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33815-7-II

No. 33852-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID G. CORNELL,

Appellant.

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COURT APPEALS  
DIVISION TWO  
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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

The Honorable Stephanie A. Arend  
The Honorable Ronald E. Culpepper, Judges

APPELLANT DAVID CORNELL'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant's Fourth Amendment and Article I, §7, rights were violated when the police conducted a warrantless search which was not justified under the very limited "emergency exception" to the warrant requirement.

2. Appellant assigns error to "Finding and Conclusions on Admissibility of Evidence CrR 3.6" ("Findings and Conclusions") "undisputed fact" 27, which provides as follows:

Deputy Messineo has learned from his training and experience that suspects will sometimes lock themselves inside meth labs in order to avoid detection by police.

CP 48.

3. Appellant assigns error to Findings and Conclusions Reasons 6, which provides:

Any evidence obtained during the forced entry into the shed is admissible for the following reasons: 1) Deputy Messineo subjectively believed that Cornell was locked in the shed and needed assistance for health and safety reasons, 2) a reasonable person in the same situation would have believed there was a need for assistance, 3) there was a reasonable basis to associate the need for assistance with the place to be searched (the shed), and 4) the forced entry of the shed was not merely a pretext for conducting an evidentiary search.

CP 50-51.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the court err in upholding a warrantless search under the narrowly tailored "emergency exception" to the warrant requirement where any subjective belief the officers might have had was not objectively reasonable in light of the important rights involved and the forced entry into the shed was an unconstitutional "pretext" search?

Further, did the court err in entering findings unsupported by sufficient evidence in the record?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant David Cornell was charged in Pierce County with unlawful manufacturing of methamphetamine. CP 1-3; RCW 69.50.401(1)(2)(b).

A motion to suppress was held before the Honorable Judge Stephanie Arend on May 12, 16 and 17, 2005. MRP 1, 84, 261.<sup>1</sup> After pretrial and trial proceedings were held before the Honorable Judge Ronald J. Culpepper on June 15, July 22, August 22, 24, 25, 29-31, and September, 6-8, 2005, a jury found Mr. Cornell guilty as charged. CP 103-104.

Mr. Cornell received a standard range sentence calculated based upon a stipulated offender score. CP 112-126; 4RP 1260, 5RP 4-7; 6RP 2-9.

Mr. Cornell appealed, and this pleading follows. CP 206-219.

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<sup>1</sup>The verbatim report of proceedings is 16 volumes long. It will be referred to as follows:

The three volumes containing the hearing on the motions to suppress (May 12, 16, and 17, 2005), as "MRP;"  
June 15, 2005 - "1RP;"  
July 22, 2005 - "2RP;"  
August 22, 2005 - "3RP;"  
The eight volumes containing the trial (August 24, 25, 29, 30, 31, September 1, 6 & 7, and 16, 2005) - "4RP;"  
Sentencing of September 23, 2005 - "5RP;"  
September 28, 2003 - "6RP."

2. Overview of facts relating to incident<sup>2</sup>

On February 19, 2005, officers responded to an anonymous 9-1-1 call in which a man later identified as Aaron McConnell reported that he had smelled a “real chemical smell” and seen what looked like “a little burner or hot plate and a bright red” glow in a shed on the property on which he lived. 4RP 170-78. The shed was associated with a house in which Britney Flowers, a relative of Mr. McConnell’s, lived. 4RP 170-202. Mr. McConnell, whose house was also on the property, was bringing mail from a shared mailbox and smelled the smell about 30-35 feet away from the shed, before seeing the door of the shed open for a few seconds. Inside the shed, he saw a man he later identified as David Cornell and who he said he had seen going in and out of the shed several times that day. 4RP 181, 201-202, 212.

When the first officers from the Pierce County Sheriff’s Department (PCSD) arrived, they could smell a “chemical smell,” so they talked with a man and woman there, asked the woman to open up a shed, looked in the shed and saw no evidence of methamphetamine manufacture, and walked over to another shed, near which the smell was much stronger. 4RP 201-232. Ultimately, after arresting the woman and the man, the officers decided to break in the door of that other shed. 4RP 224-29. After first trying to pull open the door they eventually hacked at it with an ax. 4RP 227-29. Inside, they found Mr. Cornell. 4RP 227-29. Because he did not initially respond to the officer’s commands to put his

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<sup>2</sup>More detailed discussion of the facts relevant to the issues is contained in the argument section of this brief, *infra*.

hands up and get out, he was physically mustered to the ground and handcuffed. 4RP 232.

In a subsequent search of the shed pursuant to a warrant gained with information from the initial entry, officers seized many items they testified were associated with manufacturing of methamphetamine and which later tested positive for the presence of the drug or its precursors. 4RP 234-300.

D. ARGUMENT

**MR. CORNELL'S FOURTH AMENDMENT AND ARTICLE 1, SECTION 7 RIGHTS TO BE FREE FROM UNREASONABLE GOVERNMENTAL INTRUSION WERE VIOLATED AND THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED**

Both the Fourth Amendment and Article I, Section 7 of the Washington constitution protect Washington citizens against unreasonable searches and seizures. Steagald v. United States, 451 U.S. 204, 205, 211, 101 S. Ct. 1642, 68 L. Ed.2d 38 (1981)<sup>3</sup>; State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996).<sup>4</sup> Under both constitutions, warrantless searches are presumptively unreasonable, unless the prosecution can prove that one of the very limited exceptions to the warrant requirement applies. See Arizona v. Hicks, 480 U.S. 321, 327, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987); State v. Mathe, 102 Wn.2d 537, 540-41, 688 P.2d 859 (1984). Where a search does not fall within one of those few exceptions, it violates

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<sup>3</sup>The Fourth Amendment to the United States Constitution provides: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause."

<sup>4</sup>Article I, Section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

both the state and federal constitutions and any evidence seized as a result of such a search must be suppressed. See Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); Hendrickson, 129 Wn.2d at 72. Further, where a warrant is issued based upon evidence found in the initial illegal search, evidence seized pursuant to the warrant must be suppressed unless the prosecution proves that the illegal search had no effect on the issuance of the warrant. See State v. Hall, 53 Wn. App. 296, 304-305, 766 P.2d 512, review denied, 112 Wn.2d 1016 (1989); Murray v. United States, 487 U.S. 533, 536-37, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988) (prosecution’s burden of proof on this point is “onerous”).

In this case, this Court should reverse, because the trial court erred in finding that the entry into the shed were constitutional under the “emergency” exception to the warrant requirement.

a. Relevant facts

At the suppression hearing, Mr. McConnell testified about calling police after smelling the “chemical” aroma and seeing the man he identified as Mr. Cornell in the shed. MRP 17-32. He said he was 30-40 feet away from the shed on Ms. Flowers’ property when he first smelled the smell, and that, when he saw the man in the shed for a moment, he also saw something glowing, like a burner, inside. MRP 17-32. Mr. McConnell described the odor as “non-distinct,” said he could not identify it, and could not smell it on his side of the property at all. MRP 31-42.

Mr. McConnell explained that he was on Ms. Flowers’ part of the property to deliver her mail as a fellow tenant of the property owner, their

relative. MRP 33-34, 41. He got the mail because he, Ms. Flowers and the property owner "all get. . . mail in one box." MRP 42. He was delivering the mail to Ms. Flowers as a "courtesy thing," because he knew Ms. Flowers did not have a key. MRP 48. He had headed towards the front door when Ms. Flowers' boyfriend Otis Vella, who was outside, told him Ms. Flowers was sleeping and he would take the mail. MRP 37.

The area where the houses all were is all private property, and the driveway is private from the gate forward. MRP 34. The residence is at least 200-250 feet from the gate. MRP 34.

Based on Mr. McConnell's phone call, the officers who arrived about an hour later knew that Ms. Flowers was alleged to live in the house, that an anonymous person had reported four or five people on the property, a smell and a "heat lamp or something coming from the shed that the caller had seen." MRP 53, 65. Armed with that information, the officers went to the property to do an "investigation," to "investigate" a "[s]uspected meth lab." MRP 66, 89, 99.

When they arrived, the officers saw a man, later identified as Otis Vella, walk over to a shed about 50-75 feet away from where they were parked and appear to jiggle the lock or secure it. MRP 53. The officers got out of their car and walked towards Mr. Vella, who was coming from the shed towards the front of the property. MRP 56, 69. The police met Mr. Vella halfway. MRP 56, 69.

It was dark out and the officers had to use their flashlights. MRP 148. Although the officers could see generally that the shed was there from where they were parked, they could not see details. MRP 148.

The shed was to the west of the main house, back away from the front.

MRP 89.

The deputies asked Mr. Vella if he lived there, and he said he did not and that he was visiting a female friend who was down on the lower property at her grandfather's house. MRP 56. Mr. Vella also said, when asked by the officers, that no one else was there. MRP 56, 78. Mr. Vella surrendered a knife to Deputy Johanson right away. MRP 78, 93.

When a woman later identified as Ms. Flowers came walking up the hill on the property, Deputy Johanson approached her, told her they suspected a meth lab was on the property, and walked her towards a back wood shed. MRP 57. Once there, he asked what was in the shed, and she walked over, opened the door, and said, "nothing." MRP 57. The officer looked in the shed and did not see anything or anyone inside. MRP 57.

Deputy Johanson first testified that he asked about the back shed because he intended to search it "for people that could be a threat" to him. MRP 68. A moment later, however, he admitted that he knew he was "looking for a shed" in which the suspected manufacturing was occurring. MRP 70. Deputy Smith also admitted that he knew the suspected lab was in a shed on the property. MRP 100.

Deputy Johanson never asked Ms. Flowers for consent to search anything on her property, nor did he tell her she had a right to refuse consent. MRP 67, 68. He told her he was "investigating for a possible meth lab." MRP 68.

While Deputy Johanson was with Ms. Flowers, Deputy Smith had gone further onto the property, over to the other shed, which had a fire ring

in front of it. MR 89-91. Mr. Vella had denied locking the shed because police were arriving, stating he was instead simply locking up a chainsaw he was using earlier. MRP 90. The deputy had then walked over to the shed and saw a chainsaw sitting out, which led him to believe Mr. Vella was not being honest. MRP 90. When he got about five or ten feet from the shed, the deputy noticed a stronger “chemical smell.” MRP 90.

Mr. Vella was “detained” in handcuffs in the back of a police car, as was Ms. Flowers. MRP 90-96. The officers decided to “detain” Mr. Vella because, in part, the police could not “just keep eyes on the people that” they are investigating, and the officers “needed to make sure that they were going to stay on the scene and not take off” while the officers were “investigating the property.” MRP 94. One officer admitted that, at that point, he suspected Mr. Vella of being involved in criminal activity. MRP 95. When he was detained, the officers conducted a pat-down search and found on Mr. Vella a pocket knife one deputy described as “nothing real special, no big threat.” MRP 94.

Ms. Flowers was “detained” because the officers “didn’t know who was in the house or who was around.” MRP 59, 79. According to Deputy Johanson, he and Deputy Smith “felt concern that we had a possible meth lab inside that shed,” so they handcuffed Ms. Flowers and Mr. Vella and read them their rights. MRP 59-61. Deputy Smith said he probably would have told Ms. Flowers and Mr. Vella that they were not under arrest but “you’re being detained while we investigate whatever we’re investigating.” MRP 120. They were being detained so they would not “leave the scene” or go get a weapon or other people, because the officers

“were going to be busy clearing the house and investigating.” MRP 121.

The deputies also called for backup officers to be sent out before the officers “searched the house for people.” MRP 59. A deputy stated that the search was conducted for “people and weapons” because officers were trained that such things could be at “a possible site of a meth lab.” MRP 95.

That search was not fruitful and a “meth lab” deputy was called to the scene. MRP 61-63, 96. When that deputy, Deputy Messineo, arrived and the other deputies told him about the chemical odor, Deputy Smith admitted that “there was no indication that anybody was inside the shed.” MRP 74. Deputy Messineo then went to the back side of the shed with the other officers, and said he smelled the odor of anhydrous also. MRP 111.

According to Deputy Smith, other officers reported that Mr. Vella kept asking if the officers had “found anyone in the house.” MRP 112. Deputy Smith thought it was “kind of suspicious.” MRP 112. Deputy Messineo, the person who effectively decided that the search was proper, did not report having or relying any such information. MRP 132. the other officers, and said he smelled the “odor of anhydrous also.” MRP 111. The smell, to him, was “medium.” MRP 160.

Deputy David Christian detected the odor himself only when he passed by the detached shed. MRP 131, 145-46. He described the smell as seeming to “come as a wave,” not “overwhelming” but actually “more towards faint.” MRP 140. The smell was not “consistent.” MRP 141. He personally was not able to “isolate where it was coming from.” MRP 141.

According to Deputy Smith, other officers reported that Mr. Vella kept asking if the officers had "found anyone in the house." MRP 112. Deputy Smith thought it was "kind of suspicious." MRP 112. Deputy Messineo, the person who effectively decided that the search was proper, did not report having or relying any such information. MRP 132.

Instead, Deputy Messineo relied on answers Ms. Flowers and Mr. Vella had given in questioning, the smell, the fact that Mr. Vella had locked the shed, and the fact that a car suspected to belong to Mr. Cornell was parked at the house with a dog in it. MRP 160-195. Ms. Flowers had told the deputy that she had kicked some people out when she got home, and that Mr. Cornell rented the shed for \$50 per month and had done so for a month to a month and a half. MRP 161. She admitted to being a methamphetamine user but denied smelling any chemicals coming from the shed and denied knowledge of anything going on inside. MRP 162. She also denied getting methamphetamine from Mr. Cornell, and said she did not know where Mr. Cornell was. MRP 160-62.

Mr. Vella told Deputy Messineo that Mr. Cornell had opened the shed for him at about 2 that afternoon so that Mr. Vella could use the chainsaw inside to cut firewood. MRP 166. Mr. Vella also told the officer that Mr. Cornell said to close and lock the shed when Mr. Vella was done. MRP 166. Mr. Vella also first denied using methamphetamine but when confronted by a contrary statement from Ms. Flowers and a demand to show his arms, he admitted injecting it for the past five years. MRP 167. Mr. Vella denied smelling anything near the shed, a claim the officer found unlikely, because the officer believed Mr. Vella would have had to

smell it or been in the lab in the shed at some time. MRP 167.

Mr. Vella told the deputy that one of the cars on the property belonged to Mr. Cornell. MRP 167. He also told the deputy that Mr. Cornell had left. MRP 193.

At that point, Deputy Messineo noted that there was a dog in the car Mr. Vella had indicated was Mr. Cornell's. MRP 167-68. The deputy then concluded that Mr. Cornell must be in the shed because no one knew where he was but he would not have left his car there with his dog inside. MRP 167-68. The deputy had already concluded that the shed contained a meth lab, based upon what he smelled and saw, including an "exhaust tube" and "exhaust fan" on the shed. MRP 152-60.

Deputy Messineo made no effort to corroborate whether the car or the dog indeed belonged to Mr. Cornell, by running the license plate for ownership or even looking to see whether the dog had a tag with ownership information on it. MRP 198-99, 202. Another meth lab deputy, Deputy Gosling, stated in his report that the fact that "the car and a dog belonging to Dave were still on the property led us to believe that Dave was also nearby," not that he was in the shed. MRP 242. A different deputy stated that the car with the dog inside led officers to feel "that there was someone else on the property, probably in the shed." MRP 112-13.

Deputy Messineo admitted that the person whose word he took that the car belonged to Mr. Cornell had already lied to officers about several crucial facts and been caught in at least one lie. MRP 194-95, 203.

The deputy also agreed that it is very common, with criminal investigations, for people to run when police arrive. MRP 204. In fact, it

was common enough that the deputy admitted it was a “distinct possibility” that Mr. Cornell had done so. MRP 204. In addition, the deputy conceded, people have been known to leave their animals behind when bolting from police. MRP 204-205.

Like all the other officers, Deputy Messineo heard no one call out for help and no noises from the shed at all. MRP 73, 101, 196, 245. Nevertheless, he concluded that it was necessary to break into the locked shed in order to see if Mr. Cornell was inside. MRP 168. Deputy Messineo testified that, once he suspected that Mr. Cornell was in the shed, he decided to force entry because he believed that, “with the chemicals” he smelled “around that shed,” Mr. Cornell’s health would be in danger. MRP 168. He detailed the health risks of ammonia and other chemicals used in manufacturing methamphetamine at length. MRP 169-71. He also told the other officers that if someone was inside with chemicals around them, “we need to get them out.” MRP 97.

Deputy Messineo admitted that the chemicals he listed are all perfectly legal even though they are dangerous but he did not “go into other people’s garages and make sure that the toluene lid is on. MRP 205. He also admitted that just the fact that the chemicals were present did not “in and of” itself amount to an emergency, otherwise he would maybe be “able to go into anybody’s house at any time.” MRP 206. He also admitted that he personally only smelled the smell when he got right up next to the shed. MRP 207.

The deputy said he had an experience with breaking into a locked, detached garage with several entries, where they found a woman who had

locked herself in. MRP 210-11. He admitted that it was different to lock yourself in a garage and being locked in a shed from the outside. MRP 221-22. He maintained, however, in general, that he was aware that some others in his team had had people locked in on them. MRP 213, 221-22. He admitted, however, that his team had “never had” a case where someone locked themselves in a meth lab, were not discovered right away and thus got seriously ill. MRP 213. In fact, he had never actually heard of a case where anyone had been locked inside a meth lab and gotten sick or died. MRP 213.

Deputy Messineo did not call the paramedics prior to going in to the shed. MRP 196. He did not believe there was a serious enough health risk from fumes to have any of the deputies wear a respirator when they broke down the door. MRP 196.

They tried to enter the shed by disabling the lock, then pulling on the door, but ultimately resorted to an ax. MRP 98, 171-79. Once they entered the shed, Deputy Messineo said, they found Mr. Cornell and “took him into custody” by pulling him out when he did not move fast enough, putting him on the ground, and arresting him. MRP 98, 179. Deputy Messineo then also called to have firefighters come conduct a “wet decontamination” of Mr. Cornell, later requesting a priority because of suspected “ammonia inhalation.” MRP 181-82, 229. After that, although Mr. Cornell wanted to go to the hospital, he was “cleared” to be taken straight to jail. MRP 183.

Nothing in the dispatch orders or 9-1-1 call indicated anyone on the property was armed and dangerous, in need of medical assistance,

reporting a fire or anything similar. MRP 102-104.

Deputy Messineo admitted that Ms. Flowers had said that someone else was on the property earlier, a man named James. MRP 194. The deputies never looked for "James" on the property and were not worried about him. MRP 194.

The warrant was signed the next morning on a golf course at 8:51 am. MRP 255.

In ruling, the trial court divided the issue into four issues: the "curtilage," the shed behind the house Ms. Flowers opened up, the house itself, and the other shed, in which Mr. Cornell was found. MRP 299. The court found that the failure to inform Ms. Flowers that she could deny consent to search the first shed was a violation and evidence from that shed would be suppressed. MRP 303. The court also found that it was proper for the officers to walk not towards the house but over to the other shed by the firepit. MRP 305-306. The "protective sweep" of the house was found unconstitutional, because the officers "just had no reason to believe that there was anybody in that house." MRP 306.

Regarding the final issue of the shed, the court first noted that, because there were no windows on the shed, there was not "any way" that Deputy Messineo could have "known for certain if there was somebody in the shed." MRP 307. The court then stated that the law did not require "certainty," and that the law does not even require for the officer "to make a determination on whether or not he had a reasonable belief that there could be somebody in the shed who is in need of medical assistance." MRP 308. The court also relied on the fact that the officers sought

assistance for Mr. Cornell once they found him inside, as actions which were “consistent with responding to an emergency.” MRP 309.

In addition, the court said that the fact the odor was stronger near the shed indicated the shed was not being “adequately vented,” so that

if somebody is in there and there is no sounds as the officers knock and order the person to come out, it could be that if there is in fact a person inside, that that person is incapacitated.

Deputy Messineo testified to the various problems, specifically health effects, with respect to both the ammonia as well as a number of different chemicals that are commonly used in meth labs and how it can be a serious respiratory hazard. If in fact a person is inside a very small, contained area and is suffering the effects of the inhalation of these chemicals, it could be that they cannot respond because they’re incapacitated therefore creating even more of a medical emergency situation.

MRP 311.

b. The emergency exception to the warrant requirement did not apply

Under both the federal and state constitutions, one of the few jealously guarded and narrowly drawn exceptions to the warrant requirement is the “emergency” exception. See State v. Schroeder, 109 Wn. App. 30, 38, 32 P.3d 1022 (2001); Mincey v. Arizona, 437 U.S. 385, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978). In this case, the trial court held that the emergency exception applied to the forced entry into the shed. This Court should reverse that ruling, because the emergency exception did not apply.

The “emergency exception” is part of the “community caretaking” function of police, first announced by the U.S. Supreme Court in 1973. See Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1987); see also State v. Kinzy, 141 Wn.2d 373, 386, 5 P.3d 668

(2000). The exception only applies when:

(1) the officer subjectively believes that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for such assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched.

State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004).

The purpose of the exception is to permit officers to engage in caretaking functions when it is needed. The exception allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety. See Kinzy, 141 Wn.2d at 386.

Like all other exceptions to the warrant requirement, this one is “narrowly tailored.” State v. Ladson, 138 Wn.2d 343, 356, 979 P.2d 833 (1999). Further, for the exception to apply, the police actions must be “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” Schroeder, 109 Wn. App. at 37, quoting Cady, 413 U.S. 433 at 441; see also, Thompson, 151 Wn.2d at 802 (officers’ acts must be “divorced from” criminal investigation to be justified under the exception). And where the prosecution invokes this exception, the reviewing court “must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search.” State v. Lynd, 54 Wn. App. 18, 21, 771 P.2d 770 (1989). The prosecution must also prove that the search was not primarily motivated by the intent to seize evidence. State v. Angelos, 86 Wn. App. 253, 256-57, 936 P.2d 52 (1997).

Here, the trial court’s ruling that the emergency exception applied

was based upon its findings that:

1) Deputy Messineo subjectively believed that Cornell was locked in the shed and needed assistance for health and safety reasons, 2) a reasonable person in the same situation would have believed there was a need for assistance, 3) there was a reasonable basis to associate the need for assistance with the place to be searched (the shed), and 4) the forced entry of the shed was not merely a pretext for conducting an evidentiary search.

CP 50-51.

Mr. Cornell disputes that the evidence supports the conclusion that Deputy Messineo actually, subjectively believed Mr. Cornell was locked in the shed in need of immediate assistance. CP 50-51. The fact that he did not call paramedics prior to going in to the shed, and that he did not believe there was a serious enough health risk from fumes to have any of the deputies wear a respirator when they broke down the door, indicate to the contrary. MRP 196.

But even if Deputy Messineo harbored such a belief, it was not objectively reasonable. The facts here are simply insufficient to support it. The officers saw nothing indicating anyone was in the shed. There were no lights, even though it was dark, there was no sound, the fan was not on, no one was calling for help - as Deputy Smith admitted, there were no "indications that someone was inside." MRP 74.

The only evidence upon which the "emergency" was found by Deputy Messineo was that Mr. Vella had locked the shed when officers arrived, Mr. Vella's claim that the car with the dog in it was Mr. Cornell's, and Deputy Messineo's belief that a man would not leave his dog and his car behind. MRP 150-220. But the deputy admitted that the same man who claimed the car was Mr. Cornell's also said *Mr. Cornell had left*.

MRP 167, 193. And the deputy admitted that Mr. Vella's reliability about facts - such as who owned a car - had already proven to be far from solid. MRP 194-95, 203.

Despite Mr. Vella's clear problem with telling the truth, Deputy Messineo made no effort to corroborate whether the car or the dog indeed belonged to Mr. Cornell, by running the license plate for ownership or even looking to see whether the dog had a tag with ownership information on it. MRP 198-99, 202. It can hardly be objectively reasonable to rely on part of a declaration (that the car was Mr. Cornell's) from a man known to have just lied to you but not rely on the other (that Mr. Cornell was gone). Given the lies Mr. Vella had already told, it was not objectively reasonable to rely on Mr. Vella's identification of the car as belonging to Mr. Cornell, to justify breaking into the locked shed.

Further, Deputy Messineo was apparently alone in his belief that the presence of the car and the dog meant that Mr. Cornell was in the shed, in imminent danger. The only other meth lab deputy at the scene admitted that the fact that "the car and a dog belonging to Dave were still on the property led us to believe that Dave was also nearby," not that he was in the shed. MRP 242.

And Deputy Messineo himself agreed that it is very common, with criminal investigations, for people to run when police arrive. MRP 204. The deputy knew that it happened, and that it was not uncommon for people to run from police and leave their animals behind. MRP 204. Indeed, he declared that it was a "distinct possibility" that Mr. Cornell had run. MRP 204.

Nor did Deputy Messineo's "experience" with people locking themselves in support this search. The only case with which he had personal experience involved a locked, detached garage with several entries, not a shed locked only from the outside. MRP 210-11, 221-22. And of the people on his team who had experienced someone locked in, none of them involved someone who got seriously ill or died from the incident. MRP 213, 221-22. Deputy Messineo had not even *heard* of such a case. MRP 213.

Given all the facts and circumstances at the time, any belief that any of the officers might have had that Mr. Cornell was inside the dark, quiet shed which was locked from the outside, and that he was in serious enough danger for there to be no time to get a warrant because it was such an emergency, was simply not objectively reasonable. Nor did the officers take any steps to verify whether the "information" which was the main reason for the search - that the car and dog belonged to Mr. Cornell - was correct and not just another lie from Mr. Vella. And even if that information had been reliable, or had been checked, as Deputy Gosling admitted, in only indicated that Mr. Cornell had been at the house earlier and might still be around. Given the officers' knowledge that people often run away from police, and even leave their dogs behind and the lack of any evidence whatsoever from the shed that anyone was inside, the officers' leap from the presence of the car to breaking down the door of the shed was simply not objectively reasonable.

Mr. Cornell is of course aware of the potential for irony in his argument. Obviously, he was found inside the shed, and there were fumes

inside. But the propriety of a search is not determined in hindsight, based upon what officers find. It is based upon what officers knew at the time they entered into the protected place. See, State v. Swenson, 59 Wn. App. 586, 590-91, 799 P.2d 1188 (1990).

The officers here were focused on getting into the meth lab they had decided was on the property. But the exception to the warrant requirement upon which they relied did not apply. The court erred in finding that the emergency exception applied and that the forced entry of the shed was not merely a pretext for conducting the evidentiary search, and this Court should so hold and should reverse.

E. CONCLUSION

The trial court erred in holding that the “emergency exception” to the warrant requirement applied. This Court should so hold and should reverse.

DATED this 20<sup>th</sup> day of June, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Reply Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Pierce County Prosecuting Attorney's Office, 946 County City Building, 930 Tacoma Avenue S., Tacoma, Washington, 98402;

to Mr. David G. Cornell, DOC # 918177, Washington Corrections Center, P.O. Box 900, Shelton, Washington, 98584.

to counsel for codefendant Britney Flowers, Lori Smith, Law Office of Mary K. High, 917 Pacific Avenue, Suite 406, Tacoma, Washington, 98402.

DATED this 20th day of July, 2006.



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DATED this 20<sup>th</sup> day of June, 2006.

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