NO. 103461-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross Petitioner,

v.

LAVELLE JOHNSON,

Petitioner.

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

The trial court denied Lavelle Johnson's motion to suppress evidence seized during a search of his car. The order suppressed no evidence the prosecution sought to introduce and dismissed no charges the prosecution wished to pursue. Contrary to the rules of appellate procedure, the prosecution appealed the order. The Court of Appeals did not resolve Mr. Johnson's motion to strike this improper appeal.

Despite the favorable ruling, the prosecution challenges the trial court's findings that two detectives omitted facts from a search warrant affidavit. This fact-bound issue does not merit this Court's review, and the record supports the findings in any event.

This Court should deny the prosecution's request for review. If it grants the request, it should also address whether the prosecution's appeal was proper.

B. ISSUES PRESENTED FOR REVIEW

1. RAP 2.2 (b) did not permit the prosecution to appeal the trial court's order denying Mr. Johnson's motion to suppress. The order also did not aggrieve the prosecution per RAP 3.1 because it suppressed no evidence and dismissed no charges. This Court should deny review because the prosecution's appeal was improper and the issue the prosecution raises is not properly before it. At the very least, if this Court grants the prosecution's request for review, it should address the propriety of the prosecution's appeal.

2. The issue the prosecution raises—whether the record supported the trial court's findings that two detectives recklessly omitted material facts—is limited to the record before the trial court. The findings are consistent with published precedent and have no broader implications for future cases. What's more, the

record amply supports the findings. This Court should deny the prosecution's request for review.

C. STATEMENT OF THE CASE

Mr. Johnson's partner, Amber Bryant, drove to work with Mr. Johnson in the passenger seat. RP 129, 272. When Ms. Bryant parked and Mr. Johnson stepped out to switch to the driver's seat, police officers moved in and arrested him. RP 129. Mr. Johnson left the driver's side door open. RP 130–31.

Detective Terry Bailey saw a clear plastic baggie in the door pocket. RP 131–32. Plainly visible behind the baggie was a white latex glove, giving the baggie a white appearance. Ex. 5. Detective Bailey observed the baggie and then closed the door. RP 134, 197.

Detective Benjamin Hughey arrived soon afterward. RP 232–33. Detective Bailey opened the driver's side door and pointed out to Detective Hughey

the baggie in the door pocket. RP 135–36. The detectives looked into the door pocket together for as long as 40 seconds. Ex. 2 at 7:17–7:57. Both detectives knew opening the car door without a warrant was an unlawful search. RP 136, 283.

During the arrest, Ms. Bryant told Detective Hughey there was a gun in the glove box. RP 236–37.

Detective Hughey returned to headquarters and wrote a search warrant application. RP 263. He reported that Detective Bailey saw a clear plastic baggie in the driver's side door pocket that "contained a whitish substance." Ex. 7 at 10 (Bates stamp "Johnson_L 0014"). The affidavit did not mention that Detective Hughey observed the baggie during a second, unlawful search or that the plainly visible white glove was the reason the baggie appeared white. *Id.*

A judge issued a search warrant, and Detective Hughey found a gun and drugs in the glove box. RP 242; Ex. 4–5, 7. He found no contraband in the door pocket. RP 242.

The trial court conducted a *Franks* hearing, at which both detectives testified. RP 108–09, 117, 226. The court found the search warrant affidavit omitted material facts with a reckless disregard for the truth. CP 130–31 FF 35–41, 134 FF 58. Nonetheless, the court found the affidavit stated probable cause based on Ms. Bryant's statement. CP 131 FF 42–58. The court denied Mr. Johnson's motion to suppress the evidence obtained during the search of the car. CP 134.

D. WHY THE PROSECUTION'S REQUEST FOR REVIEW SHOULD BE DENIED

1. This Court should deny review because the prosecution's appeal was improper, or at least grant review on the propriety of the appeal.

The prosecution may appeal only those trial court orders listed in RAP 2.2(b). In addition, like any other party, the prosecution may not appeal unless the order "aggrieved" it. RAP 3.1. The prosecution met neither prerequisite here. Because the issue the prosecution wishes this Court to address is not properly before it, this Court should deny review. At the very least, if this Court grants the prosecution's request for review, it should also address the threshold issue whether the prosecution's appeal was proper.

a. An order denying a motion to suppress is not appealable under RAP 2.2(b).

This Court should deny review because RAP 2.2(b) did not permit the prosecution to appeal the order it now wishes this Court to review.

Title 2 of the Rules of Appellate Procedure governs the orders that may be reviewed and the scope of review once initiated. There are two types of review: appeal as of right and discretionary review. RAP 2.1(a). A party initiates an appeal by filing a notice of appeal. RAP 5.1(a). A party seeks discretionary review by filing a notice for discretionary review. *Id.*

The provisions of Title 2 follow a logical progression. First, RAP 2.1 defines the types of review available. Next, RAP 2.2 lists the trial court decisions a party may appeal, and RAP 2.3 specifies the decisions of which a party may seek discretionary review. RAP 2.4 defines the scope of review once initiated. Finally, RAP 2.5 contains additional provisions affecting the scope of review.

As relevant here, RAP 2.2(b) sets forth an exclusive list of the decisions the prosecution may

appeal in a criminal case. *State v. Hawthorne*, 48 Wn. App. 23, 28, 737 P.2d 717 (1987). When the trial court decides a motion to suppress evidence, the prosecution can appeal the decision only if the court grants the motion, suppresses evidence, and dismisses all or part of the case as a result. RAP 2.2(b)(2). An order denying a motion to suppress, suppressing no evidence, and dismissing no charges is not appealable. *Id.*

Whether the prosecution appeals in the first instance as an appellant or through cross review as a respondent makes no difference. Either way, the prosecution may appeal only by filing a notice of appeal. RAP 5.1(a), (d). And the only orders to which the prosecution may notice an appeal are those listed in RAP 2.2(b). *Hawthorne*, 48 Wn. App. at 28.

Nor does RAP 2.4(a) provide the prosecution an independent basis to pursue review. It is true that,

when a respondent appeals from a trial court order, appellate courts "review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent." RAP 2.4(a). However, the rule also makes clear that a respondent may seek relief on appeal only "by the timely filing of a notice of appeal." *Id.* As explained, RAP 2.4 concerns the scope of review once initiated, not the circumstances under which a party may initiate an appeal in the first place.

The trial court's order at issue here is not appealable under RAP 2.2(b)(2). The order denied Mr. Johnson's motion in full[1] and did not suppress any evidence the prosecution wished to introduce at Mr. Johnson's trial. CP 134. For the same reason, the order

[1] When the prosecution says "the trial court granted [Mr.] Johnson's motion in part," it means the court granted in part Mr. Johnson's motion for a *Franks* hearing but denied his motion to suppress evidence. Ans. to PFR/Cross Pet. at 5; CP 134.

was not "prejudicial to respondent" and would not be appealable even if RAP 2.4(a) operated independently of RAP 2.2(b). The prosecution's appeal was improper.

Mr. Johnson placed the issue before the Court of Appeals by moving to strike the prosecution's appeal. Ans. to PFR/Cross Pet. at 7; Mot. To Strike Pros.'s App., No. 83412-6-I (Wash. Ct. App. Nov. 16, 2023); *see also* Reply Br. of App./Br. of Cross Resp. at 8–21 (Wash. Ct. App. Dec. 18, 2023). The Court of Appeals declined to resolve the issue. Slip op. at 8 n.7.

This Court "has the authority to determine whether a matter is properly before the court." *State v. Aho*, 137 Wn.2d 736, 740–41, 975 P.2d 512 (1999). Because the prosecution was not permitted to appeal the order in the first place, its appeal was not properly before the Court of Appeals and is not properly before this Court now. This Court should deny review.

b. An order suppressing no evidence and dismissing no charges does not aggrieve the prosecution under RAP 3.1.

This Court should deny review for the additional reason that the prosecution is not an aggrieved party.

"Only an aggrieved party may seek review by the appellate court." RAP 3.1. "A party is not aggrieved by a favorable decision and cannot properly appeal from such a decision." *Randy Reynolds & Assocs. v. Harmon*, 193 Wn.2d 143, 150, 437 P.3d 677 (2019).

"Persons aggrieved, in this sense, are not those who may happen to entertain desires on the subject, but only those who have rights which may be enforced at law . . . ." *Elterich v. Arndt*, 175 Wash. 562, 564, 27 P.2d 1102 (1933) (quoting 2 Ruling Case Law § 34, at 53 (1914)). "[I]n other words, the mere fact that a person is hurt in [their] feelings, wounded in [their] affections, or subjected to inconvenience, annoyance,

discomfort, or even expense by a decree, does not entitle [them] to appeal from it, so long as [they are] not thereby concluded from asserting or defending [their] claims of personal or property rights in any proper court." *Id.* (quoting same source).

The trial court's order did not aggrieve the prosecution. The order suppressed no evidence the prosecution wished to introduce and dismissed no charges the prosecution wished to pursue. CP 134. Having received "a favorable decision," the prosecution "cannot properly appeal." *Randy Reynolds & Assocs.*, 193 Wn.2d at 150.

That the prosecution must now disclose the detectives' reckless omission of material facts to defendants in other cases does not make it "aggrieved" within RAP 3.1's meaning. *See* Ans. to PFR/Cross Pet. at 10–11. "[I]nconvenience . . . or even expense" does

not alone make a party aggrieved. *Elterich*, 175 Wash. at 564. The effort and expense of disclosing the trial court's findings in future cases is not a burden on the prosecution's legal rights that permits it to seek review. *Id.*

The authority on which the prosecution relies, on the other hand, concerned an immediate burden on the prosecution's legal duties in the same case. *See* Ans. to PFR/Cross Petition at 11. In *State v. Bergstrom*, 199 Wn.2d 23, 502 P.3d 837 (2022), this Court allowed the prosecution to seek review despite prevailing in the Court of Appeals because the lower court held the prosecution had the burden of proving a non-existent element of the offense. *Id.* at 33 n.10. The order in Mr. Johnson's case, which dismissed no charges and suppressed no evidence, imposed no similar burden on the prosecution's legal rights.

As for the detectives, even if any "professional consequences" from the trial court's findings aggrieved the detectives within the rule's meaning, that injury would not justify the prosecution's appeal. *See* Ans. to PFR/Cross Pet. at 11–12. "Only an aggrieved *party*" may appeal. RAP 3.1 (emphasis added). The detectives are not parties.

Besides, police officers have no legal right not to be found dishonest or have their testimony rejected as incredible. *Cf. State v. Cloud*, 95 Wn. App. 606, 612–13, 976 P.2d 649 (1999) (former counsel's "interest in protecting his reputation" did not permit him to intervene in a post-trial motion alleging ineffective assistance). Every witness who testifies at a hearing or trial takes on the risk that the trial court will not believe their testimony. Police officers are neither unique nor special in this regard. Trial courts must

approach their testimony with the same degree of critical analysis and skepticism as anyone else's.

A ruling that the prosecution may appeal every time a trial court finds a police officer dishonest or not credible, even where the finding does not affect the case, would unduly burden the appellate courts and impose a chilling effect on the fact-finding function. It would also burden other accused persons' legitimate interest in learning whether any police officers involved in their cases had ever been found dishonest.

Because the prosecution is not an aggrieved party, its appeal was never properly before the Court of Appeals and is not properly before this Court now. RAP 3.1; *Aho*, 137 Wn.2d at 740–41. This Court should deny review.

c. If this Court is inclined to grant review, it should also resolve the question whether the prosecution's appeal was permissible.

If this Court grants the prosecution's request for review of the trial court's challenged findings, it should also address the threshold question whether RAP 2.2 and RAP 3.1 permitted the prosecution's appeal in the first place.

This Court may always "determine whether a matter is properly before" it. *Aho*, 137 Wn.2d at 740–41. Implicit in the question whether to review the issue the prosecution raised on appeal is whether the rules permitted the prosecution to appeal at all.

Moreover, this is not the only case in which the prosecution has tried to appeal from a trial court ruling contrary to RAP 2.2(b) and RAP 3.1. In *State v. Gililung*, ___ Wn. App. 2d ___, 552 P.3d 813 (2024), for example, the prosecution appealed a jury instruction

despite winning conviction on all counts. *Id.* at 815 & n.1. In *State v. Kelly*, 19 Wn. App. 2d 434, 496 P.3d 1222 (2021), the prosecution appealed an evidentiary ruling, also despite a jury verdict in its favor on the sole count. *Id.* at 446, 447. And in *State v. Thayer*, No. 84623-0-I, 2023 WL 6388222 (Wash. Ct. App. Oct. 2, 2023) (unpub.), the prosecution appealed the trial court's answer to a jury inquiry even though "[t]he jury convicted Mr. Thayer as charged." *Id.* at *2, *3.

As in Mr. Johnson's case, the Court of Appeals in each of these cases declined to resolve whether the rules permitted the prosecution to appeal from these rulings. *Gililung*, 552 P.3d at 815 n.1; *Kelly*, 19 Wn. App. 2d at 447; *Thayer*, 2023 WL 6388222, at *3.

In refusing to address the practice of appealing from orders that do not aggrieve the prosecution and do not appear in RAP 2.2(b), the Court of Appeals has

allowed the practice to continue, requiring convicted people to respond to—and appellate courts to address—issues that were not properly raised. This Court should not grant the prosecution's request for review without also reviewing whether its appeal was proper.

2. This Court should deny review of the fact-bound question whether the trial court's findings rest on substantial evidence.

Following a *Franks*[2] hearing, the trial court found Detectives Bailey and Hughey recklessly omitted material facts from the search warrant affidavit. Whether these findings were reasonable in light of the record is a fact-bound question specific to this case, with no implications for future cases. Contrary to the prosecution's answer, the trial court's findings of materiality and recklessness were consistent with

[2] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

published precedent and rest on substantial evidence. This Court should deny review.

a. Whether the record supports the challenged findings is a fact-bound question with no implications outside Mr. Johnson's case.

Appellate courts do not "independently review the evidence" presented at a CrR 3.6 hearing. *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994). Courts ask only whether the trial court's findings rest on substantial evidence—evidence enough "to persuade a fair-minded, rational person of the truth of the finding." *Id.* A party seeking to overturn the findings must meet the "heavy burden" of showing that no "reasonable interpretation" of the evidence "supports the challenged findings." *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 410–11, 972 P.2d 1250 (1999).

The prosecution challenges the trial court's findings that Detectives Bailey and Hughey recklessly

omitted two material facts from the search warrant affidavit: (1) that Detective Hughey made at least some of the observations recited in the affidavit during an illegal search of Mr. Johnson's car; and (2) that the only reason the clear plastic baggie appeared white in color was that a white latex glove was wedged behind it, and this fact was obvious to the officers. CP 127–31 FF 19–20, 22–25, 27–28, 34–41.

Whether the record permitted a reasonable person in the trial court's position to come to the same conclusions turns only on what evidence was before the court. The issue does not require analysis of a constitutional provision, statute, opinion, or other law that would affect any other case. RAP 13.4(b)(1)–(3). Nor is the fact-bound question whether the findings were supported an issue of broad public interest. RAP 13.4(b)(4).

The prosecution argues to the contrary that the trial court's findings misapplied published precedents of both this Court and the Court of Appeals. Ans. to PFR/Cross Pet. at 13–25. In making this argument, the prosecution misreads the findings it challenges.

For example, the prosecution suggests the trial court found Detective Hughey's affidavit "solely relied on" Detective Bailey's earlier, legal look into the open car door, and not Detective Hughey's "own observations of the baggie" during the later, illegal search of the door pocket. Ans. to PFR/Cross Pet. at 21. Because an officer may rely on information learned from other officers, the prosecution argues, the trial court erred in finding the illegal search was material. *Id.* at 14, 22.

Contrary to the prosecution's characterization, the trial court found Detective Hughey's affidavit did *not* rely solely on Detective Bailey's legal observations.

CP 128 FF 24. The court found Detective Bailey opened the car door for Detective Hughey because Detective Baily could not "convey his observations accurately enough" by words alone. CP 128 FF 24. In turn, it found that failing to point out some of the observations in the affidavit were made illegally during a warrantless search was a material omission. CP 128, 130 FF 22–23, 38.

In other words, rather than "relay[] hearsay information" to Detective Hughey regarding his observations, Detective Bailey illegally opened the car door so Detective Hughey could make observations of his own. *State v. Chasengnou*, 43 Wn. App. 379, 384, 717 P.2d 288 (1986); *see* Ans. to PFR/Cross Pet. at 14 (citing *Chasengnou*). The trial court's finding that this illegal search was a material fact is perfectly consistent with published precedent. *See State v. VanNess*, 186

Wn. App. 148, 164–65, 344 P.3d 713 (2015) (holding fruits of a warrant obtained based on an unlawful search must be suppressed); *State v. Hoke*, 72 Wn. App. 869, 877, 866 P.2d 670 (1994) (same).

As for the white glove, the prosecution argues the trial court found only that the detectives "inadequately explored an alternative explanation for the whitish color within the baggie"—that "the glove has no effect on probable cause absent hindsight knowledge that the baggie was empty." Ans. to PFR/Cross Pet. at 17–18. This argument also misconstrues the court's findings.

The trial court found not only that the white glove was "plain to see" in the door pocket, but also that the plainly visible glove was the only reason the baggie appeared white in color. CP 128, 130 FF 25, 27, 40. Rather than provide an "alternative explanation" for the detectives to explore, the glove eliminated any

inference the baggie was white because it contained drugs. The detectives did not learn only in "hindsight" that the baggie was empty—it was immediately obvious the baggie did not "have any powder in it" and the glove was the only source of the white color. CP 128 FF 27. The glove's "obvious exculpatory value" made its elision from the search warrant affidavit a material omission. CP 128–29, 130 FF 28, 38.

Had Detective Hughey mentioned the sole reason the baggie appeared white was a white latex glove that both detectives plainly saw, no reasonable magistrate could have found probable cause to believe there were drugs in the baggie. *See State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992) (an omitted fact is material if its addition eliminates probable cause); Ans. to PFR/Cross Pet. at 17–18 (citing *Garrison*). The trial

court's findings regarding the glove are also consistent with precedent.

The trial court's finding that the omissions were at least reckless also coheres with precedent. The court based this finding on the facts that the white glove was "obviously . . . there to be seen" and that both officers knew opening the car door without a warrant was illegal. CP 128, 130 FF 22, 35, 38, 40. These are "obvious reasons to doubt" that Detective Hughey included all material facts in the affidavit. *State v. Clark*, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001) (quoting *State v. Connor*, 39 Wn. App. 113, 117, 692 P.2d 208 (1984)); *see* Ans. to PFR/Cross Pet. at 23.

When the trial court's findings are read correctly and in their full context, the only issue the prosecution presents is whether those findings rest on substantial evidence. This case-specific, fact-bound question does

not involve conflicting precedent, a constitutional provision, or an issue of broader importance. RAP 13.4(b)(1)–(4). This Court should deny review.

b. Substantial evidence supports the challenged findings.

This Court should deny review for the additional reason that the record amply supports each of the challenged findings. Mr. Johnson's brief in the Court of Appeals explains this in detail. Reply Br. of App./Br. of Cross Resp. at 22–46. Here, he briefly summarizes the evidentiary support for the trial court's findings.

First, that Detective Hughey's affidavit was based at least in part on an illegal search of the car's door pocket is incontrovertible. CP 128 FF 22–24. Detective Hughey testified that Detective Bailey did not describe the baggie solely verbally, but opened the car door, pointed to the door pocket, and told Detective Hughey, "This is what I saw." RP 235, 248. Both

detectives knew opening the car door without a warrant was illegal, and the prosecution conceded their inspection of the door pocket was a "warrantless search." RP 112, 136, 283, 331. A police car's dashboard camera caught the detectives peering into the door pocket for 30–40 seconds. Ex. 2 at 7:17–7:57.

Figure 1. Detectives Hughey (on the right) and Bailey (to Hughey's left) look in the driver's side door pocket of Mr. Johnson's car. Ex. 2 at 7:45; *see* RP 248 (Hughey wore a camouflage hood and plaid jacket).

Second, that Detectives Bailey and Hughey saw the white latex glove and recognized it was the source

of the baggie's white appearance was also a reasonable inference. CP 129–30 FF 34–36, 40. A photo of the door pocket taken before the police removed its contents confirms the glove was plain to see. RP 168–69; Ex. 5. It is also apparent the baggie does not contain powder or other material, and the glove tucked behind and beneath it is the reason it appears white. Ex. 5.

Figure 2. A wadded-up plastic baggie and white latex glove are visible in the driver's side door pocket. Ex. 5

As explained, the trial court reasonably found the illegal search and the white glove to be material

because their inclusion prevents the affidavit from stating probable cause to believe there were drugs in the car. CP 128–29, 130 FF 22–24, 28, 38; *supra* at 21–25. And the court reasonably found Detective Hughey acted at least recklessly in omitting these facts because both detectives knew opening the car door without a warrant was unlawful and the glove's exculpatory nature was "obvious." CP 128, 129–30 FF 22, 35, 38, 40; *supra* at 25.

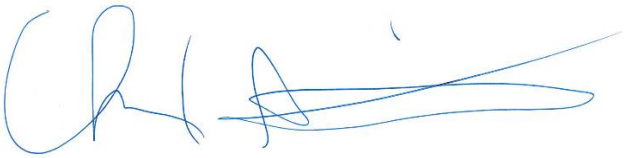
The record before the trial court was more than sufficient to support the challenged findings. This Court should deny review for this reason as well.

E. CONCLUSION

This Court should deny the prosecution's request for review. If this Court grants review, it should also address whether the rules permitted the prosecution to appeal the trial court's order.

Per RAP 18.17(c)(10), the undersigned certifies this reply contains 4,068 words.

DATED this 23rd day of October, 2024.



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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 103461-0**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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