Supreme Court No. 95833-5
Court of Appeals No. 49421-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GUSTAVO ALLEN

Petitioner.

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

The Honorable David Gregerson, Judge
The Honorable Suzan Clark, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Gustavo Allen, through his attorney, Lisa E. Tabbut, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Mr. Allen seeks review, in part, of the March 6, 2018, unpublished opinion of Division Two of the Court of Appeals (Appendix A) and the April 10, 2018, Order Denying Motion for Reconsideration (Appendix B).

C. ISSUE PRESENTED FOR REVIEW

The affidavit to support the search warrant established no nexus to the residence at 22807 NE 72nd Avenue as a repository of evidence of drug dealing activity. Did the appellate court err as a matter of law by failing to reverse the trial court's affirmation of the insufficient search warrant?

D. STATEMENT OF THE CASE

Pursuant to evidence seized during the service of a search warrant at Gustavo Allen's home, the State charged Allen by second amended information with possession with intent to deliver methamphetamine and possession of heroin. CP 41-42; RP II 247. The jury found Mr. Allen guilty. CP 86-89.

Pre-trial, the court heard Mr. Allen's CrR 3.6 motion challenging the search warrant authorizing the police to search, among other places and

things, Mr. Allen's home at 22807 NE 72nd Avenue, Battle Ground. RP I 3-40. Pleadings filed included a copy of the search warrant affidavit, CP 19-27, and the search warrant, CP 28-31.

During the service of the warrant, the detectives seized incriminating drug and firearm evidence and took an inculpatory statement from Mr. Allen. CP 2. Mr. Allen sought to suppress it all. CP 2. Mr. Allen made two arguments in his effort to suppress evidence. First, he argued the four corners of the search warrant affidavit did not provide probable cause to search the NE 72nd Avenue home for drugs. CP 3-8. Second, he argued the search warrant was stale because in requesting the warrant, the police specified the person selling the heroin to the CI was Marcos Sanchez-Luna. CP 8-10. The CI was 100% sure the heroin seller was Sanchez-Luna and had identified him in a Department of Licensing photo provided by Cowlitz Wahkiakum Narcotics Task Force Detective Phillip Thoma. CP 24.

After the magistrate approved the warrant but before the police served it, the police conducted a traffic stop and arrested who they, through their surveillance of the heroin sales and the assurance of the CI, identified as Sanchez-Luna. RP I 26. But "Sanchez-Luna" identified himself via a driver's license as Jorge Cruz-Pegueros. RP I 25. Detective Thoma

immediately sent a photo of Cruz-Pegueros to an undercover police detective involved in the case. RP I 28. The detective looked at the photo and said, "that was the guy," meaning the person who sold the CI heroin during three controlled buys was Cruz-Pegueros. RP I 28. Rather than return to the issuing magistrate with the conflicting identities of the heroin seller, the police served the warrant on 22807 NE 72nd Avenue. In serving the warrant, the police knew the CI's identification of Sanchez-Luna as the heroin seller was questionable. CP 24; RP I 25-30.

The court denied both challenges to the warrant. CP 38-40. The court found the misidentification of Sanchez-Luna and Cruz-Pegueros, inconsequential. CP 40.

On the nexus between Sanchez-Luna's heroin sales and Mr. Allen's house, the court relied on mischaracterized information to find a sufficient nexus to allow the search. CP 38-40.

In the first instance, the court found that after two separate buys in the ten days preceding the search warrant application, Sanchez-Luna was followed post buy to 22807 NE 72nd Avenue, Battleground. CP 40. That information does not exist in the search warrant affidavit. CP 25.

In the second instance, during two separate buys in the ten days preceding the search warrant application, the court found Sanchez-Luna

was followed in both instances, post buy, to 26001 NE 29th Avenue, Ridgefield. CP 40. In contrast, the search warrant affidavit specifies Sanchez-Luna was followed just once post-buy to the NE 29th Avenue address. CP 25.

In the third instance, the court found during each of the three buys specified in the warrant affidavit, the police surveilled Sanchez-Luna post-buy driving first to 26001 NE 29th Avenue, Ridgefield and then to 22807 NE 72nd Avenue, Battleground. CP 40. The search warrant affidavit itself notes just one instance, within ten days of the search warrant application, that Sanchez-Luna was surveilled post-buy traveling first to 26001 NE 29th Avenue, Ridgefield, and then to 22807 NE 72nd Avenue, Battleground.

Before hearing trial testimony, the court ruled on a CrR 3.5 motion. RP I 70-90. The court allowed into evidence statements Mr. Allen made to detectives. RP I 91-93.

The jury heard Mr. Allen was in the home when the police served the search warrant. RP I 101. A drug-sniffing dog alerted on an area high in the wall of the bedroom identified as Mr. Allen's room. RP I 122-26. With this information, the police accessed the attic through the garage and found, under the insulation, a container holding a pound of methamphetamine. RP I 110, 128-36, 182.

The detectives believed the house was a methamphetamine conversion lab where liquid methamphetamine is altered to the more substantial form sold on the street. RP I 168. They believed the conversion process was evident through the number of Igloo-type containers scattered throughout the house, many of which were coated with what either tested positive as, or appeared to be, methamphetamine residue. RP I 168-70; RP II 257, 295.

In the bathroom closest to the Mr. Allen's bedroom, the police found a grinder containing heroin residue. RP I 145-46, 166.

In Cruz-Pegueros' bedroom, the police found an unloaded rifle and shotgun. RP I 160-64. Various types of ammunition were in the home. There was ammunition for the shotgun but not for the rifle. RP I 158-62. Both guns proved operable during a pre-trial test fire. RP II 237-40. These weapons formed the basis for the State's allegation that Mr. Allen possessed a firearm in the possession with intent to deliver. RP II 347-48.

Mr. Allen made incriminating statements to Detectives Yund and Hartley about living at the house and occasionally helping his uncle, Porfirio Sanchez, pick up drugs and break larger quantities into smaller quantities. RP I 186, 191, 194; RP II 254; RP III 302. Mr. Allen told the

detectives there were, on average, three pick ups of methamphetamine per month and each averaged 10-15 pounds. RP I 194.

Mr. Allen clarified in his trial testimony that his earlier statements about methamphetamine trafficking were untrue. He had been nervous in talking to the police and had just wanted to protect his family. RP II 251, 259. His father is Jorge Cruz-Pegueros. RP II 260.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The search warrant did not establish probable cause to search Mr. Allen's Battleground home.

Under RAP 13.4, a petition for review will be accepted by the Supreme Court

> (1) If the decision of the Court of Appeals conflicts with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals conflicts with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The warrant clauses of the Fourth Amendment to the United States Constitution and art. 1, § 7 of the state constitution require that a search warrant issue only based on a determination of probable cause.

U.S. Const. Amend. 4; Wash. Const. art. 1, § 7; *State v. Fry*, 168 Wn.2d 1, 5–6, 228 P.3d 1 (2010). Probable cause is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004) (*citing State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

There is no "nexus" between the criminal activity and a home to be searched unless there is actual probable cause to believe that evidence of that activity is at that location. *Thein*, 138 Wn.2d at 140. Probable cause requires a connection between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched. *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). In Mr. Allen's case, there was no such nexus. The warrant affidavit failed to supply the required connection between Sanchez-Luna's drug sales and Mr. Allen's home.

This court's review is limited to the four corners of the affidavit submitted to establish probable cause. *State v. Murray*, 110 Wn.2d 706, 709–10, 757 P.2d 487 (1988); *Wong Sun v. United States*, 371 U.S. 471, 481–82, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Probable cause is a legal

conclusion reviewed de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40–41, 162 P.3d 389 (2007). This court reviews a trial court's ruling on a motion to suppress evidence to determine whether substantial evidence supports the court's findings and whether its findings support its conclusions. *State v. Cherry*, 191 Wn. App. 456, 464, 362 P.3d 313 (2015), *review denied*, 185 Wn.2d 1031 (2016). Substantial evidence exists only if the evidence in the record would persuade a fair-minded, rational person of the truth of the finding. *State v. Atchley*, 142 Wn. App. 147, 154, 173 P.3d 323 (2007).

State v. Thein presented this court with whether, if a magistrate determines a person is probably a drug dealer, then a finding of probable cause to search that person's residence automatically follows. *Thein*, 138 Wn.2d at 141. In *Thein*, the police executed a valid search warrant on a structure used by one McKone containing a marijuana grow. *Thein*, 138 Wn.2d at 136. It was determined that the landlord of the structure – Steven Thein -- also supplied McKone with materials for the marijuana operation. Police discovered money orders from McKone to Thein bearing the notation “rent,” found a box of nails addressed to Thein at his residential address and uncovered boxes of oil filters, marked “Toyota,” corresponding to the fact that Thein owned a Toyota pickup truck. The

warrant affidavit asserted that Thein was a drug manufacturer or dealer, and then generically asserted that such persons keep evidence or the substance itself at their home, and on this basis, a warrant was issued. *Thein*, 138 Wn.2d at 150.

This Court ordered suppression, agreeing with Thein that the search warrant affidavit failed to establish the requisite nexus between the criminal activity and his home. *Thein*, 138 Wn.2d at 150. Characterizing the affidavit's recitation of the box of nails and the oil filters as "innocuous," the Court ruled these items incapable of establishing a nexus and ruled that generic stereotypes about narcotic traffickers, standing alone, could not establish the requisite nexus, no matter how consistent the stereotypes were with common sense. *Thein*, 138 Wn.2d at 148–49. The court held that the necessary connection between Thein's residential address and evidence of drug-related crimes was not established as a matter of law because neither the particular facts nor the stereotypes about drug dealers were enough for probable cause. *Thein*, 138 Wn.2d at 147.

Here, the warrant affidavit established no nexus between the observed conduct of Sanchez-Luna and the home on NE 72nd Avenue beyond boilerplate and relatively innocuous facts, just like in *Thein*. CP

19-27. The affidavit relates three buys between Sanchez-Luna and the CI. CP 24-25. In the last instance, the blue Econovan was at the NE 72nd Avenue house 10 minutes before the buy, but no one reported seeing Sanchez-Luna leave the house, or where the Econovan traveled en route to the buy. RP 24-25. Before returning to the Battleground house, Sanchez-Luna stopped off at and entered outbuildings at a Ridgefield address and did the same at a grove of trees adjacent to NE 72nd house Avenue. CP 24-25.

In the two other controlled buys described in the warrant affidavit, the affiant noted no connection between Sanchez-Luna and the NE 72nd Avenue house other than Sanchez-Luna was known by the CI to drive a silver Honda Accord. During surveillance of the house in the month before the October 19, 2015, search warrant affidavit, a silver Honda Accord was parked at NE 72nd five times. CP 24. Nothing in the search warrant affidavit linked ownership of the car to Sanchez-Luna. CP 23-25.

The search warrant affidavit included no information such as whether the controlled buys were being made near the NE 72nd Avenue house. Nothing in the affidavit notes that anyone saw Sanchez-Luna leave

the NE 72nd house before the buys or that the police conducted surveillance of any suspect vehicle as it neared the buy location(s).

Nothing about Sanchez-Luna's observed travels showed he was keeping drug supplies at the NE 72nd house. Instead, the affidavit offered nothing other than broad sweeping generalizations about what drug dealers offend do. CP21-22. The boilerplate assertions in the warrant were just that. The affidavit offered that "upper levels sellers rarely keep large quantities of drugs at their residence," but instead they kept their drug supply commonly "at stash houses or other locations to avoid detection." CP 21. The affiant knew "that individuals who sell controlled substances frequently conceal the drugs, which they possess for future sales or consumption, as well as scales, packaging material, and records of the sales on their persons, within their residences[.]" CP 22. But these are mere generic assertions, not substantiated by any supportable factual allegations. CP 23-25. The affiant also asserts – highly generically – that traffickers of controlled substances often fortify the entrances and windows of their dwellings and other buildings used to facilitate the trafficking of controlled substances, or in some cases, the entrances to individual rooms with their dwellings or buildings. CP 21. These generic

claims were not enough to satisfy the protections of the Fourth Amendment and the state constitution under *Thein*.

Importantly, in upholding the warrant and its ostensibly adequate nexus between Sanchez-Luna and the 22807 NE Avenue house, the trial court relied on "facts" absent from the four corners of the search warrant affidavit. CP 38-40. It is inaccurate that during two separate buys in the ten days preceding the search warrant application, Sanchez-Luna was followed, post buy, to 22807 NE 72nd Avenue. CP 40. It is inaccurate that during two separate buys in the ten days preceding the search warrant application, Sanchez-Luna was followed in both instances, post buy, to 26001 NE 29th Avenue. CP 40. Finally, it is inaccurate that surveillance put the same individual at three controlled buys and all three times driving first to 26001 NE 29th Avenue and then to 22807 NE 72nd Avenue. CP 40.

The reality of the search warrant affidavit is Sanchez-Luna was never observed by police leaving the 22807 NE 72nd Avenue address before meeting with the CI. The blue Ford Econovan was parked at the NE 72nd Avenue residence five time in the month leading to the search warrant affidavit and was at the NE 72nd Avenue residence 10 minutes before a meet up with the CI for a heroin sale. CP 24-24. But no one

surveilled the van in the ten minutes between its departure from the residence and its arrival at the buy location. There is no way of knowing if Sanchez-Luna himself left the residence in the Econovan or whether the Econovan stopped along the way to pick up Sanchez-Luna and heroin.

The only other observation the police made of Sanchez-Luna and the residence is in one instance, he left the buy, stopped and went to outbuildings at the Ridgefield address, and then went to the Battleground address where he entered a grove of trees before entering the house. CP 24-24. The extent of Sanchez-Luna's connection to NE 72nd Avenue is a single entry into the house an unspecified amount of time after selling heroin to the CI and after making two stops along the way.

And but not integral to the lack of probable cause, the absence of nexus is further exacerbated by the passage of time. The Task Force conducted two of the controlled buys within ten days of the search warrant affidavit and one more purchase within 72 hours of the search being presented for judicial approval. The magistrate signing the warrant on October 19, 2015. CP 27. Yet, the warrant was not served until October 28. CP 33.

Also, as the suppression motion revealed, it is not at all clear who the Task Force was dealing with. The CI was "100% certain" she was

buying heroin from the person identified in a photo as Sanchez-Luna. CP 24. Post-traffic stop, it seemed clear to Detective Thoma that the CI was not buying from the person she identified as Sanchez-Luna. Instead, the undercover police detective was sure "the guy" was Jorge Cruz-Pegueros. RP I 1 25. Photos reveal that Sanchez-Luna and Cruz-Pegueros are two different people. CP 34-37. It is impossible for one person to be two people. The record before the failed to untangle the identification issue.

Probable cause exists for a search warrant when the affidavit properly sets forth facts and circumstances peculiar to the case that establish a reasonable inference that evidence of the crime at issue will be found at the location that police desire to search. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Here, the search warrant failed to show an adequate connection between the drug activity and the place to be searched, resting as it did on mere innocuous facts, and generalizations that drug dealers maintain evidence of the crime at their residences. CP 21-22.

Thein clarifies that the inclusion of innocuous facts in the warrant, along with the boilerplate assertions, does not save probable cause.

The facts of Mr. Allen's case closely align with those in the unpublished decision in *State v. Blye*, 196 Wn. App. 1037, Slip. Op. 46950-

2-II (October 25, 2016). See GR 14.1 (citation to unpublished authority for persuasive value only). *Blye* provides this court only with persuasive argument from a like issue.

In two instances, the police observed Joanne McFarland sell heroin to a CI in a controlled buy at a Bremerton Goodwill parking lot. After the first buy, a detective tried to follow McFarland back to the mobile home identified by the CI as McFarland's residence. The detective lost track of McFarland but another detective saw McFarland return to the mobile home about 10 minutes after the buy. After the second buy, a detective successfully surveilled McFarland from the buy to the mobile home.

The detectives submitted a search warrant affidavit to the trial court asking for permission to search the mobile home and the court authorized the warrant. In searching, the police located incrimination drug evidence again McFarland's boyfriend, Perry Blye. Blye moved to suppress the warrant arguing the warrant lacked a nexus between McFarland's criminal activity and the place to be searched, i.e., the mobile home.

In invalidating the *Blye* search, this court reviewed *Thein* and its progeny and concluded that a person's return to his or her home after

engaging in illegal activity does not, by itself, establish probable cause that illegal activity will be in the person's home.

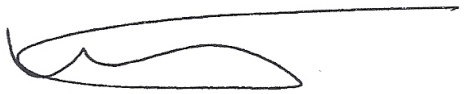
In Mr. Allen's case, at best, the search warrant affidavit established one instance where Sanchez-Luna returned to 22807 NE 72nd Avenue after taking a circuitous route and making two stops along the way - once in Ridgefield and one adjacent to the NE 72nd house – before entering Mr. Allen's home. CP 24-25. The search warrant affidavit established no nexus between Mr. Sanchez-Luna's drug sales and the house at 22807 NE 72nd Avenue. Sweeping generalizations in a search warrant affidavit about how drug dealers operate is not an adequate substitute for the constitutional requirements of a search warrant.

The search warrant affidavit did not establish probable cause to search the NE 72nd house. A warrantless search is impermissible under both art. 1, § 7 of the Washington Constitution and the Fourth Amendment to the U.S. Constitution. Art. 1, § 7; U.S. Const. Amend. IV; *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The remedy is to suppress all evidence seized and collected, including Mr. Allen's statements to investigating detectives under the exclusionary rule or the fruit of the poisonous tree doctrine. *Id*.

F. CONCLUSION

This court should accept review and suppress the evidence seized as the result of an illegal search.

Respectfully submitted May 9, 2018.



LISA E. TABBUT/WSBA 21344
Attorney for Gustavo Allen

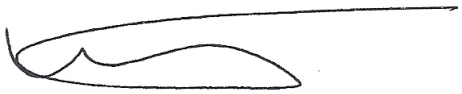
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Petition for Review to (1) Clark County Prosecutor's Office, at cntypa.generaldelivery@clark.wa.gov; and (2) I mailed it to Gustavo Allen/DOC#392458, Washington Corrections Center, PO Box 900, Shelton, WA 98584.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 9, 2018, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Gustavo Allen, Petitioner

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

March 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GUSTAVO ANDREW ALLEN, Appellant.	No. 49421-3-II UNPUBLISHED OPINION

MELNICK, J. — A jury found Gustavo Andrew Allen guilty on two charges of felony drug possession. Because probable cause supported the search warrant to search his home, and because the trial court did not abuse its discretion by requiring him to register as a felony firearm offender, we affirm the convictions and this condition. However, because Allen's sentence exceeded the statutory maximum, we remand for resentencing.

FACTS

In 2015, a confidential informant (CI) told Washington State Patrol Trooper Phillip Thoma about a middle-aged Hispanic male selling heroin in the Battle Ground and Ridgefield areas. Based on the CI's information, Thoma tentatively identified the alleged heroin seller. His name was Jorge Cruz-Pegueros. With the assistance of the CI, Thoma soon confirmed Cruz-Pegueros's involvement in drug activities.

Thoma set up surveillance on a home in Battle Ground where Cruz-Pegueros and Allen both lived. Among other details, the police learned that Cruz-Pegueros drove a blue Ford Econovan and a silver Honda Accord, both of which the police saw on numerous occasions at the Battle Ground home.

Thoma then set up three controlled heroin buys between the CI and Cruz-Pegueros. For the first buy, Cruz-Pegueros drove the Econovan. Although the police did not surveille Cruz-Pegueros en route to the buy, surveillance placed the van at his Battle Ground residence ten minutes before the buy. Police followed Cruz-Pegueros from the buy to a residence in Ridgefield, then directly to the Battle Ground house. For the second and third buys, Cruz-Pegueros drove the Accord. The police followed Cruz-Pegueros from the buy site to the same Ridgefield residence, but lost contact thereafter.

Thoma applied to the superior court for a search warrant for the Battle Ground and Ridgefield properties. Thoma supported the warrant application with an affidavit that detailed the facts above and other information. The superior court signed the warrant and authorized the police to search both properties.

The police executed the warrant on the Battle Ground property. They discovered a pound of methamphetamine hidden in the attic. The police also found a safe containing $1,600 in cash and drug paraphernalia, including plastic baggies, a digital scale, and a grinder containing heroin residue. Allen, present at the time of the search, admitted to knowledge of the drugs and to helping Cruz-Pegueros with drug pick up, delivery, and processing. The police also recovered two firearms from Cruz-Pegueros's bedroom.

The State charged Allen with two counts of possession of a controlled substance with intent to deliver, one each for methamphetamine and heroin. The methamphetamine charge included a school bus route stop enhancement and a firearm enhancement.

Pretrial, Allen moved to suppress the controlled substances, the firearms, and his statements to police. He argued that the search warrant failed to establish a sufficient nexus between drug trafficking and the Battle Ground address. The trial court denied Allen's motion and entered written findings and conclusions.

The matter proceeded to trial, and the court instructed the jury on accomplice liability and firearm enhancements. The jury found Allen guilty on both drug charges, and both enhancements.

The court imposed a standard range sentence of 51 months on the first count and added 24 months for the school bus route stop enhancement and 36 months for the firearm enhancement. In total, Allen received a 111 month sentence for the first count. On Allen's second count, the court imposed a six month concurrent sentence. The court also imposed 12 months of community custody to run concurrently on both counts, bringing Allen's total sentence to 123 months. The court also required Allen to register as a felony firearm offender. Allen appeals.

ANALYSIS

Allen argues that the police did not have probable cause to search his Battle Ground home and that the physical evidence seized from the residence and his statements should have been suppressed. He asserts the search warrant affidavit did not establish a nexus between his home and criminal activity. We disagree.

I. LEGAL PRINCIPLES

We review a magistrate's issuance of a search warrant for abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Because we consider only the information available to the issuing magistrate at the time of the probable cause determination, our review is limited to the four corners of the search warrant affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); *State v. Olson*, 73 Wn. App. 348, 354-55, 869 P.2d 110 (1994); *State v. Murray*, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988). Warrants are to be read in a commonsense and practical fashion, drawing "commonsense inferences" from all the circumstances set forth in the affidavit. *Maddox*, 152 Wn.2d at 509.

When a party challenges probable cause and seeks to suppress evidence from a warranted search at trial, "the trial court necessarily acts in an appellate-like capacity" to review the magistrate's determination of probable cause. *Neth*, 165 Wn.2d at 182. In this context, "the trial court's assessment of probable cause is a legal conclusion we review de novo." *Neth*, 165 Wn.2d at 182. However, we do not lose sight of the underlying deference due to the issuing magistrate's probable cause determination. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012); *Perrone*, 119 Wn.2d at 560. Accordingly, we resolve all doubts in favor of the warrant's validity. *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993).

II. PROBABLE CAUSE

A search warrant is invalid unless supported by probable cause. U.S. CONST., Amend. IV; WASH. CONST., art. 1, § 7. To establish probable cause, the supporting affidavit should describe such "objective facts and circumstances" that "would lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found" in the place to be searched. *In re Det. of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002). An affidavit "must be

based on more than mere suspicion or personal belief that evidence of a crime will be found." *Neth*, 165 Wn.2d. at 183. Although affidavits may include generalized statements about common criminal habits known to the police, generic statements alone cannot establish probable cause. *State v. Thein*, 138 Wn.2d 133, 146-48, 977 P.2d 582 (1999).

Probable cause for a search also requires "a nexus between criminal activity and the item to be seized and between that item and the place to be searched." *Neth*, 165 Wn.2d at 183. The judge issuing the warrant "is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." *Maddox*, 152 Wn.2d at 505. Courts should use a common sense approach in evaluating whether a warrant affidavit demonstrates that there is a probability criminal activity has occurred at the place to be searched. *Maddox*, 152 Wn.2d at 509. Warrants are to be read in a commonsense and practical fashion, drawing "commonsense inferences" from "all the circumstances set forth in the affidavit." *Maddox*, 152 Wn.2d at 509. However, if an improper search does occur, "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

In this case, the search warrant affidavit stated that police surveillance of Cruz-Pegueros began after a CI identified him as a potential heroin dealer. Surveillance of the Battle Ground home Cruz-Pegueros and Allen shared established that both vehicles Cruz-Pegueros used during the controlled buys were regularly parked at that address. Cruz-Pegueros arrived at the first buy driving the Econovan, which had been parked in front of the Battle Ground home ten minutes earlier. After the buy, Cruz-Pegueros returned to the Battle Ground house after making one stop in Ridgefield. Cruz-Pegueros used the Accord, for the second and third buys. Based on this evidence, the superior court authorized the search warrant.

We conclude that probable cause existed to search the Battle Ground home. The police conducted three controlled buys that confirmed the CI's information that Cruz-Pegueros sold heroin. While the known drug behavior did not occur at the Battle Ground home, the mere fact that Cruz-Pegueros lived there would be insufficient to establish probable cause. *Thein*, 138 Wn.2d at 147-48. However, the search warrant affidavit provided additional evidence demonstrating the "nexus" between heroin and the Battle Ground house.

A nexus establishing probable cause between the place to be searched and criminal activities exists where the facts show the seller left from a residence, consummated the sale, and returned to the residence. *State v. G.M.V.*, 135 Wn. App. 366, 372, 144 P.3d 358 (2006). *G.M.V.* is factually similar to the case at bar. There, the search warrant affidavit for a home described police surveillance of a suspect who left his girlfriend's house, conducted a controlled drug buy at another location, and then returned to the house. 135 Wn. App. at 369. The court determined that a sufficient nexus existed between the residence and the drug activity and that probable cause existed to search the girlfriend's house based on the suspect's travel to the drug buy from the house and back again. *G.M.V.*, 135 Wn. App. at 372.

In our case, before the first controlled buy, the Econovan was at the Battle Ground home. Cruz-Pegueros drove the van and it arrived at the buy site ten minutes later with heroin for sale. He drove to Ridgefield and then back to the Battle Ground residence. Given this short time frame it is reasonable to infer that Cruz-Pegueros drove his Econovan directly from the Battle Ground house to the buy and that a nexus existed between the home and the sale. It established probable

cause to believe a nexus existed between the criminal activity and the Battle Ground home. Under *G.M.V.,* the warrant affidavit in this case was sufficient to establish probable cause for the search of the Battle Ground home.[1]

Allen seems to assert that the only evidence connecting Cruz-Pegueros and the Battle Ground house is the police observation of him returning there after the first controlled buy. Allen misinterprets the record. Other evidence exists.

Allen relies on *Thein*, where the police searched Thein's home and discovered a marijuana grow. They uncovered evidence at a marijuana dealer's residence showing drug activity, money orders made out to Thein for "rent," a box of nails addressed to Thein, and oil filters that fit a vehicle Thein owned. 138 Wn.2d at 137-38. Neighbors told police that Thein was the dealer's landlord and drug supplier. 138 Wn.2d at 137-38.

The police sought a warrant to search Thein's home, asserting in an affidavit that they believed Thein to be involved in a marijuana grow operation and that the items found in the dealer's residence connected Thein's home to known drug activity. The affidavit also contained generalized statements of belief regarding the common habits of drug dealers. *Thein,* 138 Wn.2d at 138-39.

Thein held that the search warrant affidavit failed to establish a nexus between the drugs found at the tenant's residence and Thein's personal residence. 138 Wn.2d at 142-47, 151. It

[1] Allen also assigns error to the trial court's decision to uphold the warrant. Allen correctly points out that the trial court appears to misread the warrant affidavit. The trial court stated that the police followed Cruz-Pegueros from the controlled buys to the Battle Ground house three times. In fact, the police directly observed Cruz-Pegueros returning to the house only once. The State acknowledged the mistake, arguing it is not dispositive. On this record, the State is correct. As discussed above, an accurate reading of the warrant affidavit reveals sufficient evidence to demonstrate a nexus between the drug activity and location to be searched. Because the evidence supports a determination of probable cause, the trial court's error was harmless.

recognized that a person's involvement in drug dealing at one location does not provide probable cause to connect that activity to a person's residence, even in conjunction with an officer's generalized statements about the behavior of drug dealers. 138 Wn.2d at 146-48. Further, the box of nails and oil filters, the only evidence linked to Thein's residence, were "innocuous." 138 Wn.2d at 137-38, 150.

Allen argues that here, as in *Thein*, the search warrant affidavit failed to establish a connection between drug activity and the Battle Ground home. He asserts that neither the boilerplate assertions regarding typical behaviors of drug dealers nor the evidence gathered by police while conducting surveillance on Cruz-Pegueros established a sufficient nexus. However, this case and *Thein* are distinguishable.

As relevant here, the affidavit in *Thein* was inadequate because, beyond generic statements, the police could only point to "innocuous" evidence linking Thein's own residence to the residence where drugs had been found. 138 Wn.2d at 137-38, 150. Here, as stated above, the police have far more than the officers had in *Thein*. It is reasonable to infer that Cruz-Pegueros drove the van from the Battle Ground house directly to the buy location. After the buy, Cruz-Pegueros made a single stop in Ridgefield, then returned to the Battle Ground property. The evidence that Cruz-Pegueros travelled from the Battle Ground house to his confirmed drug activity, and returned there afterwards, is sufficient to connect that property to the crime for purposes of establishing probable cause.[2]

[2] Allen also cites to *State v. Blye*, No. 46950-2-II, (Wash. Ct. App. Oct. 25, 2016) (unpublished), http://www.courts.wa.gov/opinions/, an unpublished opinion, as persuasive authority. We do not believe this case is persuasive on the issue before us. It is distinguishable on the facts.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REQUIRING ALLEN TO REGISTER AS A FELONY FIREARM OFFENDER

Arguing in the alternative, Allen asserts that the trial court abused its discretion by requiring Allen to register as a felony firearm offender under RCW 9.41.333. Allen argues that registration under RCW 9.41.333 requires a jury finding that he was personally armed with a firearm during the commission of his crime. The State argues that because the jury found that Allen was "armed" for purposes of the firearms enhancement, the trial court did not abuse its discretion by requiring Allen to register as a felony firearm offender. The State is correct.

RCW 9.41.330 requires trial courts to decide whether to require a defendant convicted of a felony firearm offense to register under RCW 9.41.333. Under RCW 9.41.010(9)(a), (e), "felony firearm offense" is defined as "[a]ny felony offense that is a violation of this chapter . . . . [and a]ny felony offense if the offender was armed with a firearm in the commission of the offense."

Because the decision to require registration is discretionary, RCW 9.41.330, we review a trial court's decision to require a convicted defendant to register as a felony firearm offender for abuse of discretion. *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (2011). "A court abuses its discretion when an order is 'manifestly unreasonable or based on untenable grounds.'" *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). An order is manifestly unreasonable or based on untenable grounds if it results from applying the wrong legal standard or is unsupported by the record. *Rafay*, 167 Wn.2d at 655.

In deciding whether to require registration, courts consider the following non-exclusive factors: the defendant's criminal history, whether he has been previously found not guilty of an offense by reason of insanity, and evidence of the defendant's propensity for violence. RCW

9.41.330(2). Here, the trial court considered these three factors, as well as the "facts of [the] current case." Clerk's Papers (CP) at 81.

On this record, the court did not abuse its discretion by requiring Allen to register as a felony firearm offender. First, Allen was convicted of a felony. Second, in a special verdict form for the firearm enhancement, the jury found that Allen was "armed with a firearm at the time of the commission of the crime." CP at 47. As the relevant jury instruction stated, a person is considered armed if "the firearm is easily accessible and readily available." CP at 71 (Instr. 19). The same instruction clearly explained that "[i]f one participant in a crime is armed with a firearm, all accomplices to that participant are deemed so armed, even if only one firearm is involved." CP at 71 (Instr. 19).

Allen offers no support for his argument that a judge abuses his discretion by requiring an accomplice to register as a felony firearm offender. The court did not abuse its discretion.

IV. ALLEN'S SENTENCE EXCEEDED THE STATUTORY MAXIMUM OF 120 MONTHS

Allen also argues that, after factoring in community custody, his total sentence of 123 months exceeds the 10 year statutory maximum for possession of methamphetamine with intent to distribute. RCW 69.50.401(2)(b). Allen is correct. With respect to Allen's methamphetamine conviction, the sentencing court imposed a standard range sentence of 51 months, to which it added 24 months for the bus stop enhancement and 36 months for the firearm enhancement. The court also imposed 12 months of community custody, bringing Allen's total sentence for this count to 123 months. The State acknowledges Allen's sentence exceeds the statutory maximum by three months, and recommends resentencing.

We agree with the State and affirm Allen's convictions, the felony firearm registration requirement but remand for resentencing.

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.

We concur:

Worswick, P.J.

Lee, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

April 10, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GUSTAVO ANDREW ALLEN, Appellant.	No. 49421-3-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Gustavo Andres Allen, moves this court for reconsideration of its March 6, 2018 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Lee, Melnick.

FOR THE COURT:

Melnick J.

Melnick, J.

LAW OFFICE OF LISA E TABBUT

May 09, 2018 - 1:55 PM

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