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Court of Appeals
Division III
State of Washington

No. 32030-8-III
(consolidated to No. 32029-4-III)
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Appellant,
vs.

CASEY DUNN AND STEVEN LONG,
Respondents.

APPEAL FROM THE COLUMBIA COUNTY SUPERIOR COURT
Honorable M. Scott Wolfram, Judge

BRIEF OF RESPONDENT STEVEN LONG

SUSAN MARIE GASCH
WSBA No. 16485
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Respondent Steven Long

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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. The court erred in granting the defendant's[sic] motion to suppress.

2. Sufficient nexus existed in the search warrant affidavit to connect the residence of the Defendants/Respondents with the probable location of the stolen items for this the search warrant was issued.

(Brief of Appellant, p. 1)

B. RESPONDENT'S ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

Was the search warrant for Long's residence and outbuildings invalid because the supporting affidavit contained no facts to reasonably indicate that criminal activity was connected with his property?

C. COUNTERSTATEMENT OF THE CASE

1. Procedural history. In May 2013, the Columbia County Prosecuting Attorney charged respondent Steven Ray Long with seventeen (mostly) property crimes. CP[1] 1–8. Long and co-defendant Casey Dunn filed motions to suppress illegally obtained evidence from a search of Long's residence, claiming the search warrant was not supported by

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[1] This case was consolidated at a late date to the State's appeal involving co-defendant Casey Dunn, No. 32029-4. The State had designated Clerk's papers separately in each appeal and each respondent had also separately designated supplemental clerk's papers Mr. Long refers herein to the set of clerks papers designated by the State as to him at CP 1–24 and his own designation at Suppl. CP 25–50 simply as "CP __".

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. *See* CP 25–31. The Honorable M. Scott Wolfram granted the motions. RP 4–7. The court entered findings of fact and conclusions of law in support of orders granting defendants' motions to dismiss and dismissing the cases without prejudice. *See* CP 18–19, 20–22. The State appealed. *See* CP 23–24.

2. Substantive facts. The following facts essentially track those set forth in Brief of Respondent Casey Dunn, but are re-stated here to include references to their location in Long's clerks papers.

Columbia County Undersheriff Lee Brown applied for a search warrant of Long's home following a report of a wrecked vehicle that Long was seen driving on May 3, 2013. During the course of investigation, police discovered the truck and various other items of personal property were stolen from the home of the truck's owner. CP 20.

Brown submitted an affidavit in support of his search warrant application. CP 9–11, 21. In his 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 Zackary Zink of Dayton. The vehicle was recovered by Kyles Towing and placed in his storage yard. 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 Kyles 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 the 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 d[e]scription of the ATV in the back of the pickup truck.

CP 10–11 (alterations added).

In the portion of the affidavit requiring 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 10. The affiant added a handwritten note to the typewritten premises description that included the information, "This is the residence of Steven R. Long." CP 10.

On May 7, 2013, Columbia County Sheriff's deputies executed the search warrant. CP 14–17. A number of items were seized from Long's home which are alleged to have been stolen in the Zink burglary and another burglary, and some evidence of marijuana cultivation and drug was found. *Id.*

The State thereafter filed charges. Prior to trial the court granted the motions of Long and Dunn to suppress the evidence seized on the basis the search warrant for Long's house was invalid because the supporting affidavit contained no facts to indicate that criminal activity was connected with the residence. Specifically, the 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 the Defendant's residence and the items sought by 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 21.

D. ARGUMENT

The trial court properly granted the 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.

Pursuant to RAP 10.1(g)(2), Long joins in and adopts by reference the arguments set forth in the brief of co-defendant Dunn, and submits further argument as follows.

Normally the issuance of a search warrant is reviewed for abuse of discretion (*State v. Maddox,* 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)) and deference is given to the issuing judge or magistrate. *State v. Young,* 123 Wn.2d 173, 195, 867 P.2d 593 (1994). However, at the suppression hearing the trial court acts in an appellate-like capacity; its review, like that of the reviewing court, is limited to the four corners of the affidavit supporting probable cause. *State v. Neth*, 165 Wn. 2d 177, 182, 196 P.3d 658, 661-62 (2008) (citations omitted). "Although we defer to the magistrate's determination, the trial court's assessment of probable cause is a legal conclusion we review de novo." *Id.*

A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that

evidence of the criminal activity will be found in the place to be searched. *State v. Thein,* 138 Wn.2d 133, 140, 977 P.2d 582 (1999). A finding of probable cause must be grounded in fact. *Id.* at 147. The affidavit should be evaluated in a commonsense manner, rather than hyper-technically. *Neth*, 165 Wn.2d at 182 (citations omitted). 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). Probable cause for a search requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched. *Thein,* 138 Wn.2d at 140.

It is the second nexus that is at issue here: whether a reasonable person given the evidence presented would believe that stolen property or other evidence of a crime was likely to be found at Long's residence As

correctly determined by the Superior Court below, there is insufficient nexus to tie supposed criminal activity to Long's residence and outbuildings.

a. The facts contained in the "four corners" of the search warrant affidavit simply connect Long with a stolen pickup truck. The State correctly notes courts have found "generalizations and conclusory allegations" in a search warrant affidavit insufficient to establish a reasonable nexus between criminal activity and item to be seized and/or between that item and place to be searched. *See* Brief of Appellant at 9–13. However the State is incorrect that merely alleging a "fact" creates a nexus. Instead, 'the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness'" in order to support existence of probable cause. *Thein*, 138 Wn.2d at 149 (citations omitted). Here, the facts alleged in the search warrant affidavit are insufficient to establish the requisite nexus.

The facts contained in the "four corners" of the search warrant are set forth verbatim in section 2, Counterstatement of the Case, *supra*; *see also* CP 10–11. Appellant itemized the facts it believes to be pertinent to its issue on appeal. Brief of Appellant at 13–15. Long summarizes

Appellant's itemization as follows, minus "facts" not found in the four corners of the affidavit as noted.

1. Long drove a pickup truck on May 2, 2013.[2]

2. An all-terrain vehicle ("ATV") was in the bed of the truck.[3]

3. Long was driving the truck on Hogeye Hollow Road.[4]

4. The truck was found abandoned in a ditch at property on Ring Canyon Road the next day.[5]

5. The truck had been stolen from Mr. Zink.[6]

6. The truck and two ATVs were stolen between April 30 and May 3 from Mr. Zink's property on Robinett Road.[7]

7. The ATV in the bed of the truck driven by Long matched a description of one of the stolen ATVs.[8]

8. The search warrant affidavit describes the property to be searched as a residence belonging to Long and a garage and barn, located at 447 Hogeye Hollow Road.[9]

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[2] Brief of Appellant at 13–14.
[3] Brief of Appellant at 14.
[4] *Id.* The search warrant affidavit does not say the portion of road Long was driving on was in Columbia County and makes no reference co-defendant Casey Dunn. The only reference to Long's residence address is in the portion of the affidavit describing the property location to be searched.
[5] Brief of Appellant at 14. The search warrant affidavit actually says the vehicle was found on property at Ring Canyon Road and does not mention the location as being in a rural area or in Columbia County.
[6] Brief of Appellant at 14.
[7] *Id.*
[8] *Id.*
[9] Brief of Appellant at 15. The search warrant affidavit does not refer to the property as rural and makes no reference co-defendant Casey Dunn or to Long's alleged sharing of the residence with Dunn.

9. The description of property to be searched more specifically locates Long's residence as "approximately [one-tenth of a] mile from the intersection of Lower Hogeye Road and Hogeye Hollow Road."[10]

Viewed in a commonsense manner, these facts establish a nexus only between Long and the stolen pickup. The search warrant affidavit contains no facts which connect Long's residence to the fruits of alleged burglary beyond the mere fact that he lived there. For example, the affidavit does not mention how far away the truck was seen from Long's residence or that the truck or other evidence was seen at Long's property or that any observations were made at the Long home and property. The affidavit only mentions Long's home when it describes the place to be searched. A handwritten note explaining this is Long's residence is insufficient under *Thein* and its progeny to provide the requisite nexus between the items to be seized (Zink's stolen property) and the place to be searched (Long's residence and outbuildings).

b. <u>The facts contained in the "four corners" of the search warrant affidavit do not support any reasonable inference of criminal activity taking place at Long's residence.</u> Even if there is a reasonable probability that a person has committed a crime on the street, this does not necessarily establish probable cause to search his home. *State v. Dalton*, 73 Wn. App.

[10] Brief of Appellant at 15.

132, 139–40, 868 P.2d 873 (1994) (uncorroborated informant's tip that defendant was transporting drugs to an address in Alaska and no information given to issuing judge tying his home to controlled substances). As in *Dalton*, the affidavit here at best establishes a nexus only between Long and the stolen pickup. *Compare with State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006) (finding probable cause established where warrant was issued to search the place where the defendant was observed leaving directly from, and returning directly to, before and after he sold drugs).

Probable cause to search a person's home is also not established just because probable cause exists to search that person's vehicle. *State v. Goble*, 88 Wn. App. 503, 509, 512, 945 P.2d 263 (1997) (issuance of search warrant to search his home based on anonymous tip that defendant received drugs at his post office box and discovery of methamphetamine in a package addressed to his post office box was invalid where affidavit contained no information that he had previously dealt or stored drugs at his home or that he intended to do so in the future). As in *Goble*, the search warrant affidavit here fails to mention any facts which connect Long's residence to the fruits of alleged burglary beyond the mere fact that he lived there.

Despite the lack of nexus contained in the search warrant affidavit, the State maintains *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 *State v. McReynolds*, 104 Wn. App. 560, 17 P.3d 608 (2000). Brief of Appellant at 17–19. The State maintains *McReynolds* stands for the proposition the *Thein* standard to meet the required nexus does not apply to a case involving theft or burglary (such as the case at bar). Brief of Appellant at 17.

In evaluating whether probable cause existed to search the defendant's home, the *McReynolds* court referenced footnote four cited in *Thein*, which noted that "[u]nder specific circumstances it may be reasonable to infer [evidence of a burglary] will likely be kept where the person lives." *McReynolds*, 104 Wn. App. at 569 (citing *Thein*, 138 Wn.2d at 149 n.4). To help explain context of the reference made in *McReynolds,* it is necessary to look back to *Thein*.

The *Thein* Court emphasized the "existence of probable cause is to be evaluated on a case-by-case basis. Thus, general rules must be applied to specific factual situations. In each case, 'the facts stated, the inferences to be drawn, <u>and the specificity required must fall within the ambit of</u>

reasonableness.'" *Thein*, 138 Wn.2d at 149 (citations omitted; emphasis added).

Thus, in a footnote, the *Thein* court said it may be reasonable to infer that personal items of continuing utility that are not inherently incriminating may be at the suspect's residence if sufficiently linked to the crime and the defendant in the search warrant affidavit. *Thein,* 138 Wn.2d at 149 n. 4. In that instance, the Court specifically referred to clothing and towels described by rape victims or a particular weapon used in the commission of a crime—under circumstances when the perpetrator is unaware that the victim has identified him to police. *Thein*, 138 Wn.2d at 149 n. 4 (citing *State v. Herzog,* 73 Wn .App. 34, 56, 867 P.2d 648 (1994); *State v. Condon,* 72 Wn. App. 638, 644, 865 P.2d 521 (1993); *Wayne R. LaFave, Search and Seizure sec.* 3.7(d), at 381–85 (3d ed.1996)). The *Thein* court concluded, "We do not find it unreasonable to infer these items were in the possession of the defendant at his home. These were personal items of continuing utility and were not inherently incriminating. Under specific circumstances it may be reasonable to infer such items will likely be kept where the person lives." *Thein*, 138 Wn.2d at 149 n. 4. Here, unlike in the *Herzog* case referred to in *Thein's* footnote 4, Long was never identified by Mr. Zink or even police as the burglar at Zink's

property. Further, the alleged fruits of burglary are not "personal items of continuing utility". Under the standard in *Thein* and *Herzog,* it is unreasonable to infer these items were in the possession of Long at his home.

Following *Thein*, this Court found probable cause lacking to search a defendant's home. In *State v. McReynolds*, the only nexus with the residence was that an officer stopped one of the defendants for identification purposes and obtained his address. 104 Wn. App. at 565. But no facts established an inference that McReynolds' home would contain evidence of a burglary. *Id.* at 560.

In evaluating whether probable cause existed to search the home, the *McReynolds* court considered a related portion of the LaFave treatise that had been considered in *Thein* at footnote 4. The comment suggests courts may be more willing to infer that stolen property is at a perpetrator's residence because it is not as inherently incriminating or as readily concealable as drugs, but also notes 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 sec.* 3.7(d), at 381–84 (3d ed.1996); *see* full quotation in Brief of Appellant at 17–18 and Brief of Respondent Dunn at 11. The State contends in the context of a burglary the LaFave comment therefore dispenses with *Thein's* requirement of nexus.[11]

The opinion of the *McReynolds* court does not support the State's argument. On this issue, the court first noted that because police caught the defendants at the scene of the burglary, there was no likelihood the fruits of the burglary would be at the property where all the men lived. The court continued:

> 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 other 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 Road 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.

[11] The State further argues the search warrant was properly issued for Long's property because the items sought, among other things, were large stolen ATVs and therefore "where better to hide stolen vehicles than a garage or storage building on a rural property." Brief of Appellant 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.

McReynolds, 104 Wn. App. at 570 (emphasis original). Thus, while the court considered the LaFave comment, it found the facts did not meet the *Thein* requirement of a nexus between the items to be seized and the residence of the defendants. Similarly the sighting of Long driving a stolen vehicle at an undisclosed location on Hogeye Hollow Road "without more, does not establish an inference that evidence of the earlier burglary or any other crime would be at [Long's] property." *Id.*

The *McReynolds* decision on this issue does not support the State's position that the LaFave comment dispenses with *Thein's* requirement of nexus in a search warrant affidavit in a theft or burglary case. *See also State v. Stone,* 56 Wn. App. 153, 158–59, 782 P.2d 1093 (1989) (search warrant provided probable cause to search suspect's vehicle and residence for stolen jewelry and cash where police observed car at scene of burglary and at suspect's residence, suspect had employed same method as previous burglaries, police observed suspect leave his residence and an officer observed jewelry in vehicle).

The facts contained in the "four corners" of the search warrant affidavit do not explain why Undersheriff Brown believed the stolen items would be found at Long's home. The affidavit runs afoul of *Thein* because it does not allege a factual basis to support any reasonable inference of

criminal activity taking place at Long's residence. 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 respondents' motions to suppress.

E. CONCLUSION

For the stated reasons here and in Brief of Respondent Dunn, Long requests this Court to affirm the trial court's order of suppression and dismissal.

Respectfully submitted on June 28, 2014.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com