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NO. 3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TINA BOTTROFF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Dean S. Lum

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. BECAUSE THE SEARCH OF MS. BOTTROFF'S VEHICLE, INCIDENT TO A PASSENGER'S ARREST, VIOLATED BOTH THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7, SUPPRESSION WAS REQUIRED.

a. The federal "good faith" exception to the exclusionary rule cannot apply to a search incident to arrest held unconstitutional under *Gant*.

i. *Gant* itself established the inapplicability of the good faith exception to this context. Since *Gant*¹ was decided, courts all over the country, including in this State, have been divided over whether the good faith exception should be extended to pending pre-*Gant* cases with unconstitutional searches incident to arrest. However, the United States Supreme Court has already answered the question in *Gant* itself.

The search in *Gant* was unreasonable, and therefore the fruits of that search must be suppressed. The Court did not entertain the idea of the good faith exception for the simple reason that its application would undermine the very privacy rights which the *Gant* ruling was intended to restore and protect.

¹ *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

The Court did anticipate the good faith argument however, and directly addressed it in its opinion:

Although it appears that the State's reading of Belton² has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by the reasons underlying the Chimel³ exception. Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result. The fact that the law enforcement community may view the State's version of the Belton rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected.

Id. at 1722-23. Despite its acknowledgement that an unconstitutional interpretation of Belton has been the prevailing rule for many years, the Court chose not to apply a good faith exception to Gant. Implicit in that decision is the Court's judgment that good faith reliance could not excuse the Fourth Amendment violation, and the exclusionary rule must be applied.

Indeed, if the Gant Court had applied the good faith exception, the result would have been absurd. According to

² New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)

³ Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)

Respondent's argument, the officer who arrested Gant was relying in good faith on the same law which the police relied upon here. Therefore, the good faith exception would apply with the same force there. There is no logical reason why the exception should be applied in Ms. Bottroff's case but not in Mr. Gant's. Mr. Gant was 10 to 12 feet from his vehicle when arrested, while Mr. Gregory was 8 to 10 feet from Ms. Bottroff's vehicle. The State cannot suggest that a difference of two to four feet should distinguish a clearly unreasonable search, requiring suppression, from a scenario so obviously settled that the good faith exception should apply. Yet this absurd result is what the State's reasoning requires.

ii. Extending the exception to this context would be both untenable and unconstitutional. The good faith exception has not previously been applied to a change in the Constitutional interpretation announced by the U.S. Supreme Court. Respondent is not merely asking for the exception to be applied, but for it to be extended to this context, a step which the U.S. Supreme Court was clearly unwilling to make.

The Ninth Circuit applied the correct analysis in United States v. Gonzalez, 578 F.3d 1130 (9th Cir., 2009). There, the Court first noted that the good faith exception had not previously

been applied to this scenario: “a search conducted under a then-prevailing interpretation of a Supreme Court ruling, but rendered unconstitutional by a subsequent Supreme Court ruling announced while the defendant's conviction was on direct review.” Id. at 1132. Turning to the exception, the Court found no compelling reason justifying its extension to this new context, but did find it would conflict with the “long-standing rule” of retroactivity. Id. Application of the exception would also “violate ‘the integrity of judicial review’ by turning the court into, in effect, a legislative body announcing new rules but not applying them, rather than acting in our proper role as an adjudicative body deciding cases” and “violate the principle of treating similarly situated defendants the same.” Id., quoting Griffith v. Kentucky, 479 U.S. 314, 322-23, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Concluding that application of the exception would create “untenable tension within existing Supreme Court law,” the Ninth Circuit applied the exclusionary rule, suppressed the evidence, and reversed Gonzalez’ conviction. 578 F.3d at 1133.

Other jurisdictions have reached the same conclusion. The Western District of Michigan found the good faith exception

“untenable.” State v. Peoples, ___ F.Supp.2d ___, 2009 WL 3588564 (W.D. Mich., 2009).

Expanding the good-faith doctrine to permit reliance on case law would take the exception in a new and untenable direction. It would for the first time permit use of illegally obtained evidence based on the good faith of the officer alone, unchecked by the judgment of either the legislature (as it was in Krull) or the judiciary (as it was in Leon, Evans, and Herring). It would permit an officer to determine whether she has probable cause to search, and then permit her unilateral determination to excuse suppression even after a court determines the search to have violated the Fourth Amendment. This expansion of the doctrine is untenable because good-faith reliance on case law is materially different than good-faith reliance on a warrant. A warrant is specifically addressed to the particular facts and targets at issue, and it is issued in advance of the actual search by the executive branch. Case law, in contrast, is inherently retrospective and focused on a situation other than the one at hand. Reliance on case law necessarily would require an officer to extrapolate from prior scenarios and determine, in the first instance, whether the prior cases are sufficient to establish probable cause in the new matter. This process would be significantly different from excusing the officer's reasonable belief that a warrant exists, reasonable reliance on a later invalidated warrant, or reasonable reliance on a later invalidated statute.

Id. The Court pointed out the difficulties inherent in interpreting Fourth Amendment law, and observed,

[o]fficers are particularly poorly situated to determine whether the facts of a particular case establish probable cause to search because they lack "the detached scrutiny of a neutral magistrate." Indeed,

the "judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime" is considerably less reliable than that of a neutral court...

Relying on the reasoning of United States v. Leon, 468 U.S. 897, 902, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the Court concluded:

Permitting a police officer to rely on case law as an excuse to suppression would circumvent the process of obtaining a reliable probable cause determination from a magistrate. Moreover, it would empower the executive branch to conduct an illegal search without penalty so long as the officer could point to a case from which he could reasonably extrapolate that his actions were legal... This is precisely contrary to the general separation of powers established by the Constitution, and to the particular application of that principle in the Fourth Amendment.

Peoples, WL 3588564 citing Leon at 913-14.

Similarly, the Court in United States v. Buford observed that no case had extended the good faith exception to changes in caselaw. 623 F.Supp.2d 923, 925 (M.D. Tenn. 2009). The court refused to do so, finding that extension lacked both "logical support" and "judicial momentum to extend the 'good faith' exception to this problematic point." Id. at 923, 926 (internal citations omitted).

b. Washington does not recognize a good faith exception to the exclusionary rule.

i. The Washington Supreme Court has not changed course from its adherence to an automatic exclusionary rule and rejection of a good faith exception to that rule. In State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), the Supreme Court held in no uncertain terms:

Without an immediate application of the exclusionary rule whenever an individual's right to privacy is unreasonably invaded, the protections of the Fourth Amendment and Const. art. 1, s 7 are seriously eroded.

Id. at 111-12 (emphasis added). Without exceptions, “whenever the right is unreasonably violated, the remedy must follow.” Id. at 110.

The Court explained that a good faith exception would not only pose too much danger to privacy rights, but would also carry such subjectivity and uncertainty as to be impractical. Id. at 106, 107 Fn 6. Therefore, “the good faith arrest exception is unworkable and is contrary to well-established Fourth Amendment principles” as well as the Washington Constitution. Id. at 107.

“Like all judicially created exceptions, the automobile search incident to arrest exception is limited and narrowly drawn, and it is the State's burden to establish that it applies.” State v. Patton, 167

Wn.2d 379, 219 P.3d 651 (2009), citing State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The State is unable to carry that burden.

Instead, Respondent frames the question in a way that turns the issue on its head: Respondent argues that the holding of White applies to only the limited context of a flagrantly unconstitutional statute – but forgets that the holding, refusing to apply the exception, was the exclusionary rule itself. Thus, Respondent apparently argues that the exclusionary rule applies only to flagrantly unconstitutional statutes, while the exception should be presumed to apply to all other contexts. This reasoning is the classic example of the exception swallowing the rule.

In two recent cases, the Washington Court of Appeals, relying on Gonzalez, rejected similar reasoning. State v. McCormick, 152 Wn.App. 536, 216 P.3d 475, 478 (2009); State v. Harris, ___ P.3d ___, 2010 WL 45755 at 7 (Jan. 7, 2010). In McCormick, the Court explicitly stated, “[u]ltimately, the State fails to provide us with a sound basis for avoiding the White precedent, which our Supreme Court recently reaffirmed as a rejection of

DeFillippo⁴ and its progeny.” McCormick, 152 Wn.App. at 478.

The same is true here, requiring the same result.

White is still sound and binding precedent. The State attempts to distinguish White because the constitutional infirmity in that case was in a statute, not a judicially created rule. This distinction makes no difference; the exclusionary rule is the baseline for any unreasonable search in violation of the Fourth Amendment and art. I, § 7, in any context. The Court in White did not limit its holding to unconstitutional statute.

In the last 27 years, the Supreme Court has not seen fit to narrow this holding. Contrary to Respondent’s characterization of the cases, Potter⁵ and Brockob⁶ did not have that affect because they did not apply the good faith exception, as Respondent claims. SRB at 22-24. This Court explained that distinction in State v. Holmes, 129 Wn.App. 24, 117 P.3d 360 (2005). Like Potter and Brockob, the issue in Holmes was whether the arresting officer had probable cause to arrest based on a DOL record showing the

⁴ Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979).

⁵ State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006).

⁶ State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006)

defendant's driver's license was suspended, where such suspension was executed without due process.⁷ This Court held:

The central question in this case is not whether there is a good faith exception to the exclusionary rule. Instead the appropriate question is whether police officers are required to know for certain that the DOL provided sufficient due process in suspending a driver's license before they can form a reasonable belief that the crime of driving while license suspended in the third degree has been committed and arrest the driver. We conclude that police officers are not required to possess such knowledge to have probable cause to make an arrest in such circumstances.

Id. at 27-28 (emphasis added). This was not a privacy case, and the exclusionary rule had no currency in this context; the Court was only concerned with whether or not the facts known to the officer at that time constituted probable cause to arrest. The Supreme Court had already established that DOL records are presumptively reliable – not because of any “good faith” type of analysis, but

⁷ City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

because they pass the Aguilar-Spinelli⁸ test, a completely unrelated inquiry. Id., citing State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). In Holmes, because the police officer read DOL records stating that the defendant's license was suspended in the third degree, he had probable cause to arrest. Holmes, 129 Wn.App. at 33-34. If he had not had probable cause, the arrest would have been illegal, and the fruits of the ensuing search would have been suppressed. The good faith exception would not have entered into this scenario at all.

Holmes and Potter were consolidated in the Supreme Court and both were affirmed. Respondent erroneously claims Potter "applied the DeFillippo rule under article I, § 7," but the opinion does not support this interpretation. SRB at 22. The Court in Potter simply refused to apply White. Potter, 156 Wn.2d at 843. White was distinguished because there, the unconstitutional "stop-and-identify" statute rendered the very basis of the arrest

⁸ "To perform the constitutionally prescribed function, rather than being a rubber stamp, a magistrate requires an affidavit which informs him of the underlying circumstances which lead the officer to conclude that the informant was credible and obtained the information in a reliable way. Only in this way (as the Court emphasized in Aguilar and Spinelli) can the magistrate make the proper independent judgment about the persuasiveness of the facts relied upon by the officer to show probable cause." State v. Jackson, 102 Wn.2d 432, 436-37, 688 P.2d 136 (1984), citing Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) and Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12

unconstitutional, whereas in the Potter cases, driving while license suspended was still an arrestable offense it was the statutory procedure leading to the suspension which was unconstitutional. Id. Thus, the question was not whether the arresting officers relied in good faith on the statute. The portion of the statute defining the crime – the portion on which the officers relied – was sound, but the officers found probable cause to arrest in the DOL records. The officers' reliance on the DOL records was not a matter of good faith, but a matter of investigation. When police investigate crimes, they do not "rely in good faith" on their investigative sources. If they find evidence (such as a presumptively reliable DOL record) which constitutes probable cause, they may arrest the suspect. If the evidence later turns out to be less reliable than the officer had hoped (if the DOL record was based on a constitutionally flawed process) there is no constitutional violation and no exclusionary rule. In Potter and Holmes, the DOL functioned much more like an informant in the Aguilar-Spinelli context than like a magistrate in the good faith context.

L.Ed.2d 723 (1964) .

Later the same year, the Court clarified this distinction in Brockob, explaining that the good faith exception did not apply to another probable cause challenge under the same statute.

[Petitioner] also claims that by arguing that a police officer can arrest a person based on a statute later declared invalid, the State is effectively urging the court to adopt a good faith exception to the exclusionary rule in violation of the privacy rights granted under article I, section 7 of the state constitution, citing State v. Nall, 117 Wn.App. 647, 72 P.3d 200 (2003). This argument is without merit. Nall dealt with a good faith exception to the probable cause requirement, involving a warrant that should have been quashed in Oregon. Id. at 651. The court held that the arresting officers were bound by any information Oregon authorities knew or should have known at the time of the arrest and, because the Oregon authorities knew the warrant was invalid, the arresting officers lacked probable cause. Id.

Brockob, 159 Wn.2d at 342, Fn. 19. (In Nall, the Court of Appeals specifically declined the State's invitation to adopt the federal good faith exception, noting that Washington has not yet recognized any good faith exception. 117 Wn.App. at 651-52.) The Court added, "the State has not urged us to adopt an exception to the exclusionary rule and does not need to." Brockob, 159 Wn.2d at 345. Far from supporting Respondent's argument, Brockob provides just another example of the Supreme Court's refusal to introduce a good faith exception in any context.

In sum, Potter and Brockob had no impact on the continuing validity of White. To the contrary, the Supreme Court has consistently reaffirmed White's straightforward holding. See, e.g. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) ("We affirm this rule today, noting our constitutionally mandated exclusionary rule 'saves article 1, section 7 from becoming a meaningless promise'"); State v. Morse, 156 Wn.2d 1, 9-10, 123 P3d 832 (2005) ("We have... long declined to create 'good faith' exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement"); State v. Chenoweth, 160 Wn.2d 454, 472 Fn 14, 158 P.3d 595 (2007) (while federal exclusionary rule is a "judicially-created prophylactic measure designed to deter police misconduct," state exclusionary rule is "constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions").

The State's brief addresses the three objectives of the exclusionary rule as laid out in State v. Bonds, 98 Wn.2d 1, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831, 104 S.Ct. 111, 78

L.Ed.2d 112 (1983). However, Respondent ignores Bond's clear holding that the analysis is both unnecessary and precluded here:

[W]e do not intend to suggest that such a balancing should be carried out whenever the operation of the exclusionary rule is an issue. When evidence is obtained in violation of the defendant's constitutional immunity from unreasonable searches and seizures, there is no need to balance the particular circumstances and interests involved. Evidence obtained as a result of an unreasonable search or seizure must be suppressed.

Id. at 11 (emphasis added, internal citations omitted). Interpreting Bonds several years later, the Court explained,

[b]y relying on the objectives set out in Bonds, the State misunderstands the application of the exclusionary rule in Washington. As White and Bonds make clear, violation of a constitutional immunity automatically implies exclusion of the evidence seized.

State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990)

(emphasis added). Here, the State has made the same mistake.

The balancing of objectives is irrelevant. The constitutional violation has been established, and automatic exclusion is required.

This principle was affirmed once again just three months ago in State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009).

There, the Court conclusively rejected the inevitable discovery

doctrine “because it is incompatible with the nearly categorical exclusionary rule under article I, section 7.” Id. at 636. Although that case did not concern a good faith exception, the Court relied heavily on White and its progeny and demonstrated its refusal to relax article I § 7’s strict protections. Id. at 632. Also, like the good faith exception, the inevitable discovery exception is a federal doctrine. But the Court in Winterstein found “the federal analysis is at odds with the plain language of article I, section 7, which we have emphasized guarantees privacy rights with no express limitations.” Id. at 635. Reliance on federal rationale was erroneous, and the inevitable discovery doctrine has no support in the Washington Constitution. Id.

The Supreme Court’s adherence to the exclusionary rule is neither new nor controversial. As early as 1936, long before the federal rule was applied to the states in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), the rule was already beyond dispute.

This is not a new question in this State. There have been many cases of like import, all based upon instances where articles seized by police officers without a search warrant, or upon an invalid warrant, were subsequently offered in evidence against the person from whom, or on whose premises or property, they were taken... These cases either

specifically announce, or else recognize, the well-settled principle, or rule, that the State may not use, for its own profit, evidence that has been obtained in violation of law.

State v. Gunkel, 188 Wash. 528, 534, 63 P.2d 376 (1936)

(listing cases). Washington's exclusionary rule is not just more protective, but also much older and firmly established than its federal counterpart.

In contrast to the exclusionary rule's long and consistent history, the Supreme Court has never applied a good faith exception. No such exception is available here.

ii. Application of a good faith exception would undermine judicial integrity. The primary purpose of the federal exclusionary rule is to deter unlawful police action. However, the privacy protections of art I, § 7 are not only stronger but also built on an "emphasis on protecting individual rights rather than on curbing government actions." White, 97 Wn.2d at 110. Without the objective of deterrence, a good faith exception would serve no purpose. The Court explained,

The result reached by the United States Supreme Court in DeFillippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. As a remedial measure, evidence is excluded only when the purposes of the exclusionary rule can be

served. This approach permits the exclusionary remedy to be completely severed from the right to be free from unreasonable governmental intrusions. Const. art. 1, s 7 differs from this interpretation of the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.

Id. at 110. And judicial integrity, as articulated by Justice Brandeis, is “tarnished... when the government is permitted to use illegally obtained evidence.” Id. at 110, Fn. 8, citing Olmstead v. United States, 277 U.S. 438, 483-85, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

Judicial integrity was also an important concern in the creation of the federal exclusionary rule. Mapp, 367 U.S. at 659. The Mapp Court recognized that the exclusionary rule would “inevitably result” in some criminals going free. However, the Court explained this is the cost of “the imperative of judicial integrity.” Id., quoting Elkins v. United States, 364 U.S. 206, 222, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter for its own existence.

Mapp, 367 U.S. at 659. Notably, neither the Mapp majority nor Justice Brandeis' dissent in Olmstead discussed anything

resembling good faith analysis in their descriptions of judicial integrity. They focused not on the arresting officer's intent or belief, but on the effect of government action on the citizenry.

Respondent argues judicial integrity is preserved by "consistency" and by "recognizing that law enforcement officers must rely on judicial opinions to guide their behavior and cannot be expected to do otherwise." SRB at 29. This argument not only misses the point, it has no basis in the caselaw discussing the principle of judicial integrity. Respondent also mischaracterizes the exclusionary rule itself. The exclusionary rule, when applied without exceptions, does not lead to the conclusion that "officers (and citizens)... can no longer rely in good faith on clearly articulated judicial pronouncements." SRB at 29. Instead, it should lead to the conclusion that judicial pronouncements are not written in stone. Circumstances can change and courts are not infallible. Officers and citizens can rely on judicial pronouncements, but with the understanding that, like most things in life, those pronouncements may change. Respondent's most fundamental misinterpretation of judicial integrity appears in the statement:

[I]ntegrity is not sacrificed when the judiciary changes its mind on a constitutional principle, upon fresh examination of its reasoning, but minimizes the

impact of its new ruling as to those who relied on its earlier pronouncements.

SRB at 29 (emphasis added). Respondent apparently believes that the people most impacted by Gant are police officers, not the citizens whose privacy rights were violated by unreasonable searches, often with life-shattering consequences.

As Gant pointed out, the police were never entitled to searches and arrests pursuant to Belton.. Suppression of unconstitutionally obtained evidence does not “punish” the arresting officer. It deters unconstitutional police work insofar as it makes that officer, and law enforcement in general, more careful in the future because they will not want their efforts to be wasted. It does not, however, deprive the police of any right or bring any negative consequences upon an individual officer.⁹

To state the obvious, the citizenry does have a right to privacy, a right which the presumptive rule against warrantless

searches protects. Judicial integrity is served by continuing to jealously protect that right. To serve this purpose the Washington Supreme Court unequivocally held the exclusionary rule “will add stability to the rights of individual citizens, discourage the legislature from passing [unconstitutional statutes], and will make law enforcement more predictable.” White, 97 Wn.2d at 112. Because of “the important place of the right to privacy in Const. art. 1, s 7... whenever the right is unreasonably violated, the remedy must follow.” Id. at 110.

To the extent that this Court has held a good faith exception does exist in Washington, State v. Riley, ___ P.3d ___, 2010 WL 427118 (Feb. 8, 2010), Ms. Brockoff respectfully requests this Court reconsider that decision for the reasons presented above.

⁹ In contrast to Respondent’s assertion, there is nothing “noteworthy” in Gant’s assurance that officers who reasonably relied on pre-Gant principles would be immune from civil liability for searches consistent with that precedent. SRB at 28. Civil liability standards have no relationship to the Fourth Amendment or the exclusionary rule. At the most basic level, the point of civil liability is that the person responsible for some injury shall make the injured person whole. The point of the Fourth Amendment is that every individual’s privacy shall be protected from unreasonable government invasion, and the point of the federal exclusionary rule is to deter law enforcement from straying into such invasion. There is simply no articulable basis for arguing that one doctrine can somehow bleed into the other.

2. FAILURE TO FILE CRR 3.6 FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUIRES REMAND OR DISMISSAL.

Respondent erroneously argues written findings and conclusions, as required by CrR 3.6, are unnecessary here.

If this Court does hold that a good faith exception applies to this context, then the findings of fact will be necessary to determine whether the police acted in good faith reliance in this particular case. The oral ruling alone has “no final or binding effect.” State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998), quoting State v. Dailey, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980). Nor is it adequate for review.

An appellate court should not have to comb an oral ruling to determine whether appropriate “findings” have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

Id. at 624. “The entry of findings and conclusions is a considered and formal judicial act vastly different from the informal oral opinion judges give at the end of a case.” State v. Alvarez, 128 Wn.2d 1, 24, 904 P.2d 754 (1995) (Alexander, J., dissenting), quoted in State v. Hescocock, 98 Wn.App. 600, 606, 989 P.2d 1251 (1999).

Since CrR 3.6 findings and conclusions still have not been filed in this case, there is a “strong presumption that dismissal will

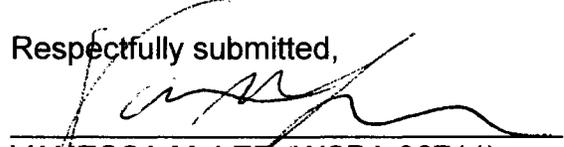
be the appropriate remedy.” State v. Smith, 68 Wn.App. 201, 209-11, 842 P.2d 494 (1992). In the alternative, the case must be remanded for entry of the CrR 3.6 findings.

B. CONCLUSION.

For the reasons presented above and in the opening brief, Ms. Bottroff respectfully requests this Court reverse the conviction and dismiss the charge with prejudice or in the alternative, remand for entry of CrR 3.6 findings and conclusions.

DATED this 9th day of March, 2010.

Respectfully submitted,



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Washington Appellate Project-91052

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63123-3-I
v.)	
)	
TINA BOTTROFF,)	
)	
Appellant.)	

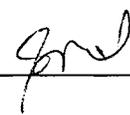
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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