

74633-2

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NO. 74633-2-I

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

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STATE OF WASHINGTON,

Appellant,

v.

JEFFREY I. SCHENCK,

Respondent

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BRIEF OF RESPONDENT

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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## **1. ISSUE**

The police served a search warrant on the Defendant's residence, the warrant authorized the "seizure" of locked containers, but not the search of those containers, and the police broke open a locked container and located firearms located in Defendant's bedroom. The Trial Court was correct in holding that the police could seize and remove the locked container from the property and apply for a search warrant to open the locked container either telephonically or in person, but that the container could not be opened without a valid warrant authorizing the opening of that locked container.

## **2. ASSIGNMENTS OF ERROR**

The Trial Court issued a correct ruling supported by the facts of this case and the applicable case law. There was no error in suppressing the illegally obtained items and statements and dismissing the criminal information.

## **3. STATEMENT OF THE CASE**

The Defendant adopts the States recitation of facts with the following additions.

On January 10, 2015, Officers of the Lynnwood Police Department obtained a search warrant for a gray single story residence at 5819 96 Drive Southeast in Snohomish, Washington in Snohomish County.

CP 37-44.

The purpose of the warrant was to investigate alleged criminal activity by a Jeremy Schenk, a resident of the house, by searching for evidence of Controlled Substance Violations, Mail Theft, Identity Theft 2, Forgery, and Possession of Stolen Property. Only Jeremy Schenk is named as a suspect and no other resident of the house is mentioned in the Affidavit for Search Warrant. CP 37-44.

The Warrant signed by Judge Anthony Howard of the District Court, grants the Officers the ability to search the entire residence, and to:

**Seize**, if located, the following property or person(s): Any illegally possessed controlled substances, narcotic paraphernalia, mail, access devices, payment instruments, financial documents, pawn slips, records, papers of ownership, receipts, scales, ledgers, proceeds, **locked containers**, and items used for the sale and transport of illegal drugs. (Emphasis added) CP 44.

The Warrant is specific about one type of item that may be located, and that is any "locked containers." The Warrant in this matter, only

allows that a "locked container" maybe "seized." The Warrant does not authorize the opening of any locked containers nor the search of the interior of a locked container, or the seizure of any item located upon the opening of a locked container. CP 44.

The warrant does not authorize any search for evidence of the crime of "unlawful possession of a firearm" nor does the warrant authorize the seizure of any firearms located in the residence, the Warrant and Affidavit authorize a search of evidence of criminal activity of Jeremy Schenck, not for any other person who might reside in the house. Absent a warrant exception, evidence of other criminal activity, if discovered, would require that a second warrant be sought and issued. CP 37-44.

Prior to the execution of the Search Warrant, the officer knew that at least two persons other than Jeremy Schenk resided in the residence, and they knew that one of them, Defendant Jeffrey Schenck allegedly has a prior felony conviction making him ineligible to possess firearms. RP 4.

On January 10, 2015, while serving the warrant, the Lynnwood Officers seized many documents that bore the name of Jeffrey Schenck including mail, tax records, ownership documents, and other papers. All these documents were purportedly taken from a single room that the officers now claim was Mr. Jeffrey Schenck's room. RP 9-10. The Search

Warrant does not authorize the seizing of these documents, as Mr. Jeffrey Schenck is not named in the affidavit, the items taken are not evidence of any of the crimes listed in the affidavit or search warrant, and they are not "illegally possessed" documents that would be subject to seizure under the warrant. CP 44. The seizure of these documents was broadly afield of the purpose of the warrant issued in this case, and was well beyond the scope of the permissible search and seizure authority granted by the warrant.

In the same room from which Jeffrey Schenk's personal and private documents not listed in the warrant were seized, the Police located a **LOCKED** Metal Container. RP 6. A photograph of the locked container is at CP 45. The warrant that the Officer's had allowed them to "**seize**" any "locked containers", however, the Officers did not seize this locked container. Rather, one of the Officers obtained a pair of bolt cutters from the garage of the residence, cut the padlock from the container to open and search the container. RP 6. The search of the locked container was not authorized by the warrant that the officers had in their possession. In fact, based on what the Officers wrote in their reports, the search of the locked container was not conducted in an effort to locate any of the items listed on the warrant for seizure. The Officers opened that locked container believing that it might contain firearms, as noted by

their reports detailing air guns and other firearms related items being in the proximity of the container. RP 10-11.

Several firearms were taken from the locked container and seized by the Officer, despite the fact that the warrant they were serving does not authorize the seizure of firearms from the residence. RP 6, RP 10.

On January 13, 2015, Defendant Jeffrey Schenck was arrested without a warrant, for the crime of "Unlawful Possession of a Firearm" and transported to jail. After being arrested, Jeffrey Schenck invoked his right to remain silent and requested an Attorney. At least one Officer continued to question Mr. Schenck and attempt to elicit incriminating statements from him in violation of his Constitutional rights. RP 21-26.

#### **4. ARGUMENT**

##### **A. STANDARD OF REVIEW**

This Court reviews de novo a Trial Court's legal conclusions on a motion to suppress. State v. Hinton, 179 Wn. 2d 862, 867, 319 P.3d 9 (2014).

Absent an exception to the warrant requirement, a warrantless search is impermissible under both Article I, Section 7 of the Washington

Constitution and the Fourth Amendment to the United States Constitution.  
*See State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996).

A search pursuant to a warrant exceeds the scope authorized if officers seize property not specifically described in the warrant. *State v. Kelley*, 52 Wn.App. 581, 585, 762 P.2d 20 (1988). In determining the scopes of a search warrant, courts give the words used in the warrant their commonsense meaning. *State v. Cheatam*, 112 Wn.App. 778, 783, 51 P.3d 138 (2002), *aff'd*, 150 Wn.2d 626, 81 P.3d 830 (2003).

**B. THE STATE MISINTERPRETS CONCLUSION OF LAW #1 WHICH MUST BE READ IN THE ENTIRETY WITH THE LETTER OPINION CONCLUSION OF LAW #8 TO SEE THAT THE COURT CORRECTLY APPLIED THE 'COMMUNITY LIVING UNIT RULE' REGARDING THE SEARCH BUT APPLIED THE LIMITS ON THE SEARCH CONTAINED IN THE WARRANT TO DISALLOW THE SEARCH OF THE LOCKED CONTAINER.**

Search warrants must specifically describe the places to be searched and the persona or items to be seized. U.S. Const. amend. IV. "The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization" *State v. Besola*, 184 Wn.2d 605, 610, 359 P.3d 799 (2015) quoting *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

Warrants must be written in a manner that allows "the searcher to reasonably ascertain and identify the things which are authorized to be seized." Besola at 610, quoting United State v. Cook, 657 F.2d 730, 733 (5th Cir. 1981). This "limits the discretion of the executing office to determine what to seize." Besola at 610.

The search warrant at issued in this case authorized the search of the entire residence located at "5819 96 Drive Southeast in Snohomish, WA" CP 44. The State argued and the Trial Court agreed that the "community living unit rule" of State v. Alexander, 41 Wn. App. 152, 704 P.2d 618 (1985) applied allowing the police to search each and every room of the residence.

In following the particularity requirement the search warrant in question specifically described the items to be seized. The warrant authorized the police to:

**Seize**, if located, the following property or person(s):

Any illegally possessed controlled substances, narcotic paraphernalia, mail, access devices, payment instruments, financial documents, pawn slips, records, papers of ownership, receipts, scales, ledgers, proceeds, **locked containers**, and items used for the sale and transport of illegal drugs. Search Warrant attached as Exhibit 2 to Defendant's Motion to Suppress (emphasis added). CP 44.

Clearly the warrant only allowed the seizure, not a search of locked containers.

During the search of the residence the police located a locked container, approximately 4 feet high and 1.5 feet wide, in the closet of a bedroom that the police knew belonged to Defendant. The police, using a pair of bolt cutters obtained from Defendant's garage, cut a key padlock from the container and searched its interior locating several firearms.

RP 6.

The State argues that the authorization to search the residence extended to the interior of the locked container and that they were allowed to breach the lock on the container despite the clear language of the search warrant that stated that the police may only "**seize**" any "**locked containers**".

While the State ignores the limiting language contained in the search warrant, the Trial Court specifically recognized that limitation in the Letter Opinion dated 12/24/15 incorporated into the Court's Findings of Fact and Conclusions of Law stating:

[O]fficers had a responsibility to either obtain a separate telephonic warrant; or, if that was not practical, to **remove** the cabinet from the **property under the authority granted by the initial warrant**. (emphasis added) 1 CP 17

The State in ignoring the plain language of limitation in the search warrant argued in the Trial Court and here that the breach of the locked container was allowed as the container was part of the residence and was authorized by State v. Llamas-Villa, 67 Wn. App. 448, 836 P.2d 239 (1992).

In Llamas-Villa, the police searched a detached storage unit that was assigned to a particular apartment that was covered by the search warrant. The storage unit was labeled with the apartment number and the police believe it was part of the apartment. The Llamas-Villa court considered five factors to allow the search almost all of which are distinguishable in the case now before the Court.

First, the Llamas-Villa court noted that the police believed the storage unit was part of the apartment. This factor is not present here as the police were not only aware the locked container was not a part of the house, but believed it belonged to someone other than the target of their investigation. Further, at the time that the police broke into the container, they did not believe that it contained evidence of the crimes for which the warrant was issued but they believed it might contain evidence of an unrelated crime, allegedly being committed by a third party that was not a part of their investigation. RP 10-11.

Secondly, the Llamas-Villa court found that the storage unit "was functionally equivalent to an attic of basement." Llamas-Villa at 451. In this case the locked container was approximately 4 feet high and 1.5 feet wide and was clearly not a part of the residence, was not a separate storage area in the residence but was a free standing container located inside a closet in a bedroom in the residence. CP 45.

Third, in Llamas-Villa the warrant did not specifically exclude the storage unit. In this case, however, the warrant does specifically exclude the search of locked containers, authorizing the police only to "**seize**" such items. CP 44.

Fourth, Llamas-Villa found the storage unit was part of the apartment due to its "close proximity" to the apartment. In this case the locked container was not close to the residence, nor was it part of the residence, but was wholly contained within the residence. RP 6, RP 10-11.

Fifth, the court in Llamas-Villa, found no indication that the issuing magistrate would not have included the storage unit if he or she had known the floor plan of the apartment. Significantly in this case, there is a clear exclusion of locked containers contained in the search warrant; the warrant authorized the "**seizure**" not the search of "locked containers". CP 44.

In applying the plain language of the search warrant in this case, the locked container in the bedroom closet could only be "seized" by the investigating officers and all five of the factors in Llamas-Villa does not change the analysis of the permissible scope of the search.

The search of the locked container exceeded the scope of the search warrant issued in this case, and all items located in that locked container must be suppressed as they were illegally located without a valid warrant. The plain language of the search warrant leads to the obvious conclusion that a separate search warrant was needed to open the locked container and to conduct a search of its interior.

**B.1. THE SEARCH WARRANT AUTHORIZED SEIZURE BUT DOES NOT ALLOW SEARCH OF LOCKED CONTAINERS.**

The State argued below and is likely to assert here that "seizure" and "search" are synonymous. That the search warrants authorization to "seize" the locked container in common understanding would allow the "search" of the locked container. The Trial Court rejected this argument in finding that the officers needed a separate search warrant to open the locked container if they could remove the locked container from the property pursuant to the authorization contained in the original search warrant. 1 CP 17, RP 41-42.

In support of this contention the State will likely cite State v. Figoroa Matines, 184 Wn.2d 83, 355 P.3d 1111 (2015) where the State Supreme Court found that a search warrant that authorized the seizure of blood from a driver to preserve evidence of driving under the influence implicitly allowed the testing of the seized blood by the Washington State Patrol Crime Laboratory. The facts and conclusions of the Figoroa Matines case demonstrate clearly that it is not applicable to the search of the locked container in the case before this Court.

The Figoroa Matines court held that "the purpose of the warrant was to draw a sample of Matines blood to obtain evidence of DUI". Figoroa Matines at 93. They further held that "the only way for the State to obtain evidence of DUI from the blood sample is to test the blood sample for intoxicants." Figoroa Matines at 93 citing State v. Grenning, 142 Wn. App 518, 532, 174 P.3d 706 (2008). That, "apparent evidence of a crime using a valid search warrant includes a right to rest or examine the seized materials to ascertain their evidentiary value", Grenning at 532 *aff'd*, 169 Wn2d 47, 234 P.3d 169 (2010).

In Figoroa Matines the subject of the investigation was lawfully arrested for driving under the influence and a search warrant obtained to draw blood. The Supreme Court allowed the blood to be tested for evidence of intoxicants to support a charge of DUI.

The facts of this case are vastly different. In the instant case a search warrant was obtained for a residence that was occupied by multiple individuals, each with their own expectations of privacy. The search warrant authorized the search for evidence of property and drug crimes allegedly committed one of the residents, other than the Defendant in this action. The search warrant allowed only the "**seizure**" of locked containers. The State claims that this authorization to "seize" allowed the police to cut the lock from the container, open it and search the contents of the locked container. CP 44.

In this case the locked container was located in a bedroom closet; a bedroom that the investigating officers knew was not occupied by the target of their investigation. The officer, at the time that they broke open the container, did not believe that the locked container belonged to the target of their investigation and that the purpose of opening the locked container was to search for evidence not listed on the search warrant related to an alleged crime not listed on the warrant, allegedly committed by a person who was not suspected of committing any of the crimes on the search warrant or the investigation that allowed entry into the residence. RP 10-11.

In Figoroa Matines, the blood was taken from the target of the investigation, to test for evidence of the crime for which the search warrant was issued.

The Court held that police "must execute a search warrant strictly within the bounds set by warrant." Figoroa Matines at 94, *citing* State v. Kelley, 52 Wn App 581, 585, 762 P2d 20 (1988) and Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

In the case before this Court, the locked container was not "tested" or "examined" but rather the lock was forcibly cut off, the container was opened and the interior was searched. The police knew at the time that the locked container was not related to the target of the investigation, and they opened not to find evidence of the crimes for which the search warrant was issued' but to locate evidence of an unrelated crime allegedly committed by a third person other than the target of the investigation for which the warrant was issued. The Trial Court correctly held that the locked container could not be searched as only a "seizure" was authorized but that the police could have removed the locked container from the property under the issued warrant or applied either telephonically or in person for an additional search warrant to open the locked container. Absent an additional warrant the search of the locked container was done

without the benefit of a valid warrant and any items located within the locked container must be suppressed as they were illegally obtained. RP 42.

**C. Conclusion of Law #2 was not erroneous as the locked container was breached and searched unlawfully.**

The Trial Court correctly found that the search warrant issued in this case only allowed the police to "seize" and not "search" the locked container. Further that the officers exceeded the scope of that authorization when they cut off the lock breaching the locked container to conduct a search. 1 CP 17, RP 42.

That even if the investigation had developed enough evidence of probable cause to support the issuance of an additional search warrant to open the locked container, and search for evidence of separate criminal activity by a person not named in the original warrant, the officers had a duty to obtain the additional warrant from an impartial magistrate; a duty that they violated. 1 CP 17.

The contents of the locked container were not located in an area that the police were within lawfully, thus the doctrine of "plain view" does not apply.

"Plain view" among other factors requires that the police "have a prior justification for the intrusion". State v. Temple, 170 Wn. App. 156,

164, 285 P.3d 149 (2012). As previously discussed, the police in this case did not lawfully open the locked container. As the officers were not lawfully in the locked container, that they opened the locked container with the expressed intent of locating firearms, items not listed on the search warrant, the "plain view" doctrine does not apply in this case. The items located in an area that required a search warrant to enter must be suppressed as those items were unlawfully obtained.

**D. Conclusions of Law 6 and 9 are a correct application of the "fruit of a poisonous tree" doctrine.**

The probable cause to arrest Defendant in this case comes only from the firearms that were located due to the unlawful search of the locked container located in Defendant's residence. Thus the arrest was unlawful. 1 CP 13.

Any and all statements made by the Defendant while in custody due to this unlawful arrest are tainted by the unlawful entry into the locked container and the subsequent search of that container and are thus also products of the "fruit of the poisonous tree" and the Trial Court correctly suppressed those statements. 1 CP 13.

Absent any evidence of firearms in this case as they were located in an illegal search and statements obtained as the result of an illegal

arrest, there is no evidence that Defendant has committed any crime, and the Trial Court correctly dismissed the case. 1 CP 13.

**E. The Challenged Finding of Fact is supported by Substantial Evidence.**

The Finding of Fact challenged by the State is supported by the totality of the evidence taken in testimony before the Trial Court.

The police knew who lived at the residence. The police had no evidence linking anyone in the residence other than Jeremy Schenck, the target of the investigation for which the search warrant was obtained, with any criminal act for which the warrant was issued. Before the officers broke into the locked container they knew that the locked container was not in a part of the home occupied by the target of the investigation. At the time that the officers broke into the locked container they had no belief that the locked container held evidence of any crime that the search warrant was issued to investigate. At the time the officers broke into the locked container they were only looking for firearms, an item not listed on the warrant to accuse a person not the target of their investigation with an unrelated criminal offense. RP 10-11.

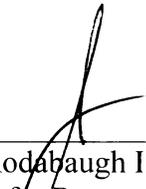
The timing of the officer's knowledge is significant and provides logical inferences and substantial evidence in support of the challenged finding of fact, that the officers knew what parts of the home were used by

which occupants and form a basis to show that the officers possessed the exact knowledge that the Trial Court attributed to them. The challenged finding of fact is not error.

## 5. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that this honorable Court uphold the rulings of the Trial Court suppressing the items located in the illegally searched locked container, suppressing the statements of Defendant gained through the illegal custodial arrest of Defendant and dismissing the Information charging Defendant with a crime for lack of evidence.

Respectfully submitted on July 22, 2016.



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