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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JUSTIN WARREN HAUGEN, Appellant.	No. 46579-5-II UNPUBLISHED OPINION

MELNICK, J. — Justin Haugen appeals his conviction for three counts of possession of a controlled substance. Acting on a tip from a credible and reliable informant, police and corrections officers arrived at Haugen's home to execute an arrest warrant for Mark Fiman. During the execution of the arrest warrant, the officers encountered Haugen who, after waiving his *Miranda*[1] warnings, admitted he had controlled substances in his room. The police searched Haugen's room pursuant to a search warrant and found controlled substances. Haugen argues that the trial court erred by denying his motion to suppress and by denying his *Franks*[2] motion. We disagree and affirm his convictions.

FACTS

I. SEARCHES, ARREST, AND CHARGES

On December 12, 2013, Officer Adam Haggerty and other officers received an informant's tip that Fiman could be found at a specific apartment on Scammon Creek Road, Centralia,

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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

Washington, with Haugen and his brother, Brian Haugen.[3] On the police incident report, Fiman had a listed address on "McElfresh Rd SW" in Centralia. Clerk's Papers (CP) at 25. Fiman had three outstanding warrants for his arrest: one from the Department of Corrections, one for a felony issued by the Superior Court, and one for a misdemeanor issued by a court of limited jurisdiction. The police had been unable to execute the warrants for four months.

Fiman's Community Corrections Officer, Mike Boone, Haggerty, and other police officers met, looked at a recent booking photograph of Fiman, and then departed for the Haugen residence to arrest Fiman. Upon his arrival, Haggerty saw Brian in an upstairs window and asked him to come to the door. After Brian opened the door, Haggerty saw Fiman walking down the hallway toward the door. Haggerty told Fiman he was under arrest, and Haggerty entered the residence. Haggerty stated, "Fiman quickly stepped into the first bedroom on the right as we entered the apartment before exiting it." CP at 26. Boone arrested Fiman in the living room. Boone searched Fiman and found drug paraphernalia.

After the police handcuffed Fiman, several people came into view from other areas of the home. The officers then conducted a security sweep of the residence. Boone entered the bedroom Fiman had previously stepped into to see if any other probation violations existed. The police later ascertained that the first room on the right was Brian's room. Boone saw a scale, white residue, and a safe. Fiman waived his *Miranda* warnings and told Boone that the scale and the drugs inside the safe were his, and that the white residue was methamphetamine. Boone related this information to Haggerty, who called a judge and obtained a telephonic search warrant for the first bedroom.

[3] Because Justin and Brian Haugen share the same last name, and to avoid confusion, we refer to Justin as "Haugen" and his brother as "Brian." We intend no disrespect.

Haggerty showed the Haugen brothers the search warrant. Haugen asked permission to retrieve his cell phone from his bedroom in the back of the house. For safety purposes, Haggerty followed Haugen when he retrieved the phone. Haugen was not under arrest and was free to leave at any time. On the way back to the living room Haggerty asked Haugen if he had drugs in his room. Haggerty reported that Haugen responded that he did in a "camo patterned case on his night stand." CP at 26. Haugen told Haggerty the drugs were not his. Haggerty read Haugen his *Miranda* warnings, and Haugen again told Haggerty he had methamphetamine in his room. Haugen disputed making these comments to Haggerty. Haggerty then called the same judge who authorized the first search warrant and received authorization to search Haugen's back bedroom.

In the back bedroom, officers recovered one baggie that tested positive for methamphetamine, numerous unused baggies, ten small blue pills identified as Alprazolam, four Clonazepam 1 mg pills, three Clonazepam .5 mg pills, methamphetamine pipes, indicia linking Haugen to the room, brown bars believed to be THC hash, $90 in $1 bills stored in a Gatorade bottle, and approximately six to ten sparklers wrapped in duct tape.

The State charged Haugen with three counts of possession of a controlled substance in violation of the controlled substances act (VUCSA)—methamphetamine (count I), Alprazolam (count II), and Clonazepam (count III).[4] The State also charged Brian.

II. PROCEDURAL FACTS

Brian filed a motion to suppress and Haugen joined the motion. Haugen also filed a memorandum in support of the motion. On the date set for the suppression motion, the trial court

[4] Former RCW 69.50.4013 (2015); RCW 69.50.206.

granted the State's motion for a continuance because of an untimely response by Brian. The hearing was set over.[5]

Haugen subsequently filed two additional motions to suppress evidence. In one, Haugen argued that the police entry into his residence to arrest a third party, Fiman, was illegal because Fiman did not live with the Haugens. In the other, Haugen challenged the warrant that authorized a search of his bedroom. He entitled this motion, "Motion for Review of Search Warrant Pursuant to *Franks v. Delaware*" (*Franks* motion). CP at 41. He alleged that in the second search warrant, the police made deliberate and material misrepresentations or statements that were made with a deliberate disregard for the truth. The motion related to Haugen's argument that Fiman did not live at the Haugens' apartment. It also alleged that the officers did not see evidence of illegal drug activity in the front bedroom during a security sweep of the house; rather, they saw it after the officers completed the security sweep.[6]

The trial court first held a *Franks* hearing. In the *Franks* motion, Haugen argued that Haggerty "had to know" that Fiman did not live at the residence and he did not provide this information to the judge issuing the search warrant. RP (June 18, 2014) at 5. The trial court denied the motion and found that Haugen did not meet his burden to establish a deliberate or knowing material omission.

[5] The record only includes the following information about this hearing and the disposition of Brian's case. The State at one point told the trial court, "[T]he actual suppression hearing for Brian Haugen, yes, that ultimately did come about by an unlawful method." Report of Proceedings (RP) (April 23, 2014) at 6. Also, in Haugen's "Memorandum In support of Motion to Suppress" he indicates the State conceded the search of the front bedroom was invalid and that charges against Brian were dismissed with prejudice. Haugen does not argue on appeal that the first search warrant formed a basis to invalidate his conviction or that any evidence seized pursuant to the first search warrant was used against him.

[6] The State did not use any of the evidence seized from the front bedroom against Haugen.

After we remanded the case to the trial court, it heard the motion to suppress based on the police entry into the residence.[7] Haggerty and Haugen testified. The trial court entered findings of fact and conclusions of law. The trial court denied the motion and found that Fiman was living at the Scammon Creek Road apartment with the Haugens and that law enforcement's entry to effect his arrest was lawful.

Haugen waived his right to a jury and proceeded to a stipulated facts bench trial. The trial court found Haugen guilty. Haugen appeals the conviction and the trial court's rulings on his suppression motions. The trial court stayed his sentence pending appeal.[8]

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[7] After Haugen appealed and raised issues about this motion to suppress, we realized that a formal hearing had not been held on this motion. We remanded the case to the trial court and ordered it to conduct a suppression hearing and to enter findings of fact and conclusions of law. *See State v. Dillon*, 163 Wn. App. 101, 103, 257 P.3d 678 (2011) (retaining jurisdiction over remaining issues and remanding to the trial court to make findings of fact and conclusions of law); *see also State v. Cruz*, 88 Wn. App. 905, 908, 946 P.2d 1229 (1997) (emphasizing the requirement for a "clear and comprehensive" opinion to review on a CrR 3.6 motion). We also allowed the parties to file additional briefing on this issue. The State filed a supplemental brief, but Haugen did not.

The concurring opinion criticizes this remand ruling. However, the concurring opinion fails to consider that the trial court had determined that an evidentiary hearing on this motion to suppress should occur. Obvious confusion occurred in the trial court based on the filing of multiple motions and statements of counsel, and the hearing did not occur. We could not conclude from the record that the defendant waived his right to have this motion to suppress heard.

[8] Haugen makes 14 assignments of error and lists 13 issue statements. They all fit into two categories and are consolidated to reflect that Haugen only argues the motion to suppress based on illegal entry and the *Franks* motion.

Additionally, assignment of error number 14 is not sufficiently briefed to warrant review. RAP 10.3. For an issue to be considered on appeal, an appellant must raise the issue in the assignments of error, present an argument on the issue, and provide some legal citation. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995). An appellant waives an issue when he fails to argue it in his appellate brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992). Haugen assigns error to "Stipulated Trial finding [of fact] #6" but does not argue the alleged error in the body of his brief. Br. of Appellant at 3.

ANALYSIS

I. ENTRY PURSUANT TO ARREST WARRANT

Haugen argues that the trial court erred by not suppressing the evidence found in his bedroom because the police illegally entered the Haugen residence to arrest a non-resident.[9] Haugen argues that the police entry into his residence violated his state and federal constitutional rights.[10] He asserts that because Fiman did not live at the residence, no search warrant existed, no one consented, and no exigent circumstances existed all evidence seized from his bedroom should have been suppressed. Because the trial court concluded that Fiman lived at the residence and because this conclusion is unchallenged, we disagree with Haugen.

A. STANDARD OF REVIEW

We review a trial court's denial of a suppression motion in two parts. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011). We review a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011).

"Unchallenged findings of fact entered following a suppression hearing are verities on appeal." *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Because neither party assigns error to the findings of fact, we take them to be true. *Gaines*, 154 Wn.2d at 716. We review a trial court's conclusions of law de novo. *State v. Budd*, 185 Wn.2d 566, 572, 374 P.3d 137 (2016). We

[9] Haugen makes a number of sub-arguments but each is dependent on the officers having made an illegal entry. He argues that because of the initial illegal entry, everything that followed was tainted and that no other legal authority supported the seizure of the evidence. Because Haugen's underlying premise is incorrect, we address them all under the broader issue he articulated.

[10] The Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington State Constitution.

also review de novo whether the trial court's findings of fact support its conclusions of law. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

B. LAWFUL ENTRY INTO RESIDENCE

The trial court's unchallenged findings of fact stated that Haggerty and other law enforcement personnel worked together to serve three arrest warrants on Fiman. An informant who had proven reliable and credible in the past, told law enforcement officers that "Fiman was living at . . . Scammon Creek Road with Justin and Brian Haugen." CP at 89 (FF 1.3). Law enforcement went to the residence and saw Fiman inside. After being told he was under arrest, he ran into a bedroom. The officers then entered the apartment and arrested Fiman.

In *State v. Hatchie*, 161 Wn.2d 390, 166 P.3d 698 (2007), the court established a four part test to determine when an arrest warrant provides authority of law to allow law enforcement the authority to enter a residence pursuant to an arrest warrant. The test is that, "(1) the entry is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches or investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an actual resident of the home, and (4) said named person is actually present at the time of the entry." *Hatchie*, 161 Wn.2d at 392-93. All four parts of the test are satisfied in this case.

Based on the trial court's unchallenged findings, the count entered an unchallenged conclusion of law that Fiman lived with the Haugens and that the officers lawfully arrested Fiman. This conclusion of law flows from the unchallenged findings of fact. Therefore, we conclude that law enforcement lawfully entered the Fiman and Haugens residence to arrest Fiman pursuant to three valid arrest warrants. Because of this conclusion, the rest of Haugen's arguments on this issue are without merit.

II. *FRANKS* MOTION

Material factual inaccuracies and material misrepresentations void a warrant only if they were made with "deliberate falsehood" or as a result of "reckless disregard for the truth." *Franks*, 438 U.S. at 171; *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). An omission rises to the level of misrepresentation when it is relevant to probable cause, and thus, invalidates the warrant. *Franks*, 438 U.S. at 156. If the defendant makes a preliminary showing that one of these exist, and at an evidentiary hearing establishes the allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit and a determination made whether, as modified, the affidavit supports a finding of probable cause. *State v. Chenoweth*, 160 Wn.2d 454, 469, 158 P.3d 595 (2007); *Franks*, 438 U.S. at 171. "In evaluating whether probable cause supports a search warrant, the focus is on what was known at the time the warrant issued, not what was learned afterward." *Chenoweth*, 160 Wn.2d at 476. "The fact that the affiant's information later turns out to be inaccurate or even false is of no consequence if the affiant had reason to believe those facts were true." *Chenoweth*, 160 Wn.2d at 476.

We review a trial court's ruling as to whether an affiant deliberately excluded material facts as a factual determination. *See Chenoweth*, 160 Wn.2d at 481. Great deference is given to a trial court's factual findings and the determination is upheld unless it is clearly erroneous. *Cord*, 103 Wn.2d at 367.

Haugen argues that the trial court erred by denying his *Franks* motion because the police omitted material information from the search warrant. Haugen contends that he met his burden to show a "deliberate falsehood" or "reckless disregard for the truth" because Haggerty knew that Fiman did not live at the residence and did not provide this information to the judge who issued the search warrant. He argues that the police were illegally inside the Haugen residence and that

there was no authority of law for the intrusion. He further asserts that "Fiman's residence was necessary to finding [probable cause]" and therefore, the trial court erroneously found the omission was not material. Br. of Appellant at 34. For the reasons previously stated above, we disagree.

Because substantial evidence supports the finding of fact that Fiman lived with the Haugens, the court did not err by including the information Haugen contends should have been excised. Here, based on the unchallenged finding of fact, there is "no indication of a deliberate misrepresentation, statement made with reckless disregard, or a material omission on the part of Officer Haggerty in applying for the search warrant." CP at 69. The trial court did not err.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

I concur:

Bjorgen, C.J.

LEE, J. (concurring) — I write separately not because I disagree with the majority's opinion, but to voice my concern with the manner in which the majority proceeded to resolve this appeal.

The majority acknowledges that "no hearing occurred" on "Haugen's CrR 3.6 motion to suppress" because the trial court failed to hold "a formal hearing" on, "or decide," Haugen's CrR 3.6 motion to suppress.[11] Order Remanding to the Trial Court for CrR 3.6 Hearing, Issuance of Findings and Conclusions, and Directing Additional Briefing (Nov. 30, 2015); Majority at 5, n.7; Order Clarifying the Court's Order Remanding to the Trial Court for CrR 3.6 Hearing, Issuance of Findings and Conclusions, and Directing Additional Briefing (Apr. 28, 2016) at 1. Rather than reversing and remanding this case because the trial court failed to even consider Haugen's CrR 3.6 motion to suppress, the majority stayed the appeal and ordered the trial court "*to hold an evidentiary hearing* on the first motion to suppress and enter findings of fact and conclusions of law." Order (Apr. 28, 2016) at 1 (emphasis added). I respectfully disagree with the manner in which the majority proceeded in resolving this appeal.

> When a defendant files a CrR 3.6 motion to suppress, the trial court
>
> (a) . . . *shall* determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.
>
> (b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

[11] The record contains a clerk's minute entry setting a CrR 3.6 "[s]uppression hearing to be heard February 28, 2014" on the trial court's calendar with no indication as to whether it was to be an evidentiary hearing. Clerk's Papers (CP) at 10. The record is devoid of any information as to whether the scheduled "[s]uppression hearing" was to be an evidentiary hearing. And there is no record that any such "[s]uppression hearing" occurred. CP at 10.

CrR 3.6(a), (b) (emphasis added). The rule is clear. When a CrR 3.6 motion to suppress is filed, the trial court must address the motion. The trial court must address the motion by determining whether an evidentiary motion is required. CrR 3.6(a). If the trial court determines no evidentiary hearing is required, then the trial court must enter a written order setting forth its reasons for its conclusion that no evidentiary hearing is required. CrR 3.6(a). However, if the trial court determines that an evidentiary hearing is required, the trial court must enter written findings of fact and conclusions of law at the conclusion of the evidentiary hearing. CrR 3.6(b).

Here, the trial court failed to comply with CrR 3.6 by not even addressing Haugen's CrR 3.6 motion to suppress. Therefore, the appropriate remedy was to reverse and remand.

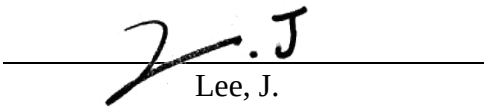
The majority may have chosen to proceed with staying the appeal and ordering the trial court to do what CrR 3.6 required it to do because of judicial efficiency.[12] Even if that were the case, I disagree with the order issued to the trial court.

The majority ordered the trial court "*to hold an evidentiary hearing*" on Haugen's CrR 3.6 motion. Order (Apr. 28, 2016) at 1 (emphasis added). By issuing such an order, the majority acted as a trial court by deeming an evidentiary hearing was necessary. That decision is not for the appellate court to make. The trial court should have made the determination of whether an evidentiary hearing was required. CrR 3.6(a).

Thus, rather than reversing this case because the trial court failed to address Haugen's CrR 3.6 motion to suppress, the majority made the decision for the trial court

[12] This appeal was considered on our docket on October 22, 2015. The appeal was stayed on November 30, 2015.

that an evidentiary hearing was necessary and ordered the trial court to hold such a hearing. Respectfully, proceeding in this manner was imprudent.



Lee, J.