93725-7

Supreme Court No. (to be set)
Court of Appeals No. 47902-8-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Steven Hicks
Appellant/Petitioner

Pierce County Superior Court Cause No. 15-1-01914-9
The Honorable Judge Jack Nevin

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

Petitioner Steven Hicks, the appellant below, asks the court to review the decision of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Steven Hicks seeks review of the Court of Appeals unpublished opinion entered on September 27, 2016. A copy of the opinion is attached.

III. ISSUE PRESENTED FOR REVIEW

Did police lack probable cause to search Mr. Hicks's vehicle, because they had no real basis to conclude that anything of evidentiary value would be found within?

IV. STATEMENT OF THE CASE

Steven Hicks was pulled over by police while driving in Pierce County. He was on community custody for a drug offense, and had an active warrant for a violation of supervision. CP 5, 22.

To the officers, Mr. Hicks seemed nervous, and was slow to turn off his vehicle. CP 5, 22. One of the officers saw a red nylon lunch-type bag in the car. CP 5, 22.

Before police were finished with him, Mr. Hicks drove off fast. The officers gave chase. CP 6, 22. They lost sight of the car, but later saw it in some bushes next to Steilacoom Lake. The red bag was no longer visible in the car, and the officers didn't find it in the area. CP 6,

23. They discovered that Mr. Hicks had jumped in the lake, and they ordered him out and arrested him. CP 6, 23.

Mr. Hicks told the officers he tried to get away because he knew he had a warrant. CP 6, 24. He declined to consent to a search of his car. CP 6, 23.

One of the officers saw a Coke can with the top open inside the car. CP 6, 23; RP (7/14/15) 3-12. This officer said that he has previously seen fake Coke cans, which people use to conceal contraband. CP 23.

Based on this information, the officers sought and obtained a search warrant for the car. CP 6, 22-24, 26-27. The found ammonia and methamphetamine, and the state charged Mr. Hicks with Attempting to Elude, Possession of Ammonia with Intent to Manufacture Methamphetamine, and Possession of Methamphetamine with Intent to Distribute. CP 1-2.

Mr. Hicks moved to suppress the evidence, arguing that the affidavit in support of the search warrant did not establish probable cause. CP 4-10.

The first hearing on the suppression motion took place on July 14, 2015. At that hearing, the court heard argument and suppressed the evidence. RP (7/14/15) 10-12. In explaining his ruling, Judge Nevin addressed the Coke can in the car: "Can the top off a Coke can be

something with a secret compartment, yeah. It can also be an empty Coke can. And there's not enough substance in this to draw that distinction." RP (7/14/15) 11.

The state moved to reconsider, and the court held another hearing. CP 28-44; RP (7/14/15) 10-12. The trial judge heard more argument, and concluded that the same facts earlier reviewed should lead to the opposite result. RP (8/5/15) 30-37; CP 45. The evidence was un-suppressed. CP 45.

Mr. Hicks sought and obtained discretionary review. CP 46-47; Ruling Granting Review, filed November 5, 2015. The Court of Appeals affirmed the trial court's decision admitting the evidence. Opinion, pp. 1, 7.

Mr. Hicks seeks review of that decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review and hold that police lacked probable cause to search Mr. Hicks's car for evidence of a crime. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

Under both the fourth amendment and Wash. Const. art. I, §7, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). An affidavit in support of 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." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Conclusory statements of an affiant's belief or inferences drawn from the facts do not support a finding of probable cause. *Lyons*, 174 Wn.2d at 363-65.

Probable cause requires a nexus between criminal activity, the item to be seized, and the place to be searched. *Thein*, 138 Wn.2d at 140. Furthermore, generalizations about what criminals generally do cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Id.*, at 147-148. Thus, for example, "[a]n officer's belief that persons who cultivate marijuana often keep records and materials in safe houses is not...a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation." *State v. Olson*, 73 Wn. App. 348, 357, 869 P.2d 110 (1994).

The affidavit in this case did not establish that evidence of criminal activity would be found in Mr. Hicks's car. Instead, the facts provided to the magistrate showed only that Mr. Hicks had an arrest warrant for escape from community custody, that he was on supervision for a drug-related offense, that he had a red nylon lunch bag on his seat when stopped by police, that he fled the traffic stop because of the arrest warrant, that he abandoned his car and jumped in a lake to evade police, that the red bag

wasn't in the abandoned car, and that an open Coke can rested on the car's floorboards. CP 22-24.

The officers didn't observe any controlled substances, paraphernalia, or other evidence of possession. Furthermore, the criminal activity they had grounds to suspect—escape from community custody, attempting to elude, and reckless driving—did not include offenses that would leave evidence inside the car.[1]

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 Olson*, 73 Wn. App. at 357.

Furthermore, the state may not draw adverse inferences from the exercise of a constitutional right. *In re Cross*, 180 Wn.2d 664, 711, 327 P.3d 660 (2014). Because of this, Mr. Hicks's refusal to consent to a search after receiving *Ferrier*[2] warnings could not contribute to the finding of probable cause. *Id.*

The affidavit does not establish probable cause. The affiant failed to show a nexus between evidence of criminal activity and the car. The trial court's initial decision suppressing the evidence was correct. *Thein*,

[1] The officers did not seek evidence of these offenses when they applied for the warrant. CP 21, 26-27.

[2] *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

138 Wn.2d at 147-48.

The Court of Appeals erroneously concluded that the officers had probable cause. Opinion, pp. 6-7. Although unpublished, this decision has implications for other cases.

Under the approach taken by the Court of Appeals, anyone with a criminal record who flees police can be presumed to be concealing evidence of a new crime if found in possession of a container, especially if the person drops or disposes of something during the pursuit.[3] Thus, for example, a convicted burglar who flees police while holding a lunchbox can be presumed to be in possession of stolen property or illegal burglary tools.[4] A person previously convicted of a domestic violence offense who flees police can be presumed to have something with blood on it (or other evidence of domestic violence) in his backpack. The court's rule applies even when there is a reasonable explanation for the person's flight, such as the existence of an arrest warrant.

The Supreme Court should accept review and reverse the Court of Appeals. This case presents a significant question of constitutional law

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[3] This is an especially curious aspect of the court's decision. Something disposed of might be incriminating evidence of some type. If recovered, police might have probable cause to search it. It is difficult to understand why the absence of something—like the red nylon lunch bag's absence from the car—provides a basis to search the area where the object once was for some other evidence of a crime.

[4] *See* RCW 9A.52.060.

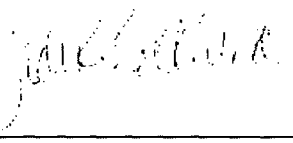
that is of substantial public interest. Review is thus appropriate under RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The Supreme Court should accept review, reverse the Court of Appeals, and order suppression of the evidence seized from Mr. Hicks's car.

Respectfully submitted October 13, 2016.

BACKLUND AND MISTRY



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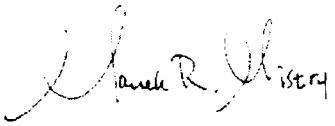


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Steven Hicks, DOC #0
c/o Pierce County Jail
910 Tacoma Ave S
Tacoma, WA 98402

and I sent an electronic copy to

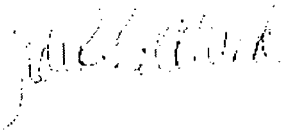
Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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 October 13, 2016.



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APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

September 27, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN LEROY HICKS, Appellant.	No. 47902-8-II UNPUBLISHED OPINION

LEE, J. — Steven Leroy Hicks was charged with unlawful possession of ammonia with intent to manufacture methamphetamine, unlawful possession of a controlled substance with intent to deliver, and attempt to elude police. Hicks unsuccessfully sought to suppress evidence seized from his vehicle, arguing that the search warrant lacked probable cause. Hicks sought discretionary review of the trial court's denial of his motion to suppress evidence, and we granted discretionary review. Hicks also requests that we exercise our discretion to not impose appellate costs if the State prevails because he is indigent.

We hold that Hicks's argument fails because the affidavit supporting the request for search warrant established a nexus between the criminal activity and the area to be searched, and therefore, probable cause supported the search warrant. We also exercise our discretion to not impose appellate costs on Hicks. Accordingly, we affirm.

FACTS

On May 15, 2015, Officers Max Criss and Ryan Moody were on patrol when they noticed a vehicle parked at an intersection. After a female got out of the vehicle, the vehicle drove off. The officers did a routine registration check on the vehicle, which showed that the vehicle belonged to Hicks. Hicks had a felony warrant for his arrest from the Department of Corrections (DOC) for escaping supervision on a narcotics related offense.

The officers confirmed that Hicks was the driver of the vehicle and initiated a traffic stop. Hicks pulled the vehicle over. As the officers approached the vehicle, Officer Moody observed a red nylon bag on the front passenger seat. Hicks appeared nervous and kept his hand on the gear shifter. Officer Criss asked Hicks twice to turn his vehicle off, but Hicks did not comply. Hicks suddenly drove away from the officers, driving approximately 70 miles per hour through a residential neighborhood.

The officers pursued Hicks, but temporarily lost sight of his vehicle. When the officers caught up with Hicks's vehicle a few minutes later, they found it unoccupied in some bushes near Steilacoom Lake. The officers searched the area and eventually found Hicks in the lake clinging to a dock. Officer Moody ordered Hicks to exit the lake numerous times. Hicks initially refused to comply, but he eventually got out of the lake and was taken into custody.

While in custody, Officer Criss asked Hicks why he fled, and Hicks responded that he fled because he knew he had an outstanding warrant. From outside the vehicle, Officer Criss saw a Coke can on the floor of the driver's seat. The Coke can had a false top that was open. Officer Moody knew from his police experience that soda cans with false tops are frequently used to conceal illegal contraband such as narcotics. Officer Moody noticed that the red nylon bag that was on the passenger seat was missing. The officers checked the area, but they could not locate it.

Officer Criss asked Hicks for consent to search the vehicle, but Hicks refused. The officers then transported Hicks to Pierce County Jail, and another officer arrived on scene to help impound Hicks's vehicle.

Officer Moody applied for a warrant to search Hicks's car for evidence of controlled substances and narcotics paraphernalia. The affidavit of probable cause described the above facts. The affidavit stated that based on "Hicks['s] obvious narcotics history and his attempt to avoid police capture," the officers suspected there was illegal contraband in the vehicle. Clerk's Papers (CP) at 23. The affidavit also contained a summary of Officer Moody's police experience as support for his belief that Hicks's car contained evidence of narcotics, which included hundreds of arrests for possession of controlled substances, assignments to special operation units that deal with street level drug dealers and users, and a total of nine years working as a police officer. A judge signed the search warrant for Hicks's vehicle.

Police searched Hicks's vehicle pursuant to the search warrant. They discovered 2,000 pseudoephedrine pills, coffee filters, a cold compress, lithium batteries, a container of isopropyl alcohol, and two mason jars in the trunk; the false-top Coke can contained a small baggie with a crystalline substance.

The State charged Hicks with unlawful possession of ammonia with intent to manufacture methamphetamine,[1] unlawful possession of a controlled substance with intent to deliver,[2] and attempt to elude police.[3] Hicks filed a motion to suppress evidence from the vehicle pursuant to CrR 3.6. The trial court determined that probable cause supported the search warrant and denied Hicks's motion to suppress. Hicks sought discretionary review, which we granted. Ruling Granting Review.

ANALYSIS

A. MOTION TO SUPPRESS

Hicks argues that the trial court erred in denying his motion to suppress the evidence found in his car because the search warrant lacked probable cause. Specifically, Hicks argues that the search warrant failed to establish a nexus between the alleged criminal activity and the place to be searched. We disagree.

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[1] RCW 69.50.440(1).

[2] RCW 69.50.401(1)(2)(b).

[3] RCW 46.61.024 (1).

1. Legal Principles

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, probable cause must support a search warrant. *State v. Myers*, 117 Wn.2d 332, 337, 815 P.3d 761 (1991). The trial court's conclusion that there was sufficient probable cause is an issue we review de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). We review the same evidence that was available to the trial court, limited to the four corners of the affidavit supporting probable cause. *Id.*

To establish probable cause, the affidavit supporting the search warrant must set "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." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Thus, a nexus between the criminal activity, the item to be seized, and the place to be searched must exist for there to be probable cause to issue a search warrant. *Neth*, 165 Wn.2d at 183. The affidavit must establish the probability of criminal activity, but it need not make a prima facie showing of criminal activity. *State v. Emery*, 161 Wn. App. 172, 202, 253 P.3d 413 (2011), *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012). Generalized statements in an affidavit, when standing alone, do not establish sufficient probable cause. *Thein*, 138 Wn.2d at 148-49.

2. Nexus between Criminal Activity and the Vehicle

Hicks argues that the affidavit supporting the search warrant failed to establish a nexus between the property searched and the alleged criminal activity. Because the facts and circumstances presented in the affidavit for search warrant established a reasonable inference that

Hicks was probably involved in the criminal activity alleged and that evidence of that alleged criminal activity could be found inside Hicks's vehicle, we hold that Hicks's argument fails.

Hicks contends that it was not reasonable to rely on his prior arrests and convictions to conclude that he was presently engaged in a crime. Hicks's DOC warrant was for escaping community custody, not for the underlying narcotics related offense that gave rise to community custody. A defendant's prior criminal history, by itself, does not create a reasonable inference to support a search. *State v. Maddox*, 152 Wn.2d 499, 512, 98 P.3d 1199 (2004); *State v. Hobart*, 94 Wn.2d 437, 446-47, 617 P.2d 429 (1980). However, a similar narcotics related history of offenses may be considered in determining probable cause when other supporting evidence is present. *See Neth*, 165 Wn.2d at 185-86 (concluding that a history of similar crimes cannot establish probable cause without other supporting evidence). Here, Hicks's prior arrests and convictions were not the sole factor used to support the conclusion that Hicks was presently engaged in a crime.

The affidavit stated that the officers pulled Hicks over because he had a felony warrant for escape from community custody on a narcotics related offense. Hicks appeared nervous during the traffic stop and refused to comply with Officer Criss's orders to turn off his vehicle. Hicks fled from police, abandoned his vehicle in some bushes, and jumped into a lake. The officers saw a Coke can with its fake top open inside the vehicle Hicks fled from and the red nylon bag that had been in the vehicle during the traffic stop was gone. Taking the facts presented in the affidavit as

a whole, along with Officer Moody's experience in investigating controlled substance crimes, a reasonable inference can be made that evidence of unlawful possession of a controlled substance would likely be found inside the vehicle.

Reviewing the facts in the affidavit de novo, we hold that the trial court did not err in finding sufficient probable cause to issue a search warrant for Hicks's vehicle. The facts in the affidavit, when taken as a whole, established a nexus between the alleged criminal activity, the item to be seized, and place to be searched.

B. APPELLATE COSTS

Hicks requests that if the State prevails, then this court should decline to impose appellate costs against him because he claims he is indigent. We exercise our discretion to decline to impose appellate costs.

RCW 10.73.160(1) vests the appellate court with discretion to award appellate costs. Under RAP 14.2, that discretion may be exercised in a decision terminating review. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *Sinclair*, 192 Wn. App. at 389.

The trial court found that Hicks was indigent. We presume a party remains indigent "throughout the review" unless the trial court finds otherwise. RAP 15.2(f). Thus, we exercise our discretion and hold that an award of appellate costs to the State is not appropriate.

We affirm.

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

Lee, J.

We concur:

Johanson, J.

Bjorgen, C.J.

BACKLUND & MISTRY

October 13, 2016 - 3:39 PM

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Court of Appeals Case Number: 47902-8

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