

65.876-0

65876-0

NO. 65876-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD COUSINS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIDGETTE E. MARYMAN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Officers may search a vehicle incident to arrest if there is a nexus between the defendant, the vehicle, and the crime of arrest. While he was being arrested for possession of crack cocaine, Cousins threw the drugs back into his vehicle. Did officers lawfully search the vehicle when they retrieved the drugs?

2. Officers may conduct a warrantless search of a vehicle if there is probable cause to believe that the vehicle contains evidence of a crime and if exigent circumstances make obtaining a warrant impractical. Here, the drugs were in open view after Cousins threw them onto the floorboard of his vehicle. Both Cousins and his passenger were within reaching distance of the drugs when the officer retrieved them. Did exigent circumstances justify the warrantless search?

3. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court while the appeal was pending and are consistent with the trial court's oral ruling. Has the trial court properly entered written findings in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Richard Cousins was charged by information with Violation of the Uniform Controlled Substances Act ("VUCSA"); specifically, the State alleged that on October 18, 2009, Cousins possessed cocaine. CP 1-5.

Trial occurred in June 2010. The court denied Cousins's CrR 3.6 motion to suppress evidence. 2RP 43-45.¹ The jury found Cousins guilty as charged. CP 35. The court imposed a standard range sentence. CP 45-52.

2. SUBSTANTIVE FACTS.

On October 18, 2009, Seattle Police Officer Terry Bailey and his partner, Andrew Zwaschka, were working as bicycle officers in the area of First Avenue and Blanchard, in downtown Seattle. 1RP 10; 2RP 5. There are a number of bars and nightclubs in that part of the Belltown neighborhood and the officers were monitoring the crowds and traffic as the bars began to close. 1RP 8.

¹ The verbatim report of proceedings will be referred to as follows: 1RP (6/16/2010); 2RP (6/17/2010); 3RP (6/21/2010); and 4RP (7/26/2010).

Just before 1:00 a.m., Bailey heard extremely loud music coming from Cousins's sports utility vehicle ("SUV"). 1RP 11. When he first heard the music, Bailey was approximately 100 feet away from the SUV.² 1RP 12. Cousins was stopped at a red light in the innermost southbound lane. 1RP 13. Cousins was driving the SUV and there was a passenger in the front passenger seat. 1RP 12. Cousins's window was partially rolled down. Id.

As he rode up to Cousins's window, Bailey immediately noticed an open beer can on the center console. 1RP 13. Bailey told Cousins to turn down his music. 1RP 14. Using his right hand, which was somewhat clenched, Cousins turned down the volume. Id. Bailey could see a small baggie, containing what appeared to be crack cocaine, in Cousins's right hand.³ Id.

Based on his observations, Bailey decided to arrest Cousins for possession of cocaine. 1RP 16. He ordered Cousins to take the keys out of the ignition. Id. Cousins did not comply. Id. Instead, he looked at Bailey, looked at the traffic light, and then

² In Belltown, which is classified as a "nighttime zone," it is unlawful for anyone to create "loud and raucous, and frequent, repetitive, or continuous sounds that are audible at a distance of at least 75 feet" between the hours of 12:00 a.m. and 5:00 a.m. Seattle Municipal Code 15.48.050.

³ Bailey has been a police officer for nine years. 1RP 6. In that time, he has seen crack cocaine hundreds, if not thousands, of times. 1RP 14.

turned up the volume on his radio. Id. At this point, Bailey became concerned that Cousins was thinking about fleeing. Id. Again, Bailey instructed Cousins to take his keys out of the ignition. Id. Cousins turned down his music, but continued to glance at the traffic and the traffic light. 1RP 17. Bailey suspected that Cousins was waiting for the traffic to clear so that he could drive away. Id. Once again, Bailey ordered Cousins to take his keys out of the ignition. Id. Cousins finally complied with this third command. Id.

Bailey opened the door and had Cousins step out of the SUV. 1RP 18. As Cousins was getting out, he tried to toss the baggie of crack cocaine under his seat, but the baggie landed on the floorboard where Bailey could see it. 1RP 19. Bailey had Cousins stand facing the rear driver's-side door, with his hands on the roof of the SUV. Id. Bailey quickly reached into the SUV and grabbed the baggie off the floorboard. 1RP 20. He then handcuffed Cousins. 1RP 21. It took about five seconds for Bailey to get Cousins out of the vehicle and to retrieve the baggie. 1RP 67.

Throughout this time, the passenger was sitting in the front seat. 1RP 19. No officer had contacted him yet, and Zwaschka was busy at the back of the SUV, updating dispatch about the stop.

1RP 18-19; 2RP 9. Both Cousins and the passenger were within reaching distance of the baggie. 1RP 20-21. Given that he could see the crack cocaine from outside the car, Bailey suspected that the passenger also knew that there were drugs in the vehicle.

1RP 22. Bailey was not able to adequately watch the passenger while he was having Cousins put his hands on the roof of the SUV.

1RP 74. Bailey suspected that the passenger was either buying crack cocaine or that some of the crack belonged to the passenger, and he was especially concerned that the passenger would destroy the drugs or swallow them to prevent Bailey from recovering them.

1RP 22.

Because the baggie was open, Bailey thought that some crack cocaine might have fallen out when Cousins tossed it on the floorboard. 1RP 26. Bailey also knew that it was easy to hide drugs in a vehicle and thought that there might be additional baggies under the seat. Id. The passenger was still unsecured in the front seat. 1RP 25. If the passenger knew that there were drugs under the seat, it would have been possible for him to reach over and grab them. Id. Bailey found a second baggie under the driver's seat. 1RP 24. During a search incident to arrest, Bailey found \$209 on Cousins. 3RP 26.

C. ARGUMENT

1. THE SEARCH OF COUSINS'S VEHICLE WAS
LAWFUL UNDER ARTICLE I, SECTION 7 OF THE
WASHINGTON CONSTITUTION.

Cousins argues that officers were required to obtain a search warrant before retrieving the drugs from his vehicle. However, Officer Bailey had probable cause to arrest Cousins and to believe that there was evidence of the crime of arrest in his vehicle. Because there was a nexus between Cousins, his vehicle, and the crime of arrest, the search was lawful. In the alternative, the drugs were in open view when Bailey saw them and the exigencies of the situation justified Bailey collecting them without a warrant.

a. The Search Of Cousins's Vehicle Was Lawful
Because There Was A Nexus Between
Cousins, His Vehicle, And The Crime Of
Arrest.

Citing State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010), and State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009), Cousins contends that under article I, section 7 of our state constitution, police may not search a vehicle for evidence related to the offense of arrest unless the suspect was within reaching distance of the evidence at the time of the search. Cousins overstates the

holdings of Afana and Valdez, as neither case stands for such a broad limitation on searches incident to arrest. Moreover, both Afana and Valdez are distinguishable.

A police officer stopped Afana's car to arrest his passenger, Bergeron, for an outstanding warrant. Afana, 169 Wn.2d at 174. After arresting the passenger and having Afana exit the car, the officer searched the car incident to arrest. Id. During the search, the officer found a cloth bag containing drugs and paraphernalia. Id. The Supreme Court found that the search was unlawful because there was no reason to believe that the vehicle contained evidence of the crime for which Bergeron was being arrested. Id. at 178. The court also ruled that, because Bergeron was in custody, she posed no risk to officers. Id. at 179.

In contrast to Afana, Officer Bailey arrested Cousins for possession of a controlled substance. Bailey could see the drugs from his vantage point outside the vehicle. Likewise, neither Cousins nor his passenger was restrained, and both were within reaching distance of the drugs. Therefore, Afana does not apply.

In Valdez, police arrested the driver on an outstanding warrant and searched his car while he was handcuffed and secured in the back of a police car. Valdez, 167 Wn.2d at 766. The

Supreme Court held that the search violated article I, section 7 because it "was not necessary to remove any weapons the arrestee could use to resist arrest or effect an escape, or to secure any evidence of the crime of the arrest that could be concealed or destroyed." Id. at 778. The court noted that the State had "not shown that it was reasonable to believe that evidence relevant to the underlying crime might be found in the vehicle." Id. Unlike in Valdez, Officer Bailey could see evidence of narcotics possession in Cousins's vehicle.

Following Valdez, this Court considered the application of article I, section 7 to a search incident to arrest in State v. Wright, 155 Wn. App. 537, 230 P.3d 1063, review granted, 169 Wn.2d 1026 (2010).⁴ An officer stopped Wright for a traffic infraction and smelled a strong odor of marijuana coming from the car. Id. at 542. Wright appeared nervous and hesitated to open the glove box to retrieve his registration. Id. When Wright finally opened the glove box, the officer saw a ball of money inside. Id. The officer arrested Wright for possession of marijuana, handcuffed him, and placed him under arrest. Id. Wright admitted that he had smoked

⁴ Oral argument on Wright (Case No. 84223-0) is scheduled for May 19, 2011, before the Washington Supreme Court.

marijuana earlier that day. Id. A narcotics K-9 dog alerted to the presence of drugs. Id. at 543. Officers searched the vehicle and recovered, among other things, two bags of marijuana. Id.

On appeal, this Court distinguished Wright from the type of automobile search involved in Valdez, where “a search after a traffic stop leads to the fortuitous discovery of evidence of an unrelated crime.” Wright, at 555. The Court determined that the officer had probable cause to arrest Wright for a drug crime. Id. at 556. The facts of Wright's arrest provided the necessary nexus between Wright, his arrest for a drug crime, and the search of his vehicle. Id. at 553. “Because the police had probable cause to arrest Wright for possession of marijuana and to search the car for evidence of the drug crime, the search of the passenger compartment of the car incident to arrest did not violate article I, section 7.” Id. at 556.

Just as in Wright, the trial court here found that Officer Bailey had probable cause to arrest Cousins for possession of a controlled substance. In addition, Bailey had probable cause to believe that the drugs were on the floorboard in front of the driver's seat. Like the officer in Wright, and unlike the officers in Afana and Valdez, the police here were not conducting a “fishing expedition” for

evidence of a crime unrelated to the crime for which Cousins was arrested. See Wright, 155 Wn. App. at 555.

Even as it has narrowed the scope of the search incident to arrest exception, the Washington Supreme Court has consistently recognized that a warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest. Afana, 169 Wn.2d at 178; Valdez, 167 Wn.2d at 777. However, in none of the recent cases addressing search of a vehicle incident to arrest has the record supported a concern about evidence destruction. In Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), Afana, Valdez, and State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), the courts all found that there was no reason for officers to believe that they would find evidence of the crime of arrest in the vehicle.⁵ Therefore, there was no concern about evidence destruction. Gant, 129 S. Ct at 1719;

⁵ Gant was arrested for driving on a suspended license. Gant, 129 S. Ct. at 1715. Afana, Valdez and Patton were all arrested on outstanding warrants. Afana, 169 Wn.2d at 174; Valdez, 167 Wn.2d at 765; Patton, 167 Wn.2d at 384-85.

Afana, 169 Wn.2d at 178; Valdez, 167 Wn.2d at 778; Patton, 167 Wn.2d at 395.

Here, there certainly was a reason for Officer Bailey to believe that there was evidence of the crime of arrest in the SUV. The trial court found that Bailey had probable cause to arrest Cousins for possession of cocaine, and that Bailey could see a bag of suspected crack cocaine on the floorboard of the driver's seat. Supp. CP __ (Sub 52, Written Findings of Fact) (Appendix A).

In addition, there was a valid concern that evidence could be destroyed. At the time that Cousins threw the crack cocaine on the floorboard, the passenger was not being watched by police and was not restrained. Id. The trial court also found that Bailey was reasonably concerned that the passenger could "take, hide, or destroy" the baggie. Id. Finally, Bailey looked under the driver's seat after Cousins was handcuffed to make sure that no drugs had fallen out of the first baggie. Id. When Bailey saw a second baggie, he recovered it to prevent its destruction by the unrestrained passenger. Id.

Cousins contends that the presence of a passenger is immaterial and that, under Afana, a search incident to arrest is justified only when the *arrestee* poses a safety risk or might be able

to destroy evidence. However, Cousins misinterprets the court's holding in Afana. A careful review of Afana, as well as the sections of Gant and Patton cited in Afana, shows that courts are concerned about evidence destruction in general, rather than destruction specifically at the hands of the arrestee.

In Gant, the defendant was the sole occupant of the vehicle. Gant, 129 S. Ct. at 1715. Because there was no passenger, the focus on the arrestee does not appear to bear any particular legal significance. In fact, the Court held that an officer may search a vehicle when he has a reasonable suspicion that an "individual, whether or not the arrestee, is 'dangerous' and might access the vehicle...." Id. at 1721 (quoting Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)).

Likewise, in Patton, the defendant was alone at the time of his arrest. 169 Wn.2d at 384. The court held that the search of a vehicle incident to arrest is unlawful unless an officer has a reason to believe that "the arrestee poses a safety risk *or* that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed...." Id. at 395 (emphasis added). Again, the court's concern was whether the *vehicle* contained evidence that could be

concealed or destroyed, not whether the *arrestee* could destroy the evidence.

Finally, in Afana, the defendant was the driver of the vehicle and the passenger, Bergeron, was the original arrestee. Afana, 169 Wn.2d at 174. In ruling that the search of the vehicle was unlawful, the court found that the officer had no reason to believe that "the vehicle contained evidence of the crime for which [Bergeron] was being arrested, namely, trespass. Nor did the deputy have reason to believe that the arrestee, Bergeron, posed a safety risk since she was already in custody at the time of the search." Id. at 178. Consistent with Gant and Patton, the court was concerned about the potential for evidence destruction in general, rather than at the hands of the arrestee specifically.

Officer Bailey's search of Cousins's vehicle was a lawful search incident to arrest because there was a nexus between Cousins, his vehicle and the crime of arrest. Furthermore, the search was necessary to prevent destruction of the evidence. Therefore, the trial court properly denied Cousins's motion to suppress.

b. Exigent Circumstances Justified The Warrantless Seizure Of Open View Evidence.

In addition to being a valid search incident to arrest, Bailey's retrieval of the drugs, which were in open view, was justified by exigent circumstances. Under the open view doctrine, when a law enforcement officer observes an item of evidence from a nonconstitutionally protected area, that observation does not constitute a search. State v. Bobic, 140 Wn.2d 250, 259, 996 P.2d 610 (2000). Entry into the constitutionally protected area, pending the arrival of a search warrant, must be authorized by some other exception to the warrant requirement, such as exigent circumstances. State v. Gibson, 152 Wn. App. 945, 956, 219 P.3d 964 (2009).

The exigent circumstances exception to the warrant requirement applies where “obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.” State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). The Washington Supreme Court has identified five circumstances from federal cases that “*could* be termed ‘exigent’” circumstances. State v. Tibbles, 169 Wn.2d 364,

370, 236 P.3d 885 (2010) (emphasis in original). They include “(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence.” *Id.* (citing State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986); State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983)). A court must look to the totality of the circumstances in determining whether exigent circumstances exist. State v. Smith, 165 Wn.2d 511, 518, 199 P.3d 386 (2009).

Here, the potential destruction or concealment of the drugs created an exigency that justified Bailey's warrantless search. At the time that Bailey retrieved the drugs, both Cousins and the passenger were unrestrained and within reaching distance of the drugs. 1RP 20-21. Cousins already had attempted to conceal the drugs by trying to toss them under his seat. 1RP 19. As the trial court found, it was reasonable for Bailey to be concerned that Cousins or the passenger would destroy or conceal the drugs. Supp CP ___ (Sub 52) (App. A).

Cousins discounts the risk posed by the unrestrained passenger, arguing that Bailey could have ordered the passenger out of the car or he could have called over another officer to assist. However, Bailey described the encounter as dynamic and

estimated that he grabbed the drugs within five seconds of getting Cousins out of the SUV. 1RP 38, 67. Bailey acted so quickly because, in his experience, crack cocaine was very easy to conceal or destroy. 1RP 22. He was concerned that "every half second" he was away from the evidence, it could be destroyed. Id. In the time that it would have taken another officer to reach the front of the SUV, the passenger could have destroyed the evidence by swallowing it or throwing it out the window into the heavy traffic.⁶ Id. Moreover, if Bailey had attempted to order the passenger out of the SUV, his attention would have been distracted from paying attention to Cousins.

Because of the risk that the passenger would destroy or conceal the evidence of the arrest, both of Bailey's searches were justified under the exigent circumstances exception to the warrant requirement.

⁶ Cousins contends that there were two officers around the vehicle. While Zwaschka was at the rear of the SUV, communicating with dispatch, Bailey repeatedly testified that he was not sure when Officer McCauley arrived. 1RP 18, 31, 38, 54.

2. COUSINS WAS NOT PREJUDICED BY THE DELAY
IN ENTRY OF CrR 3.6 FINDINGS.

Cousins argues that his case should be remanded for entry of findings of fact and conclusions of law under CrR 3.6(b). This argument should fail because the trial court entered written findings on April 18, 2011, and Cousins cannot show any prejudice. Supp. CP __ (Sub 52) (App. A).

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, the court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992).

However, unlike Smith, here the court entered findings that have not delayed resolution of Cousins's appeal. There is no resulting prejudice.

Nor can Cousins establish unfairness or prejudice resulting from the content of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. Supp. CP __ (Sub 52) (App. A). The language of the findings is consistent with the trial court's oral ruling. 2RP 42-44. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. Supp. CP __ (Sub 53, Declaration of Deputy Prosecuting Attorney) (Appendix B).

In light of the above, Cousins cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 3.6 findings of fact and conclusions of law are properly before this Court.

D. **CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Cousins's conviction.

DATED this 28 day of April, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Bridgette Maryman
BRIDGETTE E. MARYMAN, WSBA #38720
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Appendix A

- 1 3. Officer Bailey has been a police officer for approximately 9 years, has received numerous
2 trainings on drugs, has personally been involved in roughly 400 narcotics related arrests,
3 and has purchased crack cocaine in an undercover capacity. As a result of his training
4 and experience, Officer Bailey knows what crack cocaine looks like and how it is
5 packaged. As a result of this training and experience he believed that the item in Cousins'
6 right hand was cocaine.
- 7 4. At the moment Officer Bailey observed the suspected cocaine, Cousins was driving a
8 SUV that was stopped in traffic at a red light. There was also a passenger in the SUV.
9 Officer Bailey was on a bike. Officer Bailey then told Cousins to take the keys out of the
10 ignition and get out of his car. Cousins was arrested at this point.
- 11 5. As Cousins got out of the car Officer Bailey saw Cousins toss the baggie of suspected
12 crack cocaine onto the floor board of the driver's seat. The baggie was open, therefore
13 there was a possibility that some of the bag's content came out and went under the seat.
- 14 6. When Cousins got out of the car and threw the baggie of suspected crack onto the floor
15 boards, which was in open view from where Officer Bailey stood. The passenger
16 remained in the car, was within arms reach of the baggie, and was not being watched by
17 police or restrained. Officer Bailey had Cousins put his hands on the side of the car. At
18 that moment Officer Bailey quickly reached back into the car and recovered the baggie
19 that Cousins had tossed. Officer Bailey had just arrested the defendant for possession of
20 cocaine and was recovering the evidence of arrest. Further, Officer Bailey was
21 reasonably concerned that the passenger could take, hide, or destroy the baggie.
- 22 7. After cuffing Cousins, Officer Bailey looked under the driver's seat of the vehicle to see
23 if any cocaine had fallen out of the previously recovered baggie, which was open.
24 Officer Bailey saw what, as a result of his training and experience, he believed was a
baggie of crack cocaine under the seat. The passenger was still in the car, unrestrained by
police, and was within arms length of the driver's seat. Officer Bailey recovered the
baggie to prevent its destruction by the passenger.
8. The testimony of Officer Bailey was credible.

4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
SOUGHT TO BE SUPPRESSED:

a. EVIDENCE

1. There was probable cause to arrest the Defendant for the crime of
Violation of the Uniform Controlled Substances Possession of Cocaine.
2. The alleged cocaine recovered is admissible.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 2

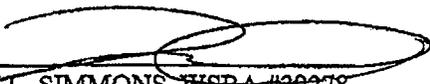
Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

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Douglas A. North
HON. JUDGE NORTH

4/10/2011

Presented by:


JASON L. SIMMONS, WSBA #39278
Deputy Prosecuting Attorney
Attorney for the Plaintiff

*No objection As to Form,
AND PRESERVING OBJECTIONS RAISED at Hearing and trial*


VICTORIA FREER 23152
Attorney for Defendant

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 3

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

Appendix B

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	No. 09-1-06958-8 SEA
Plaintiff,)	
)	
vs.)	DECLARATION OF DEPUTY
)	PROSECUTING ATTORNEY
RICHARD COUSINS,)	
)	
)	
Defendant.)	
)	
)	
)	

I, the undersigned, hereby declare that I am 18 years of age, I am competent to testify in a court of law, and I am familiar with the facts contained herein:

1. I am a Deputy Prosecuting Attorney with the King County Prosecutor's Office.
2. I was the trial attorney in the above captioned case.
3. On April 12, 2011, I sent proposed finding of facts and conclusions of law to Victoria Freer, the defendant's trial attorney, and Judge North, the trial judge. I also requested that a hearing be set regarding the entry of the findings.
4. On April 13, 2011, I received an email response from Ava Chen, Judge North's Bailiff, requesting that the parties attempt to agree on the findings prior to a hearing being set.

DECLARATION OF DEPUTY PROSECUTING ATTORNEY - 1

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

1 5. On April 14, 2011, I emailed Ms Freer requesting that she review the proposed findings
2 and inform me if she objected to any portion of the proposed findings.

3 6. On April 15, 2011, I emailed Ava Chen requesting that a hearing be set as I had not yet
4 heard form Ms. Freer.

5 7. On April 15, 2011, I received an email from Ms Chen indicating that a hearing was set
6 for April 20, 2011.

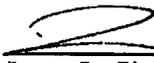
7 8. Later on April 15, 2011, I received an email from Ms. Freer. The email contained an
8 attachment of the State's proposed findings that was signed by Ms. Freer.

9 9. On April 18, 2011, I presented the proposed findings to Judge North. The findings were
10 signed by both Ms. Freer and myself.

11 10. I understand that the findings were signed by Judge North and filed on April 18, 2011.

12 11. I have not reviewed the appellate file or any documents related thereto in the above
13 captioned case. I have spoken to the State's appellate attorney for the sole purpose of
14 getting a copy of the transcript of the 3.6 hearing at trial. I have also been informed that
15 the State's appellate brief is due April 28, 2011. A copy of the transcript of the 3.6
16 hearing was given to me and I forwarded a copy to Ms. Freer and Judge North. I have
17 not spoken with anyone regarding the appellate issues being raised in the above captioned
18 case. I have no knowledge of any appellate issue being raised in this matter.

19 Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is
20 true and correct. Signed and dated by me this 25th day of April, 2011, at Seattle, Washington.

21
22 
23 Jason L. Simmons, 39278
Deputy Prosecuting Attorney

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RICHARD COUSINS, Cause No. 65876-0-I, in the Court of Appeals, Division I, for the State of Washington.

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



Bora Ly
Done in Seattle, Washington

04-28-11
Date