inventory search can "merely list[a] container on the inventory rather than opening the container and listing each individual item inside." *Id.* at 675. Therefore, the purposes of an inventory search are not furthered by opening a closed container, and searching that closed container is therefore outside the scope of a valid inventory search.

The facts in *Wisdom* are indistinguishable in any relevant respect from the facts here. There, Mr. Wisdom was "arrested...for possession of a stolen vehicle." *Id.* 658. There, a closed container—"a black 'shaving kit type' bag—was observed on the "front seat" of that stolen vehicle. *Id.* The searching officer "removed the bag from the vehicle, opened it, and found methamphetamine, cocaine, ecstasy, heroin, drug paraphernalia, and two thousand seven hundred dollars in case." *Id.* The searching officer "never obtained a warrant for his search, nor did he request [Mr.] Wisdom's consent before opening the black bag." *Id.* at 659. Mr. Wisdom was

ultimately charged with, and convicted of, "possession with intent to deliver methamphetamine." *Id.* at 658.

Here, Mr. Peck was arrested for possession of a stolen vehicle. RP 82. In that vehicle, a closed container—a black CD case—was observed "partially wedged under the seat." RP 108. The searching Deputy "opened" the container and found "[a] lot of drugs" and drug paraphernalia. RP 108-09. The searching Deputy never sought a search warrant or consent from Mr. Peck or Mr. Tellvik. RP 115. And Mr. Peck was ultimately charged with and convicted of unlawful possession with intent to deliver methamphetamine.

The State may argue that in *Wisdom*, unlike here, the searching officer had probable cause to obtain a search warrant. The *Wisdom* court squarely responded to that argument, finding it self-defeating. 187 Wn. App. at 678 ("We doubt a magistrate would deny a search warrant," given that Mr. "Wisdom earlier told [the searching officer] that methamphetamine lay on the front seat of the pickup truck and the only container on the seat that could hold the methamphetamine was the shaving kit bag." However, if one "assum[es]...a denial of the application," the searching officer then "lacked probable cause to search inside the bag," which leads to the conclusion the searching officer

"should not have searched inside and the evidence of the contents inside should not be used...in a prosecution").

Because Deputy McKean searched a closed container outside the scope of a valid inventory search, and because the State cannot establish any other exception to the warrant requirement applies, the search of the CD case by Deputy McKean was illegal, and all evidence obtained therefrom should have been suppressed.

Because the only evidence that Mr. Peck possessed a controlled substance came from the illegal search of the CD case, this Court should reverse Mr. Peck's conviction under Count 3, Unlawful Possession of a Controlled Substance with Intent to Deliver, and remand for entry of an order dismissing the same.

E) CONCLUSION

The trial court erred in denying Mr. Peck's motion for authorization of public funds for a forensic media expert by failing to find the expert services unnecessary or financially obtainable, and only finding the amount requested was of a large dollar amount. This Court should, therefore, reverse Mr. Peck's convictions and remand for a new trial.

The trial court erred in failing to enter written findings of fact and conclusions of fact after conducting an evidentiary hearing on Mr. Peck's

motion to suppress physical evidence. This Court should, therefore, remand for entry of written findings and conclusions.

The trial court erred in denying Mr. Peck's motion to suppress physical evidence. The search was conducted without a search warrant, and not pursuant to any exception to the warrant requirement. In particular, the search was not a valid inventory search, both because it was partially a pretext for an investigatory search and because it exceeded the scope of a valid inventory search by involving the opening of closed containers. This Court, therefore, should reverse the conviction under Count 3 (Unlawful Possession of a Controlled Substance with Intent to Deliver) and remand for entry of an order dismissing the same.

DATED this 27th day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT'S BRIEF was mailed, postage prepaid, on this 27th day of March, 2017 to counsel for Respondent, as follows:

Kittitas County Prosecuting Attorney
205 W 5th Ave Ste 213
Ellensburg, WA 98926

and to Appellant as follows:

Michael N. Peck
DOC # 852989
c/o Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

/s/ Christopher Taylor
Christopher Taylor

CR TAYLOR LAW, P.S.
March 27, 2017 - 2:14 PM
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Court of Appeals Case Number: 34496-7

Party Respresented: Appellant

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Comments:

Appellant's Opening Brief

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