

No. 47902-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Steven Hicks,

Appellant.

Pierce County Superior Court Cause No. 15-1-01914-9

The Honorable Judge Jack Nevin

Appellant's Reply Brief

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ARGUMENT

I. THE SEARCH WARRANT AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE TO SEARCH THE CAR.

Mr. Hicks fled a traffic stop because he had an arrest warrant. CP 24. He abandoned his car and jumped in a lake to evade police. CP 22-24. When officers came upon the abandoned car, they saw a coke can with a false top, open on the floor board. CP 23-24. A red nylon lunch bag had been on the seat when they'd first stopped Mr. Hicks; it was no longer there when they arrived at the car. CP 22-23.

They saw no controlled substances. Nor did they see any drug paraphernalia. CP 22-24.

These facts do not amount to probable cause to search the vehicle, even when combined with Mr. Hicks status "on DOC supervision for a narcotics related offense." CP 22.

Probable cause requires a nexus between criminal activity, the item to be seized, and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Generalizations about what criminals generally do cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Id.*, at 147-148. The warrant here was not based on probable cause because the affidavit did not establish a nexus between the property searched and any evidence of criminal activity.

The officer's claim that coke can safes are "commonly used to conceal illegal contraband" is nothing more than generalized speculation of the type criticized by the *Thein* court. *Thein*, 138 Wn.2d at 147-48; *see also State v. Olson*, 73 Wn. App. 348, 357, 869 P.2d 110 (1994).

The affidavit does not establish probable cause. The affiant failed to show a nexus between evidence of criminal activity and the car. Thus the trial court should have ordered the evidence suppressed. *Thein*, 138 Wn.2d at 147-48.

II. THE COURT OF APPEALS SHOULD EITHER DECLINE TO CONSIDER RESPONDENT'S NEW ABANDONMENT THEORY OR SHOULD REMAND THE CASE FOR AN EVIDENTIARY HEARING.

For the first time on appeal, Respondent suggests that the search was justified because Mr. Hicks abandoned his property. Brief of Respondent, pp. 10-11. But Respondent did not make this argument to the trial court. CP 12-32. The court declined to hold an evidentiary hearing, and no facts were developed relating to this abandonment theory. CP 11; RP (7/14/15) 3-12; RP (8/5/15) 13-39.

The Court of Appeals may not affirm on new grounds unless "the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a). Such is not the case here.

The trial court did not find facts relating to abandonment. Furthermore, Mr. Hicks never denied ownership of the vehicle, and had

reasserted his privacy interest in it before the police searched. *See* CP 23 (“Hicks refused to give us consent to search his vehicle.”) At the time of the search, neither the vehicle nor its contents qualified as abandoned. *Cf. State v. Boland*, 115 Wn.2d 571, 578-583 800 P.2d 1112 (1990).

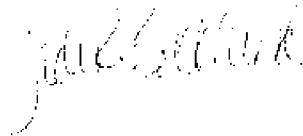
The Court of Appeals should not consider the state’s new theory. RAP 2.5(a). In the alternative, the court must remand the case for an evidentiary hearing.

CONCLUSION

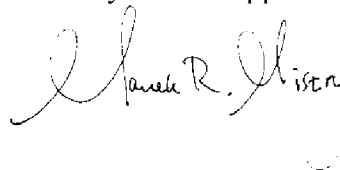
For the foregoing reasons, the evidence must be suppressed. In the alternative, the case must be remanded to the trial court for an evidentiary hearing on the state’s new theory.

Respectfully submitted on May 18, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Steven Hicks
c/o Pierce County Jail
910 Tacoma Ave S
Tacoma, WA 98402

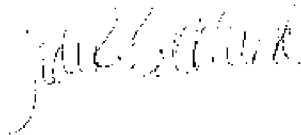
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on May 18, 2016.



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May 18, 2016 - 8:43 AM

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