

69268-2

69268-2

NO. 69268-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN TERRY,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 MAR 12 PM 4:33

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

The Honorable Anita L. Farris, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertainig to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
TERRY'S WARRANTLESS ARREST WAS UNLAWFUL BECAUSE POLICE LACKED PROBABLE CAUSE.....	6
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Allen</u> 138 Wn. App. 463, 157 P.3d 893 (2007).....	15
<u>State v. Bauer</u> 98 Wn. App. 870, 991 P.2d 668 <u>review denied</u> , 140 Wn.2d 1025 (2000).....	8
<u>State v. Berlin</u> 46 Wn. App. 587, 731 P.2d 548 (1987).....	11
<u>State v. Callahan</u> 77 Wn.2d 27, 459 P.2d 400 (1969).....	13, 15
<u>State v. Chamberlin</u> 161 Wn.2d 30, 162 P.3d 389 (2007).....	7, 8, 10
<u>State v. Chavez</u> 138 Wn. App. 29, 156 P.3d 246 (2007).....	13, 14
<u>State v. Chouinard</u> 169 Wn. App. 895, 282 P.3d 117 (2012) <u>review denied</u> , 176 Wn.2d 1003 (2013).....	12
<u>State v. Cote</u> 123 Wn. App. 546, 96 P.3d 410 (2004).....	12
<u>State v. Emery</u> 161 Wn. App. 172, 253 P.3d 413 (2011) <u>affd</u> , 174 Wn.2d 741 (2012).....	8
<u>State v. Franklin</u> 41 Wn. App. 409, 704 P.2d 666 (1985).....	7
<u>State v. Gaddy</u> 152 Wn.2d 64, 93 P.3d 872 (2004).....	6, 7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Galbert</u> 70 Wn. App. 721, 855 P.2d 310 (1993).....	12, 13
<u>State v. George</u> 146 Wn. App. 906, 193 P.3d 693 (2008).....	12
<u>State v. Huff</u> 64 Wn. App. 641, 826 P.2d 698 <u>review denied</u> , 119 Wn.2d 1007 (1992).....	7
<u>State v. Hystad</u> 36 Wn. App. 42, 671 P.2d 793 (1983).....	12
<u>State v. Ibarra</u> 61 Wn. App. 695, 812 P.2d 114 (1991).....	10
<u>State v. Jackson</u> 102 Wn.2d 432, 688 P.2d 136 (1984).....	8
<u>State v. Mance</u> 82 Wn. App. 539, 918 P.2d 527 (1996).....	7, 15
<u>State v. Nall</u> 117 Wn. App. 647, 72 P.3d 200 (2003).....	7
<u>State v. Potter</u> 156 Wn.2d 835, 132 P.3d 1089 (2006).....	6
<u>State v. Smith</u> 110 Wn.2d 658, 756 P.2d 722 (1988) <u>cert. denied</u> , 488 U.S. 1042 (1989).....	8
<u>State v. Spruell</u> 57 Wn. App. 383, 788 P.2d 21 (1990).....	12, 13
<u>State v. Staley</u> 123 Wn.2d 794, 872 P.2d 502 (1994).....	15

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Aguilar v. Texas

378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)..... 7

Spinelli v. United States

393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)..... 7

A. ASSIGNMENTS OF ERROR

1. The trial court erred by relying on unreliable information supplied by an anonymous informant to deny Ryan C. Terry's motion to suppress evidence discovered as a result of an unlawful warrantless arrest.

2. The trial court erred by denying Terry's motion to suppress evidence.¹

Issues Pertaining to Assignments of Error

1. Did the trial court err by relying on information supplied by an anonymous informant where the State failed to establish the informant's basis of knowledge or reliability?

2. Did the trial court err by denying Terry's motion to suppress evidence derived from a warrantless arrest that was not supported by probable cause?

B. STATEMENT OF THE CASE²

Darcy Mulrooney sold her 1993 Nissan Pathfinder to Lance Schneider in early May, 2010. CP 32, 37. Schneider damaged the

¹ The trial court's findings of fact and conclusions of law are attached as an appendix.

² The parties stipulated the evidence used to determine whether there was probable cause to arrest Terry was that contained in Bellevue police officer Christensen's supplementary report. The trial court attached the report as Appendix A to its findings of fact and conclusions of law. CP 26-43.

vehicle's motor in July and left the disabled Pathfinder parked in front of Mulrooney's residence. CP 37.

Elizabeth Usarzewicz's 1993 Pathfinder was stolen in Bellevue on August 3, 2010. CP 38-39. In early August, Mulrooney observed Schneider and Terry drive up in a pickup truck. They removed a car motor from the pickup and put it in the back of Schneider's Pathfinder. CP 37. Later that night Schneider towed the Pathfinder to a different location. Id.

On August 10, Bellevue police officer Christensen observed Schneider's Pathfinder parked in front of Mulrooney's residence. The vehicle's rear seats were folded down and a motor similar in size to a car motor was in the rear cargo area. CP 32.

The following day, Snohomish County Sheriff's deputy Haley responded to a Monroe residence to investigate an unrelated car prowling complaint. CP 33. Haley recovered Usarzewicz's stolen Pathfinder there, with its motor, front fenders and front bumper missing. CP 33. An anonymous informant told Haley that Terry was at the location just before Haley's arrival and sped off. CP 33. Haley knew Terry previously lived at the residence. He shared his information with Christensen on September 9. CP 33. Christiansen learned that Terry listed the Monroe address as his

residence during previous jail bookings and was renting the property in January 2010. Id.

On August 16, Schneider was arrested while driving his Pathfinder. CP 33-34. Terry accompanied Schneider at the time. After obtaining a search warrant, an officer found items, including a car audio amplifier and a floor jack, with obscured serial numbers. CP 34. Christensen reported that in his experience, suspects "remove or deface serial numbers in an attempt to avoid being caught with stolen property[.]" CP 34.

Roughly one month later, an anonymous "concerned citizen" told officer Christensen that in mid-August, Schneider explained he had recently put a new motor in his Pathfinder. CP 34. This person also said Schneider revealed he traded the Pathfinder for a Saab toward the beginning of September. Id.

Christiansen identified the registered owner of the Pathfinder and went to his residence on September 28, 2010. The vehicle was parked near the driveway and the hood was up. The owner said he traded his Saab to Schneider in exchange for the Pathfinder. He also reported that Schneider told him he replaced the motor for the Pathfinder about a month earlier. CP 34-35.

One of Christensen's colleagues stood next to the Pathfinder's open hood and observed a fresh weld on the motor that obscured the serial number. CP 35. Christensen impounded the Pathfinder and later obtained a search warrant. CP 35-36, 38. He inspected the motor's obscured serial number, and observed all but the letters "VG" were covered by a fresh weld. CP 38. The correct serial number for the stolen 1993 Pathfinder also began with the letters "VG." CP 38. According to Christensen, the engine would have had to have been removed from the vehicle to apply the weld. Id.

Meanwhile, police arrested Schneider on October 3, 2010, for an unrelated offense. Id. Christensen visited Schneider at the jail on October 15 and told him he was under arrest for first degree trafficking in stolen property for installing a stolen motor in the Pathfinder and later selling it. CP 40. Schneider asked who "ratted" on him and claimed he was "not the only one involved in this." Id.

Finally, on October 22, a Snohomish County Sheriff's deputy arrested Terry for possession of stolen property based solely on the information Christensen had gathered during his investigation of Schneider. CP 41. During a search incident to arrest the deputy found suspected methamphetamine on Terry's person. Id.

The State charged Terry with possession of methamphetamine. CP 60-61. Terry filed a motion to suppress the evidence, asserting probable cause did not support his arrest. CP 51-57; 1RP 11-14.³ Defense counsel contended the State failed to establish the anonymous Monroe informant's basis of knowledge or reliability. 1RP 13-14.

The trial court disagreed. CP 26-43. The court relied on the information provided by the informant. CP 27. The court concluded there was "clearly" probable cause to believe that Schneider put a stolen motor into his Pathfinder. CP 28; 2RP 5. The closer question for the court was whether there was probable cause to establish Terry knew the motor was stolen. CP 28; 2RP 6. The court found the totality of the evidence demonstrated Terry knew the motor was stolen. CP 28-29; 2RP 7-8.

Terry waived his right to a jury trial and agreed to a bench trial on agreed documentary evidence consisting of the probable cause certificate and arresting officer's report. CP 44-50; 3RP 6-9. The parties stipulated that the substance found on Terry's person contained methamphetamine. CP 46; 3RP 8-9. The trial court found Terry guilty as charged. CP 47; 3RP 9-10. The court imposed a standard range sentence, based on an

³ In this brief, Terry refers to the verbatim report of proceedings as follows: 1RP – 5/24/12; 2RP – 5/29/12; 3RP 6/26/12; 4RP – 8/23/12.

offender score of four, of six months and one day in the county jail, converted to work release. CP 15-25; 4RP 3-4.

C. ARGUMENT

TERRY'S WARRANTLESS ARREST WAS UNLAWFUL BECAUSE POLICE LACKED PROBABLE CAUSE.

A Snohomish County Sheriff's deputy arrested Terry for possession of stolen property based on a Bellevue Police Department determination it had probable cause to arrest. This determination was erroneous; police lacked probable cause to arrest Terry. The trial court's decision to the contrary constituted an error of law. This Court should reverse the court's denial of Terry's motion to suppress evidence.

A lawful custodial arrest requires the officer to have probable cause to believe that a person has committed a crime. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). Probable cause exists when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

An arrest not supported by probable cause is not made lawful by an officer's subjective belief that the arrestee has committed a crime. State v. Huff, 64 Wn. App. 641, 645, 826 P.2d 698, review denied, 119 Wn.2d

1007 (1992). A bare suspicion of criminal activity falls short of establishing probable cause to arrest. State v. Franklin, 41 Wn. App. 409, 416, 704 P.2d 666 (1985). This Court reviews de novo the legal conclusion whether probable cause exists. State v. Chamberlin, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

An arrest based on information from fellow officers is lawful only if the police agency issuing the information has sufficient evidence to establish probable cause. State v. Gaddy, 152 Wn.2d 64, 71, 93 P.3d 872 (2004). If the issuing agency or officer lacks probable cause, the arresting officer also lacks probable cause. State v. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996). Good faith on the arresting officer's part does not save an arrest unsupported by probable cause. State v. Nall, 117 Wn. App. 647, 651-52, 72 P.3d 200 (2003).

When probable cause is based on an informant's tip, Washington courts apply a two-prong test,⁴ under which a probable cause determination is invalid unless the State establishes both the informant's basis of knowledge and credibility. State v. Jackson, 102 Wn.2d 432, 443,

⁴ This has come to be known as the "Aguilar-Spinelli" test, named after two United States Supreme Court cases, Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

688 P.2d 136 (1984). If either or both prongs are deficient, independent police work confirming the informant's tip may satisfy probable cause to the extent it cures the deficiency. State v. Emery, 161 Wn. App. 172, 202, 253 P.3d 413 (2011), aff'd, 174 Wn.2d 741 (2012).

The knowledge prong is met if the informant has personal knowledge of the claimed facts, such as where he has personally seen the facts. State v. Smith, 110 Wn.2d 658, 663, 756 P.2d 722 (1988), cert. denied, 488 U.S. 1042 (1989); State v. Bauer, 98 Wn. App. 870, 875, 991 P.2d 668, review denied, 140 Wn.2d 1025 (2000). An informant's reliability may be satisfied if his credibility is established, or, if nothing is known about the informant, the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth. State v. Chamberlin, 161 Wn.2d at 41-42.

As applied to Terry's case, the validity of the arrest by the Snohomish County Sheriff's deputy hinges on whether Christensen and his Bellevue Police colleagues shared trustworthy information that would cause a reasonable officer to believe a crime has been committed. They did not.

Usarzewicz's Pathfinder was stolen on August 3. Officer Christensen observed a car engine inside the back cargo area of

Schneider's Pathfinder during a visit to Ms. Mulrooney's residence on the afternoon of August 10. He did not report seeing an obscured serial number on the motor at that time. CP 32.

Mulrooney recalled seeing Terry help Schneider load a vehicle motor into Schneider's Pathfinder in early to mid-August. She said Schneider towed the disabled Pathfinder away later that same evening. Terry was not with Schneider when the vehicle was towed. CP 37.

On August 11, deputy Haley saw Usarzewicz's stolen Pathfinder, minus motor, front fenders and front bumper, at a Monroe address. Haley knew Terry had earlier lived on the property at some undisclosed earlier time. Christensen reported Terry had listed the address as his residence during bookings at the King County Jail at an unspecified time. In January 2010, the main tenant of the property informed a police officer Terry was a renter there. CP 33.

There is no indication Christensen or any other officer independently determined that Terry lived at the Monroe address in August, was routinely seen there, or had been there on the day Haley saw the Pathfinder. The vehicle's presence at a place Terry lived at eight months before added nothing to the probable cause calculus.

In addition, a "person who wished to remain anonymous" told Haley that Terry left the property at a high rate of speed just before Haley's arrival. CP 33. The basis of knowledge of this unknown informant was not established. It was not explained to the trial court whether the informant knew Terry, or if so how he knew him, or even why the informant was at the location.

There is even less information to establish the informant's reliability. The informant's statements were not, for example, against penal interest. The informant's identity was unknown. Nor were the statements recorded. Cf. Chamberlin, 161 Wn.2d at 42 (informant was found to be reliable where he was identified to the court, made a statement against penal interest that was tape recorded, and was willing to publicly stand by his information).

Furthermore, there was no physical description of the informant, nor was there an explanation provided as to why the informant was at the location and why he wished to remain anonymous. See State v. Ibarra, 61 Wn. App. 695, 700, 812 P.2d 114 (1991) ("This kind of information substantially decreases the possibility that the informant is an anonymous troublemaker, is somehow involved in the criminal activity, or is motivated by self interest."). Nor was the court informed whether the

informant had a criminal record. Cf. State v. Berlin, 46 Wn. App. 587, 591, 731 P.2d 548 (1987) (informants were found reliable because they divulged their names and addresses to the police, a detective investigated and found they had no criminal record, and the detective gave the court a legitimate reason why they wished to remain anonymous).

For these reasons the trial court should not have considered the informant's statements placing Terry near the stolen Pathfinder on the day Haley discovered it.

In addition to Mulrooney's observation of Terry helping Schneider with a motor, Christensen reported that on August 16, Schneider was arrested while driving his Pathfinder. Schneider's girlfriend and Terry were also in the vehicle, as were three items, including a car audio amplifier and floor jack, with obscured serial numbers. Schneider was arrested again on August 25 while driving his Pathfinder. Again, Schneider's girlfriend and Terry were passengers. CP 33-34.

Terry's presence in Schneider's vehicle when it contained suspected stolen property the car is of little moment. There is no question the Pathfinder belonged to Schneider, who was in control of the vehicle. A person who has dominion and control over an automobile constructively possesses any contraband found inside the vehicle. State v. George, 146

Wn. App. 906, 920, 193 P.3d 693 (2008). Schneider therefore had constructive possession of the suspected stolen property.

Constructive possession may be joint. State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). But there is no information as to where the items were found in the Pathfinder. And even if they were near Terry, mere proximity to the contraband is not enough to support a finding of constructive possession. State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990). Nor is knowledge of the presence of the contraband sufficient to show dominion and control. And knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) review denied, 176 Wn.2d 1003 (2013); State v. Hystad, 36 Wn. App. 42, 49, 671 P.2d 793 (1983). Therefore, even if Terry could see the altered serial numbers on the items, that fact does not establish constructive possession.

Although these cases involved challenges to the sufficiency of the evidence to support a conviction, cases in which the defendant contested probable cause are consistent. In State v. Galbert, 70 Wn. App. 721, 855 P.2d 310 (1993), police executed a search warrant authorizing entry into a house to search for controlled substances and related items. Inside the

living room, officers found Ervin Galbert, whom they cuffed and placed down on the ground. Less than two feet from Galbert, police found marijuana and a pipe. Officers then searched Galbert and found cocaine in his pocket. He was charged with possessing the cocaine. Galbert, 70 Wn. App. at 722-23. A motion to suppress was denied. Galbert, 70 Wn. App. at 724.

On appeal, the State argued the search of Galbert's pockets was a lawful search incident to arrest because officers had probable cause to arrest him for possession of marijuana given his presence in the house and proximity to the drug. Galbert, 70 Wn. App. at 726. Citing, among other cases, State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969), and Spruell, this Court disagreed, finding that Galbert's temporary presence in the home and very close proximity to the drugs were insufficient to establish probable cause. Galbert, 70 Wn. App. at 727-728. Galbert's conviction was reversed and dismissed. Galbert, 70 Wn. App. at 729.

In State v. Chavez, 138 Wn. App. 29, 156 P.3d 246 (2007), a police officer interrupted what appeared to be a drug transaction in progress in a nightclub restroom. The officer saw three men, including Chavez, standing together in an open stall. One man left immediately upon seeing the officer. Another man was holding a partially folded dollar

bill that appeared to have cocaine on it. The man was handing it to Chavez, who was refusing to take it in the officer's presence. Chavez, 138 Wn. App. at 31-32. Chavez was arrested for constructive possession of a controlled substance. In a search incident to arrest, officers found more cocaine in his wallet. Chavez, 138 Wn. App. at 32.

On appeal, Division Three reversed. The Court found that despite Chavez' "placement and posture within the stall," there had not been probable cause to arrest him. Chavez, 138 Wn. App. at 34-36. Recognizing that proximity alone was insufficient for constructive possession, the Court noted that police had no knowledge of what occurred before the officer arrived and never saw Chavez holding or using the cocaine. And although the circumstances gave the officer involved a "strong suspicion" Chavez was involved with the cocaine, the evidence was insufficient for probable cause. Chavez, 138 Wn. App. at 34-36.

The remainder of the information before the trial court in Terry's case explains how Schneider traded the Pathfinder for another car and how Christensen ultimately found the Pathfinder with the stolen motor installed. CP 34-38. While this is strong circumstantial evidence establishing Schneider possessed and trafficked in stolen property, it does not implicate Terry.

Therefore, the State is left with Mulrooney's observation of Terry helping Schneider move a car motor from an unknown blue pickup truck into Schneider's Pathfinder. This does not establish probable cause to believe Terry knowingly possessed stolen property. "To establish possession the prosecution must prove more than a passing control; it must prove actual control." State v. Staley, 123 Wn.2d 794, 801, 872 P.2d 502 (1994) (citing Callahan, 77 Wn.2d at 29). Mulrooney's statement establishes nothing more than passing control.

Finally, it is undisputed that Schneider actually owned the stolen motor. As noted in Callahan, "[c]onsideration must be given to the ownership of the drugs as ownership can carry with it the right of dominion and control." 77 Wn.2d at 31.

To summarize, the State bears the burden of establishing probable cause for Terry's warrantless arrest. Mance, 82 Wn. App. 539, 544-45, 918 P.2d 527 (1996). The State failed to meet its burden here. The methamphetamine seized as a result of the unlawful arrest must thus be suppressed. See State v. Allen, 138 Wn. App. 463, 472, 157 P.3d 893 (2007) ("Police may conduct a warrantless search incident to a valid felony arrest, but this exception to the warrant requirement applies only if the

arrest is valid; otherwise, the evidence obtained must be suppressed as fruits of the poisonous tree.").

Without the methamphetamine, the State's case fails. This Court should therefore reverse Terry's conviction and remand for dismissal with prejudice.

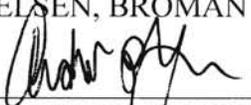
D. CONCLUSION

For the above reasons, this Court should reverse the trial court's denial of Terry's motion to suppress evidence and remand the case for dismissal with prejudice.

DATED this 12 day of March, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER
WSBA No. 18631
Office ID No. 91051
Attorneys for Appellant

APPENDIX

2012 JUN 26 PM 2:45

CRIMINAL JUSTICE
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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

RYAN C. TERRY

Defendant.

No. 12-1-00055-1

CERTIFICATE PURSUANT TO
CrR 3.6 OF THE CRIMINAL RULES
FOR SUPPRESSION HEARING

On 5/24/12, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. UNDISPUTED FINDINGS OF FACT

AT have the court consider as facts all those facts in the attached police reports *
At the time of the defendant's arrest, Detective Christiansen knew the following information. Darcy Mulrooney sold her 1993 Nissan Pathfinder to Lance Schneider in May 2010. Sometime in July 2010 Schneider damaged the Pathfinder's engine leaving it inoperable; Schneider then left the vehicle on Mulrooney's property, which is located on West Lake Sammamish Parkway. Mulrooney observed Schneider working on the * incorporated herein by reference. Those reports contain additional details that the court also considered as undisputed facts.

30

pathfinder in July. Elizabeth Usarzewicz's 1993 Nissan Pathfinder was stolen on August 3, 2010. Sometime in early August, Mulrooney saw the defendant and Schneider unload an automobile motor from a blue truck into Schneider's 1993 Nissan Pathfinder. On August 10, 2010, Detective Christiansen observed a vehicle motor in the back of Schneider's Pathfinder. On August 11, 2010, Snohomish County Sheriff's Deputy Haley responded to 19201 299th Ave SE in Monroe after a report of a vehicle prowl. An anonymous citizen told Deputy Haley that the defendant had been at that location just prior to Deputy Haley's arrival and had left at a high rate of speed. This residence in Monroe has been listed as the defendant's residential address during prior bookings at the King County jail and the defendant was known to be a renter at that property as recently as January 2010; in January 2010, police were told that the defendant was renting the residence and they observed the defendant there with Schneider and Schneider's vehicle on the property. The defendant was a passenger in Lance Schneider's vehicle when Schneider was arrested on August 16, 2010 and at the time of Schneider's arrest several items were found in the vehicle with their serial numbers obscured. Among these items were a reciprocating saw, a car audio amplifier, and a heavy duty floor jack; two of these items are involved with vehicles. After a Court approved a search warrant for the engine in Schneider's Pathfinder, Detective Christiansen observed a fresh weld over the serial number which obscured all but the first two letters, "VG" which match the first two letters of Usarzewicz's stolen motor. The weld could only be put on the motor while the motor was outside the vehicle. Schneider told multiple people that he installed a new motor in his Pathfinder sometime in August.

A concerned citizen told police that the defendant traded his Pathfinder for a Saab in early September. Consequently, police went to the Registered Owner of the Saab's address and saw Schneider's vehicle. Schneider told the Saab owner that he installed a new motor approximately four to five weeks prior in Maple Valley. Schneider was arrested after a high speed chase and on October 15, 2010, Schneider was told he was under arrest for Trafficking in Stolen Property for the motor in his old Pathfinder that he traded for the Saab. At that time, Schneider confessed "who ratted me out?" which was confirmation of the motor being stolen, and said that he was not the only one involved.

II. DISPUTED FINDINGS OF FACT

On August 11, 2010, when Snohomish County Sheriff's Deputy Haley responded to 19201 299th Ave SE in Monroe after a report of a vehicle prowl it was on this date that he discovered Usarzewicz's stolen Pathfinder, which had its engine, front fender and front bumper missing. Detective Christiansen did not learn of this information until almost a month later on September 8, 2010.

III. CONCLUSIONS OF LAW

The Court has jurisdiction to hear this matter. The Court finds that there was clearly probable cause to believe that Schneider put a stolen motor into his pathfinder. The issue then becomes whether or not there is enough to show that the defendant here had knowledge of the stolen motor. There were a series of circumstances that if put together are sufficient to support probable cause in this case. There was a known citizen (Mulrooney) who saw the defendant possess the stolen motor and move it into a thief's car. The address in Monroe where the stolen vehicle was discovered was the

defendant's address and the Court puts significance on this fact because the stolen car which was stripped was found at this address. The timing of everything is consistent with someone stealing a motor and then moving it into Schneider's Pathfinder. The defendant helped move it. It was an operable motor and one might question moving an operable motor into another car. These are all circumstantial things that the trier of fact can draw conclusions from. Combined with all of that is Schneider's statement that someone else was involved with his crime. As to the defendant's knowledge that it was a stolen motor, the Court also takes into consideration the fact that the defendant was found in Schneider's Pathfinder with other items with serial numbers on them that were obscured and this occurred just days after the motor was moved. Taking everything together, the Court finds that there was probable cause for the defendant's arrest for the crime of Possession of Stolen Property.

Given the aforementioned reasoning, the defendant's motion to suppress is therefore denied.

DONE IN OPEN COURT this 26 day of June, 2012



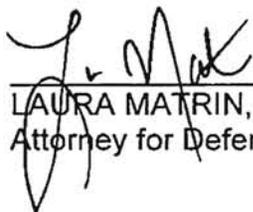
JUDGE

Presented by:



TONG. MONTGOMERY, #36927
Deputy Prosecuting Attorney

Copy received this 26 day of
June 2012



LAURA MATRIN, #32897
Attorney for Defendant



RYAN TERRY
Defendant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69268-2-1
)	
RYAN C. TERRY,)	
)	
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 12TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] RYAN TERRY
4825 S. CAMANO DRIVE
CAMANO ISLAND, WA 98282

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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF MARCH 2013.

X *Patrick Mayovsky*