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NO. 68603-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TJUAN BLYE,

Appellant.

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

The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not suppressing evidence obtained during a residential search where there was insufficient proof of a nexus between the suspected criminal activity and the place searched.

2. There was insufficient evidence to sustain appellant's conviction for possession of a stolen firearm.

Issues Pertaining to Assignments of Error

1. Officers suspected appellant was dealing drugs. Through a several-month investigation, officers were able to establish a nexus between appellant's suspected drug-dealing and his vehicle. Officers could not locate appellant's primary residence; however, they suspected he was often staying at his girlfriend's house. This suspicion was based on the fact that appellant's vehicle had been seen there on several occasions. No one ever reported appellant had drugs at that residence and police never observed any. After police arranged a controlled drug transaction, they observed appellant leave the residence, get into his vehicle, and drive to the buy location. Based on these facts, officers obtained a search warrant for both appellant's vehicle and his girlfriend's residence. No drugs were discovered, but officers found

a gun along with paperwork belonging to appellant inside the house. Based on this, appellant was charged with unlawful possession of a firearm and possession of a stolen firearm. Should the trial court have suppressed the gun on the ground police failed to establish a sufficient nexus between the item to be seized (evidence of drug dealing) and the place to be searched (girlfriend's apartment)?

2. Appellant was convicted of possession of a stolen gun. To sustain the conviction, the State needed to prove appellant knew the gun was stolen. At trial, no evidence was presented regarding the manner in which appellant obtained the gun. No evidence was presented suggesting appellant had any idea the gun was stolen. Indeed, the gun had been stolen three years prior to appellant's arrest, and the gun-owner had never met appellant before. Although the serial number on the gun was scratched, it was readable, and there was no evidence suggesting appellant, or anyone else, would have taken this as a sign the gun was stolen. Was the evidence insufficient to establish beyond a reasonable doubt appellant knew the gun was stolen?

B. STATEMENT OF THE CASE

1. Procedural History

On June 9, 2011, the Snohomish County prosecutor charged appellant Tjuan Blye with one count of unlawful possession of a firearm in the first degree. CP 103-04. The information was later amended, with the prosecutor adding one count of possession of a stolen firearm. CP 71-72. A jury found Blye guilty, and he was sentenced to serve 157 months. CP 3-13, 52-53. Blye timely appeals. CP 1-2.

2. Substantive Facts

On May 26, 2011, Everett police officer Duane Wantland requested a warrant to search Blye's car and his girlfriend's residence located at 805½ 52nd Place W. (the 805 ½ residence) for evidence of drug possession or drug dealing. CP 92; 2RP 64, 67.¹ The affidavit alleged the following facts:

- On September 29, 2010, Blye was stopped while driving his White 2001 Chevrolet Tahoe (Tahoe). Others were in the car with Blye, including a woman who had a drug-dealing history. Drug paraphernalia and a small amount of cocaine

¹ Transcripts are referred to as follows: 1RP (7-15-11); 2RP (2-27-12); 3RP (2-28-12); 4RP (2-29-12); and 5RP (3-20-12).

was discovered in the Tahoe. The woman was arrested.

- On March 3, 2011, Blye was arrested for possession of a controlled substance with intent to deliver. He had been stopped while driving the Tahoe.
- In April 2011, a confidential source (CS) purchased cocaine from Blye. Blye drove his Tahoe to the transaction.
- On May 4, 2011, Blye was seen driving a Honda rental car while his girlfriend, Gabriel Krug, drove his Tahoe. Krug was stopped for speeding and the Tahoe was impounded.
- On May 10, 2011, Blye drove Krug in his rental car to pick up the Tahoe. Krug and Blye drove the vehicles to Krug's house.
- On May 11, 2011, police surveillance showed the Tahoe was parked outside the 805½ residence.
- On May, 24, 2011, a man fitting Blye's description was seen exiting the 805½ residence.
- Within forty-eight hours of the warrant request, the CS phoned Blye and arranged for a controlled drug transaction to take place. At the time of the call, Blye's Tahoe was parked at the 805½ residence. Officers watched Blye and Krug leave the residence, get into the Tahoe, and drive to

the location where the drug transaction took place.

CP 16-18; 92-99.

After the search warrant was issued on May 26, 2011, police went to the 805½ residence to execute it. 2RP 66. No one was home. 2RP 69. Shortly afterward, Blye drove his Tahoe into the driveway, with Krug in the passenger seat. 2RP 69. Officers detained them while other officers executed searches of the car and residence. 2RP 70. Although police found no evidence of drug possession or dealing, they discovered a gun and paperwork belonging to the defendant in a nightstand inside the residence. CP 101-02; 2RP 73. The gun's serial number was scratched but still readable. 3RP 50, 52. Because of a prior conviction, Blye was not permitted to possess a gun and consequently was arrested. 2RP 90. Police later discovered the gun had been stolen approximately three years prior. 2RP 9; 3RP 91-93.

C. ARGUMENT

- I. THE GUN SHOULD HAVE BEEN SUPPRESSED BECAUSE THE SEARCH WARRANT DID NOT ESTABLISH A NEXUS BETWEEN THE ITEM TO BE SEIZED AND THE PLACE TO BE SEARCHED.

The facts in the search warrant affidavit failed to establish a "nexus" between the 805½ residence and evidence relating to

suspected narcotics activity. Hence, the warrant was issued upon an insufficient showing of probable cause in regard to the 805½ residence, and the trial court erred when it did not suppress the gun found there.

It is well-established that the warrant clauses of the Fourth Amendment to the United States Constitution and article I, section 7 of Washington's constitution require that a search warrant issue only upon a determination of probable cause. State v. Fry, 168 Wn.2d 1, 5-6, 228 P.3d 1 (2010) (citing State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)). Probable cause is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability the defendant is involved in criminal activity and that evidence of the criminal activity will 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)). Thus, "probable cause requires a nexus between: (1) criminal activity and the item to be seized, and (2) 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) (citing Wayne R. LaFave, Search and Seizure § 3.7(d), at 372 (3d ed.1996) (emphasis

added)).² It is this second nexus, between the item and the place to be searched, which is at issue here.

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. 132, 140, 868 P.2d 873 (1994). Probable cause to search a person's home is also not established just because probable cause exists to search that person's vehicle. Goble, 88 Wn. App. at 512. Nor is probable cause to search a residence established where officers attest only to generalized stereotypes regarding drug dealers and other innocuous facts. Thein, 138 Wn.2d at 148-50. Yet, that is the gist of what was alleged here.

Blye correctly conceded that police had established sufficient probable cause to merit the search of his Tahoe. 1RP 3. However, the warrant affidavit did not contain the facts necessary to show a nexus between the suspected criminal activity and the 805½ residence.

First, there was no evidence that anyone ever suggested to police that Blye was dealing drugs from the 805½ residence. And

² A trial court's legal conclusion of whether evidence meets the probable cause standard is reviewed de novo. In re Det. of Petersen, 145 Wn.2d 789, 800, 42 P.3d 952 (2002).

police made no independent observations indicating the physical presence of drugs in the residence. C.f., State v. Olson, 73 Wn. App. 348, 350, 869 P.2d 110 (1994) (an anonymous caller told officers drugs were in the residence and officers smelled marijuana at the residence).

Second, the affiant presented no facts establishing the 805 ½ residence was Blye's sole or primary residence. Although the affiant suggested that drug dealers commonly hide drugs where they reside, this was nothing more than a "generalized statement regarding the common habits of drug dealers." Thein, 138 Wn.2d at 149.

Third, although officers had seen Blye's Tahoe at the 805½ residence several times, this indicated only that Blye may have been visiting or perhaps staying there some of the time. Without further evidence indicating Blye was dealing drugs from the residence, or using it as a safe house, Blye's presence at the residence was innocuous. See, Olson, 73 Wn. App. at 357 (finding innocuous the fact that defendant drove his car from a house containing a marijuana grow operation to his own residence and concluding there was insufficient probable cause to search the residence).

Finally, on only one occasion did officers see Blye leave the 805½ residence and proceed to a drug transaction. And, police never saw him return to that house right afterward. More importantly, on this occasion, officers observed Blye leave the residence and get into his Tahoe, which he drove to the drug transaction. Consequently, based on this single observation, police could not establish with sufficient probability that Blye “stored drugs at his house, rather than in some other place (for example, in his car...)” Goble, 88 Wn. App. at 512.³

In sum, officers only established probable cause that Blye had committed a crime on the street through the use of his Tahoe. This did not give rise to probable cause to search the 805½ residence. Consequently, the trial court erred when it denied Blye’s motion to suppress the gun found at that residence. This Court should, therefore, reverse the trial court’s denial of Blye’s motion to suppress and reverse his convictions. See, e.g., State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997) (once evidence

³ The fact that officers did not see Blye go directly from the house to the buy and then return directly to the house afterward distinguishes this case from 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).

obtained through illegal search was properly excluded, there was no evidence to support the charge).

II. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT BLYE POSSESSED A GUN HE KNEW TO BE STOLEN.

Due process requires the state to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. In order to convict a defendant of possession of a stolen firearm under RCW 9A.56.310, the State must prove beyond a reasonable doubt that the defendant knew the firearm in his possession was stolen. State v. Anderson, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000). The State failed to do so in this case.

A person is guilty of possessing a stolen firearm if he possesses, carries, delivers, sells, or is in control of a stolen firearm. RCW 9A.56.310. The definition of "possessing stolen property" under RCW 9A.56.140 applies to the crime of possessing a stolen firearm. RCW 9A.56.310 (4). Under RCW 9A.56.140(1), "[p]ossessing stolen property" means "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has

been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.”

“Bare possession of stolen property is insufficient to justify a conviction.” State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284 (2010) (citation omitted). In fact, mere proof of possession of stolen property does not even raise a presumption of law which a defendant is required to rebut. State v. Portee, 25 Wn.2d 246, 252, 170 P.2d 326 (1946) (citation omitted). Thus, it is the State’s burden to prove not only possession but also knowledge by offering proof of inculpatory circumstances from which the jury might conclude the defendant possessed the goods knowing them to be stolen. Id.; Anderson, 141 Wn.2d at 366.

Here, the State proved nothing more than Blye’s bare possession of a stolen gun. No evidence was presented at trial regarding the manner in which Blye obtained the gun at issue. The State failed to present facts demonstrating Blye knew anything about the gun’s stolen status. In fact, the gun owner testified he had never met Blye. 3RP 93. In sum, the State failed to offer any evidence from which the jury could infer Blye knew the gun was stolen.

The State's failure to present sufficient evidence to support this element is underscored by its attempt during closing argument to gloss over the difference between: (1) knowingly possessing a stolen gun; and (2) possessing with knowledge the gun was stolen.

When discussing the to-convict instruction, the prosecutor stated:

Instruction Number 10, again, possession of stolen firearm must prove beyond reasonable doubt That the defendant acted with knowledge that the firearm had been stolen.... So the question is, did he control the gun with knowledge? And, yes. Given all the facts of this case, given the circumstances of this case, it is unreasonable to doubt that he didn't know the gun was in that drawer. He did know it.

4RP 30-31.

This is clearly a misleading statement of the law. The State needed to prove not just that Blye knew the gun was in the drawer, but also that Blye knew the gun was stolen. In the end, the State failed to offer evidence to support this element and then glossed over it when addressing the to-convict instruction. When the gloss is removed, however, the record clearly shows the State failed to produce sufficient evidence that Blye knew the gun was stolen.

In response, the State may argue possession of "recently" stolen property coupled with "slight" corroborative evidence is sufficient proof of knowledge that the property was stolen. While

this would be a correct statement of the law,⁴ it does not apply here. First, the gun at issue here was stolen three years prior. 3RP 91. Thus, its theft was not recent. Second, there was not corroborative evidence supporting a finding of guilt.⁵ Blye never gave a false or improbable explanation for how he obtained the gun. There was no false paperwork or forged bill of sale. No one ever accused Blye of stealing the gun before the legal charges were made, so there was no failure to explain. And there was no evidence suggesting Blye possessed other stolen goods along with the gun.

The State may also argue, as it did in its rebuttal argument,⁶ that the fact the gun's serial number was scratched proved beyond a reasonable doubt Blye knew the gun was stolen. This argument

⁴ State v. Couet, 71 Wn.2d 773, 776, 430 P.2d 974 (1967).

⁵ The necessary corroborative evidence has been described as follows:

When the fact of possession of recently stolen property is supplemented by the giving of a false or improbable explanation of it, or a failure to explain when a larceny is charged, or the possession of a forged bill of sale, or the giving of a fictitious name, a case is made for the jury.

Portee, 25 Wn.2d at 252 (citing 4 Nichols on Applied Evidence 3664, § 29).

⁶ 4RP 46-47.

is not persuasive. Whether a person might reasonably infer that a firearm with an *altered* serial number has flowed through a gun-trafficking chain that was designed to subvert the federal licensing laws,⁷ it does not necessarily mean the gun was stolen. There are other viable reasons for why a gun, which is not stolen, might have an altered serial number. See, e.g., Bryan v. United States, 524 U.S. 184, 189, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (involving guns purchased by “straw purchasers” and sold to an unlicensed dealer who altered the serial numbers for the purpose of protecting the “straw purchasers” from criminal charges); U.S. v. Sangalang, ___ F.3d ___, 2012 WL 1574822 (D.Nev.,2012) (involving a person who bought guns legally from a sporting goods store and gave them to another to alter the serial numbers and offer for sale). The evidence here is even less, however, as the serial number was merely *scratched*, not altered. Hence, proof of Blye’s bare possession of a gun with a scratched serial number was not sufficient proof that he knew the gun was stolen.

⁷ City of New York v. A-1 Jewelry & Pawn, Inc., 247 F.R.D. 296, 314 (E.D.N.Y., 2007) (citations omitted) (explaining serial number obliteration is clear indicator of firearms trafficking outside the legal licensing process).

Finally, the State may argue, as it did in rebuttal below,⁸ that Blye would had to have obtained a gun he knew to be stolen because he was a convicted felon who could not legally purchase or possess a gun. Again, this is unpersuasive. While Blye's status as a convicted felon might mean Blye could not procure a gun from a dealer through the regular licensing process, it does not necessarily follow that any gun he possessed must be stolen. Proof that someone illegally possesses a gun is simply not proof he knows the gun is stolen. For example, a friend could have provided Blye with a gun that he believed had been legally obtained. While Blye's possession of the gun would be illegal, he would have no reason to believe that the gun he possessed had been stolen.

For the reasons stated above, this Court should find the State failed to produce sufficient evidence to establish Blye knew the gun was stolen and, thus, reverse his conviction for possession of a stolen firearm.

⁸ 4RP 21, 46

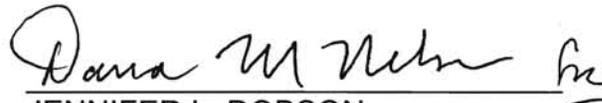
D. CONCLUSION

This Court should reverse appellant's two firearm convictions, because the search warrant affidavit did not allege facts sufficient to establish probable cause to search the residence where the gun was found. Alternatively, Blye's conviction for possession of a stolen firearm should be reversed due to insufficient evidence.

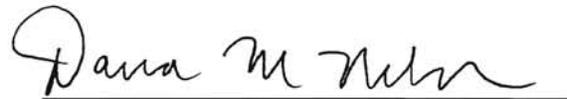
DATED this 15th day of October, 2012.

Respectfully submitted,

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Respondent,)	
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v.)	COA NO. 68603-8-1
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TJUAN BLYE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF OCTOBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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CLERK OF COURT
2012 OCT 15 PM 4:24

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF OCTOBER 2012.

x *Patrick Mayovsky*