IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32029-4-III, consolidated with No. 32030-8-III

STATE OF WASHINGTON, Appellant,

v.

CASEY J. LYNN DUNN, Respondent.

RESPONDENT'S BRIEF

Elizabeth Halls, WSBA #32291
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED

State Cases

Constitutions

Other

I. INTRODUCTION

Casey J. Lynn Dunn was charged with possession of methamphetamine, manufacture of marijuana, and second degree possession of stolen property. Dunn and co-defendant, Steven Long, moved the trial court for orders suppressing the evidence because the search warrant affidavit lacked a sufficient nexus between the place to be searched and the items sought. The trial court granted the motions, suppressed the evidence and dismissed the case. The State appeals.

II. COUNTERSTATEMENT OF ASSIGNMENT OF ERROR

COUNTERSTATEMENT OF ASSIGNMENT OF ERROR 1: The trial court properly granted Dunn's motion to suppress because the search warrant affidavit does not set forth sufficient facts to support a reasonable nexus between the place to be searched and the items sought.

III. COUNTERSTATEMENT OF ISSUE PERTAINING TO ASSIGNMENT OF ERROR

ISSUE 1: Whether the search warrant affidavit contains sufficient facts to support a reasonable nexus between the place to be searched and the items sought.

IV. COUNTERSTATEMENT OF THE CASE

On May 6, 2013, Columbia County Undersheriff Harvey Lee Brown applied for a search warrant of the residence of Steven Long following a report of a wrecked vehicle that Steven Long was seen driving on May 2, 2013. CP 16. During the course of investigation, Brown discovered that the truck and various other items of personal property were stolen from the home of the truck's owner. CP 16-17.

Brown submitted an affidavit in support of his search warrant application. CP 5-7, 17. In the affidavit, Brown set forth the following facts:

> On May 3, 2013, I was dispatched to a report of an abandoned vehicle in the ditch on Steve Shoun's property on Ring Canyon Road. While enroute to the field I called Shoun on his cellphone and was told by him that he had observed the same pickup truck on Thursday, May 2, 2013 when it almost ran his hired hand off the road on Hogeye Hollow Road. Shoun told me that he had seen Steven Long driving the pickup and that Long had waved at him. I was also advised by Shoun that there was an ATV in the bed of the pickup which had cammo packs on it.
>
> When I arrived, I observed a Dodge Ram pickup truck with a grey bed and a brown cab in the ditch with the rear of the pickup sticking out of the ditch, the pickup truck had Washington State License plate number B38538R. The pickup was registered to Zachary Zink of Dayton. The vehicle was recovered by Kyle's Towing and placed in his storage. The ATV was not in the back of the pickup truck.
>
> After the pickup was pulled out of the ditch I called Shoun on his cellphone and asked him to come to my location and verify that this was the pickup he had observed Steven Long driving on

> Thursday. Shoun and his hired hand arrived and verified that they had both observed Long driving that same pickup. Long was employed by Shoun in 2010 and the hired man has known Long for 6 or 7 years.
>
> At approximately 1300 I made contact with the owner of the vehicle in the foyer of the Sheriff's Office. I was advised that the Dodge pickup that was at Kyle's Towing was his and had been at his property located at 628 Robinette Mountain Road being used as a farm vehicle. I was told that the vehicle was not suppose[d] to be off the property and that the last time he had seen it, it was parked next to a horse trailer on his property. According to Zink the last time he had observed the pickup was on Tuesday, April 30, 2013. Zink advised me that he was going to check his property and see if his cabin had been entered.
>
> On May 3, 2013, at approximately 1440 hours I was advised to respond to the Zink cabin on Robinette Mountain Road for a report of a burglary. The property listed in this affidavit was provided by the Zink's who stated that the property was at a cabin and is now missing.
>
> When I arrived I was met by Zink at the front gate and advised that the back door had been kicked in and the outbuildings had also been entered. While driving up to the cabin Zink told me that both his ATV's were gone as well as generators and a rifle. Zink also advised me that the door had a shoe print on it.
>
> As we pulled up to the back door I observed that the door had been kicked in I dusted for latent prints but did not find any at all.
>
> I was advised that one of the ATV's had tannish colored cammo packs on the back of it which matched the description of the ATV in the back on the pickup truck.

CP 6-7. In the affidavit designated for a description of the premises to be searched, Brown described the residence of Steven Long:

> A single family one story manufactured home which is tan in color with white trim located at 447 Hogeye Hollow Rd in the County of

> Columbia. Also present is a cinderblock garage with a silver metal roof located in front of the residence. There is also a weathered wooden barn on the north side of Hogeye Hollow Rd that belongs with the property. This residence and barn is approximately .1 miles from the intersection of Lower Hogeye Road and Hogeye Hollow Road.

CP 6. A handwritten note included the information: "This is the residence of Steven R. Long." CP 6.

On May 7, 2013, Columbia County Sherriff's deputies executed the search warrant. CP 10-13. A number of items were seized from Long's home which are alleged to have been stolen in the Zink burglary and another burglary; evidence of marijuana cultivation and drug use were also found. CP 10-13. Based on the evidence seized, on May 9, 2013, the State filed an information charging Dunn with possession of a controlled substance, methamphetamine, manufacture of marijuana, and second degree stolen property. CP 1-4. Dunn and co-defendant, Long, both filed motions to suppress the illegally obtained evidence from the search, claiming that the search warrant was not supported by probable cause because the affidavit in support of the search warrant did not contain sufficient facts to establish a nexus between the crimes being investigated and the house searched. CP 16-17.

On September 27, 2013, at a hearing on the motion to suppress, the trial court granted the motion to suppress the evidence gathered as a result

of the warrant issued. RP 4-7. On October 3, 2013, the court entered findings of fact and conclusions of law and order dismissing the case without prejudice. CP 14-15. On October 10, 2013, the trial court entered findings of fact, conclusions of law and order granting defendant's motion to suppress. CP 16-18. Specifically, the trial court made the following conclusions of law:

1. The search warrant affidavit at issue herein does not set forth sufficient facts to support a reasonable nexus between Steven Long's residence and the items sought be Sheriff's deputies in the warrant affidavit;
2. Without the nexus between the items sought and the place to be searched, probable cause did not exist to grant the warrant;
3. The warrant was not supported by probable cause and therefore was not valid.

CP 17.

On October 21, 2013, the State filed a notice of appeal, seeking review. CP 19-20.

V. ARGUMENT

THE TRIAL COURT PROPERLY GRANTED DUNN'S MOTION TO SUPPRESS BECAUSE THE SEARCH WARRANT AFFIDAVIT DOES NOT SET FORTH SUFFICIENT FACTS TO SUPPORT A REASONABLE NEXUS BETWEEN THE PLACE TO BE SEARCHED AND THE ITEMS SOUGHT.

This court reviews conclusions of law from an order pertaining to the suppression of evidence de novo. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513, 515-16 (2002); *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The rights of individuals to be secure from government intrusion into their persons and property are protected by both the United States and Washington constitutions. U.S. Const. Amend. IV; Wash. Const. Art. 1, § 7. With a few narrowly-tailored and jealously-guarded exceptions, agents of the state or federal government may only search an individual's person or his home with a warrant. U.S. Const. Amend. IV; Wash. Const. Art. 1, § 7; *State v. Reichenbach,* 153 Wn.2d 126, 131, 101 P.3d 80 (2004).

A search warrant may issue only upon a determination of probable cause. *State v. Thein,* 138 Wn.2d 133, 140, 977 P.2d 582 (1999); *State v. Cole,* 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An application for a search warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of

the evidence by the issuing magistrate. *Thein,* 138 Wn.2d at 140. Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *Id.* Accordingly, probable cause thus requires (1) a nexus between criminal activity and the item to be seized, and (2) a nexus between the item to be seized and the place to be searched. *Id.*

When determining whether or not a search warrant should have been issued, trial courts are limited to the "four corners" of the affidavit and the application for the warrant, and may not consider other information or evidence. *State v. Neth,* 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

A finding of probable cause must be grounded in fact. *Thein,* 138 Wn.2d at 147; *Cole,* 128 Wn.2d at 286. This requirement is constitutionally prescribed because information that is not sufficiently grounded in fact is inherently unreliable and frustrates the detached and independent evaluative function of the magistrate. *Thein,* 138 Wn.2d at 147. Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. *Thein,* 138 Wn.2d

at 147; *see, e.g., State v. Smith,* 93 Wn.2d 329, 352, 610 P.2d 869 (1980) ("if the affidavit or testimony reveals nothing more than a declaration of suspicion and belief, it is legally insufficient"); *State v. Helmka*, 86 Wn.2d 91, 92, 542 P.2d 115 (1975) ("Probable cause cannot be made out by conclusory affidavits"); *State v. Patterson*, 83 Wn.2d 49, 52, 61, 515 P.2d 496 (1973) (record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant).

Moreover, probable cause must be based on more than conclusory predictions. *Thein,* 138 Wn.2d at 147. Blanket inferences of this kind substitute generalities for the required showing of reasonably specific "underlying circumstances" that establish evidence of illegal activity will likely be found in the place to be searched in any particular case. *Id.* at 147-48. Probable cause to believe that a man has committed a crime does not necessarily give rise to probable cause to search his home. *Id.* at 148.

Further, the existence of probable cause is to be evaluated on a case-by-case basis. *Thein,* 138 Wn.2d at 149; *Helmka*, 86 Wn.2d at 93. Thus, the general rules must be applied to specific factual situations. *Thein,* 138 Wn.2d at 149. In each case, the facts stated the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness. *Id.* General, exploratory searches are unreasonable, unauthorized, and invalid. *Id.*

In *Thein,* police obtained information through a series of investigations and informants that Mr. Thein was involved in the production and distribution of marijuana. *Id.* at 136-40. Police officers applied for a warrant to search Thein's residence, reasoning that in their "training and experience" drug dealers keep evidence in their homes. *Id.* at 138-39. The magistrate issued the warrant, and officers found evidence in Thein's home which was used at trial to convict him over the objections of Thein's counsel. *Id.* at 140. Although upheld by the Court of Appeals, the Supreme Court overturned the conviction and held that the affidavit was insufficient to establish a nexus between Thein's home and evidence of drug dealing. *Id.* at 151. The Court reasoned that the conclusory "training and experience" type statements of officers applying for the warrant did not set forth any facts which established that it was likely that evidence of drug-dealing would be found at Thein's home. *Id.* at 148. The Court held that such a nexus was not satisfied by the generalized statements regarding the habits of drug dealers and their practice of storing drugs or drug paraphernalia at their homes. *Id.* at 147-48. Apart from such statements, there was no incriminating evidence linking drug activity to the home that was searched in *Thein*: "The only evidence linked to the Austin Street residence is innocuous: a box of nails and vehicle registration." *Id.* at 150.

The Court instead demanded that specific facts be set forth linking the evidence to the location to be searched. *Id.* Generalizations and assumptions that a criminal would keep evidence at his home are grossly insufficient to establish probable cause without facts making it likely—this despite the fact that it may be common-sense to make such an assumption. *Id.* The Court further reasoned that even if there is no other logical place for a criminal to keep evidence, a nexus with the individual's home cannot be established. *Id.* at 150. Because the facts did not establish a nexus between evidence of illegal drug activity and the defendant's Austin Street residence, the Court ordered the evidence seized therefrom suppressed. *Id.* at 151.

Following *Thein*, this Court found probable cause lacking to search the defendants' home when the police caught the defendants at the scene of the burglary in *State v. McReynolds*, 104 Wn.App. 560, 570, 17 P.3d 608 (2000). In *McReynolds,* the only nexus with the residence was that an officer stopped one of the defendants for identification purposes and obtained his address. *Id.* at 565. But no facts established an inference that his home would contain evidence of a burglary. *Id.* at 560. In evaluating whether probable cause existed, the court referenced footnote four cited in *Thein,* noting that "[u]nder specific circumstances it may be reasonable to infer such items will likely be kept where the person lives." *McReynolds,*

104 Wn.App. at 569 (citing *Thein,* 138 Wn.2d at 149 n. 4). The court then quoted from LeFave's treatise, suggesting a more limited reading of *Thein* for burglary and theft crimes:

> Another situation in which this problem arises is when the crime in question was a theft, burglary or robbery in which valuable property was obtained by the perpetrator. Here, the question is whether, assuming a not too long passage of time since the crime, it is proper to infer that the criminal would have the fruits of his crime in his residence, vehicle, or place of business. Perhaps because stolen property is not inherently incriminating in the same way as narcotics and because it is usually not as readily concealable in other possible hiding places as a small stash of drugs, courts have been more willing to assume that such property will be found at the residence of the thief, burglar or robber. It is commonly said that such circumstances account may be taken of "the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property." It is most relevant, therefore, that objects are "the sort of materials that one would expect to be hidden at [the offender's] place of residence, both because of their value and bulk," and also that the offender "had ample opportunity to make a trip home to hide" the stolen property before his apprehension.

McReynolds, 104 Wn.App. at 569-70 (citing WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.7(d), at 381-84 (3d ed. 1996)).

Even after carefully examining the officer's affidavit in light of LaFave's treatise, this court still found that the affidavit failed to establish a nexus between the alleged criminal acts and the defendants' residence. *McReynolds*, 104 Wn.App. at 570. For instance, the court held:

> Because the officers found Eugene McReynolds and Leonard Wolf at the scene of the burglary and Randy McReynolds and Jeffery

> Sears nearby, there is no likelihood the fruits of that crime would be at the property where all the men lived. The question therefore is whether there is a basis for inferring evidence of *other* crimes would be at the Aladdin Road property. The only possible evidence is the presence at the scene of a pry bar inscribed with the initials "E.A.," which allegedly had been stolen along with a large quantity of tools several weeks earlier. But the presence of this tool, without more, does not establish an inference that evidence of the earlier burglary or any other crime would be at the Aladdin Property. The result is that, as in *Thein*, the affidavit failed to establish a nexus between the crimes of which the residents were accused and their residence.

Id. at 570.

Like *Thein* and *McReynolds*, the search warrant affidavit in this case does not set forth sufficient facts to support a reasonable nexus between the place to be searched and the items sought. The search warrant affidavit makes no mention of any facts which connect Long's residence to the fruits of alleged burglary beyond the mere fact that he lived there. Not even insufficient statements based on training and experience as discussed in *Thein* were alleged in the affidavit. Instead, the affidavit focuses on establishing the nexus only between Long and the stolen pickup. No mention is even made of Long's home, except as the description of the place to be searched. A handwritten note explains that this is Long's residence, however, that is clearly insufficient under *Thein* and its progeny to support the necessary items to be seized with the place to be searched. Further, there is no mention in the affidavit as to how far

away the truck was seen from Long's residence, that there was any other evidence seen at the Long home, and there are no observations at the Long home mentioned in the affidavit.

As in *Thein* and *McReynolds,* it is clear that some factual reason needs to be given in this case to support the nexus between the items stolen in the Zink burglary and Long's home. The affidavit is devoid of any reasoning for Undersheriff Brown's belief that the stolen items would be found at Long's home. Since there are no facts within the four corners of the affidavit that explain why the officer believed the stolen items would be found at Long's home, no nexus was established. As such the warrant should not have issued, and the trial court properly granted Dunn's motion to suppress.

In its brief, the State argues that the motions to suppress were improperly granted and should be overturned. The State maintains that *Thein* is distinguishable from this case because this is not a drug case, but involves burglary and theft, and therefore the court should apply the language of LaFave's treatise quoted in *McReynolds*. Appellant's Brief at 17. The State further argues that because the items sought, among other things, were large stolen ATVs and "where better to hide stolen vehicles that a garage or storage building on a rural property." Appellant's Brief at

18. This reasoning is flawed because the State is asking this court to look outside the four corners of the search warrant affidavit to find the nexus.

The State's reliance on *State v. Graham,* 130 Wn.2d 711, 725, 927 P.2d 227 (1996), similarly to the State's argument in *Thein*, for the proposition that officers may draw reasonable inferences based on their training and experience, is not appropriate under the facts presented here. *Thein,* 138 Wn.2d at 148. In *Graham*, officers personally observed the suspect in possession of packets that, from experience and training, they believed to contain rock cocaine. *Graham*, 130 Wn.2d at 725. The inference that the suspect was in actual possession of an illegal controlled substance was, therefore, drawn from specific facts and informed by experience. *Thein,* 138 Wn.2d at 148. In its brief, the State argues that *Graham* is applicable because "Long was personally observed by Shoun and his assistant to be in possession of a truck and ATV later determined to be stolen. Additionally, Long was seen driving the stolen truck with the ATV on the same road his residence is on." Appellant's Brief at 20.

However, *Graham* is not applicable in this case. The affidavit's allegation that Long was in personal possession of Zink's vehicle several days before fails to support an inference that he possessed other property on another location several days later. In addition, the officer's "training and experience" was not at issue in this case because the officer's training

and experience was not mentioned in the affidavit for search warrant. That means the judge did not rely upon the officer's training and experience when he initially issued the search warrant, as in *Graham.*

The State also relies on *State v. Cowin,* 116 Wn.App. 752, 67 P.3d 1108 (2003). In *Cowin,* the trial court denied the defendant's motion to suppress and the Court of Appeals affirmed the trial court, finding that there was a sufficient nexus established between the residence and the marijuana grow operation. *Cowin,* 116 Wn.App. at 760. The *Cowin* court found the following:

> [T]he property owner told the sheriff's department about the marijuana on his land shortly after the informant reported the plants' transfer from the Cowin house into the woods. Further investigation disclosed the presence of two grow sites a short distance from the Cowins' residence, and accessible only by passing their house. The detectives saw the same truck at the grow sites that they saw on more than one occasion at the Cowins' residence. This truck was registered to the man who had witnessed the Cowins' marriage and who had the same first name as the man identified by the anonymous informant. Beck was seen in the truck six weeks before the discovery of the grow sites, and at that time the truck contained materials associated with marijuana grow operations.

116 Wn.App. at 759-60. The court held that this was sufficient evidence to corroborate the informant's statement that marijuana plants had been recently moved from the Cowin's residence to an outdoor location, and it established the necessary nexus between that residence and the grow operation. *Id.* at 760.

Although the State argues that the affidavit in *Cowin* is similar to the affidavit in this case, this is simply not the case. Here, the search warrant affidavit focuses on establishing the nexus only between Long and the stolen pickup. In *Cowin*, an eye witness provided information about the use of the home in the operation. No such evidence was provided here.

Viewing the four corners of the affidavit, the warrant plainly runs afoul of *Thein* because it alleges no other factual basis to support a belief that stolen property would be found at Long's house than the mere fact that Long lived there. Because the search warrant affidavit does not set forth sufficient facts to support a reasonable nexus between the place to be searched and the items sought, the trial court properly granted Dunn's motion to suppress.

VI. CONCLUSION

Because the trial court properly granted Dunn's motion to suppress, this court should affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 21st day of May, 2014.

ELIZABETH HALLS, WSBA #32291
Attorney for Appellant

ANDREA BURKHART, WSBA #38519
Attorney for Appellant